UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0326

September Term, 2015

DUANE WENSEL

v.

LYNNE ZETTERGREN
f/k/a LYNNE WENSEL

Arthur,
Reed,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: March 30, 2016

Under a custody order, a divorced couple had shared physical custody of their two adolescent children. The mother planned to move to Connecticut. Because shared custody would not be viable if the parents lived hundreds of miles from one another, the mother's move required the court to decide which of these two capable and loving parents should have primary physical custody. The court selected the mother, and the father has appealed.

QUESTIONS PRESENTED

The appellant, Duane Wensel ("Father"), presents four questions, which we rephrase and consolidate into three:

1. Was the circuit court's ruling denying Father's motion to modify custody based on findings of fact that were clearly erroneous and not supported by the evidence?

2. Did the circuit court abuse its discretion in denying Father's requests that the court (1) appoint a best interest attorney, (2) interview or otherwise hear from the children, and (3) order a professional custody evaluation of the children?

3. Did the circuit court err in its application of precedent?[1]

[1] Father originally phrased his questions in the form of the following assertions:

1. The magistrate's findings of fact were clearly erroneous and conclusions of law were not supported by evidence, testimony, and case law.

2. The magistrate and exceptions judge erred in failing to consider the minor children's preference in determining the children's best interests.

A. Impact of child's preference on court's determination.

B. It is error for the court to determine whether the child is a competent witness.

(continued…)

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Divorce and Onset of Litigation

Father and Lynne Zettergren ("Mother") were married on April 4, 1997. They are the parents of a 13-year-old daughter ("Daughter") and a 12-year-old son ("Son"). The family's marital home at all relevant times was in Olney, Maryland. Father was employed full-time with a telecommunications company, and Mother worked part-time as a medical imaging professional.

In May 2012, Mother told Father that she wanted to separate and that she intended to seek a divorce. The parties voluntarily separated in September 2012, and on May 28, 2013, they entered into a custody and parenting agreement, which the Circuit Court for Montgomery County approved in a custody order on June 5, 2013. Under the custody agreement and order, the parents had joint legal custody over the children and shared physical custody: under a regular access schedule, the children would primarily reside with Mother, but Father would have them in his care on certain evenings and weekends. The court granted the parties a judgment of absolute divorce on January 27, 2014.

The custody order required the parties to give 45 days' written notice if they planned to relocate outside of the Washington, D.C., area. By letter dated April 23, 2014,

3. The magistrate and exceptions judge erred in failing to appoint a best interest attorney and/or a custody evaluation.

4. The magistrate and exceptions judge erred in applying applicable case law.

Mother notified Father that she planned to relocate with the children to Connecticut in August 2014. Shortly thereafter, in June 2014, Mother remarried and moved to her new husband's residence in Connecticut.

In the meantime, on May 20, 2014, Father, representing himself, filed a motion to modify custody, visitation, and child support and to appoint a best interest attorney for the children. He argued that because Mother intended to relocate with the children, "changed circumstances" made the current custody arrangement "impossible" and required the court to grant him primary physical custody.

On June 11, 2014, Mother, representing herself, answered Father's motion and filed a cross-motion to modify custody to give her primary physical custody of the children.

In an order entered on July 8, 2014, the court denied Father's request for the appointment of a BIA. Two days later, Father moved for a custody evaluation or that the trier of fact interview the children.

On July 15, 2014, a domestic master[2] conducted a scheduling conference, at which both parties appeared and represented themselves. At the conference, Mother confirmed that she "ha[d] remarried and relocated" to Connecticut, but said that she and Father had been sending the children back and forth between Maryland and Connecticut based on the predetermined summer visitation schedule. She added that because the custody

[2] As of January 1, 2016, masters are to be designated as "family magistrates." *See* Md. Rule 1-501(a). We employ the term "master" because that is the name of the position that the family magistrate held at the time of the events in question in this case.

modification motions were still under review, she had not yet enrolled the children in school in Connecticut.

At the scheduling conference, the master informed the parties that because of the anticipated length of the proceedings, the court had no available trial dates until November, after the beginning of the new school year. In response to a question from Father, the master stated, "The current custody order stays in effect until it's changed by the court."

In an order entered on July 29, 2014, after the scheduling conference had concluded, the court denied Father's request for a custody evaluation and deferred to the trier of fact on whether to interview the children.

B. The Emergency Motion and Aftermath

On July 31, 2014, Father, still representing himself, filed a "Motion for Immediate and Temporary Custody" to prevent Mother from moving the children to Connecticut and enrolling them in school there before the custody hearing in November. At the time of the motion, it was apparently still unclear whether the children would attend school in Maryland or Connecticut when classes resumed in the fall.

In his motion, Father argued that Mother had violated a provision in the custody agreement prohibiting either party from removing the children from the Washington, D.C., area "for the purpose of changing the children's residence to a location outside of [the area] unless that party first obtains a written agreement from the other party or, in the absence of an agreement, obtains a court order." The certificate of service stated that

Father had served the motion on Mother at an address in Olney, not at her current address in Connecticut.[3]

On Thursday, August 21, 2014, Father, representing himself, obtained a hearing on the motion before Judge Terrence McGann. Before hearing from Father, Judge McGann attempted to reach Mother by telephone in Connecticut, but was unable to do so. Father then told the judge that Mother had moved to Connecticut with the children and that she had obtained neither his consent nor a court order before doing so, in violation of the custody agreement. On the basis of Father's representations, Judge McGann granted Father's motion for immediate and temporary custody. After obtaining the order, Father enrolled the children in school in Maryland.

On the following Monday, August 25, 2014, Mother, representing herself, came down from Connecticut and appeared before Judge Joan Ryon. From the record before us, it is unclear whether Father received notice of the appearance from Mother or the court.

Before Judge Ryon, Mother insisted that she had not received notice of Father's motion and that she had only learned from Father over the weekend that the hearing had occurred and that he had been granted temporary custody. After determining that Mother had notified the court of her new address in Connecticut and that Father had served her with notice of the motion at a defunct address in Olney, Judge Ryon decided that Judge

[3] It appears that Father also filed a motion to shorten the time for a response to his emergency motion and that he served that motion on Mother at the Olney address. Earlier, when Father filed his complaint to modify custody, he had served it on Mother at her address in Connecticut.

McGann had simply tried to maintain the status quo until the court could decide whether to modify the custody order. Judge Ryon inferred that Judge McGann had been concerned about whether Mother was going to enroll the children in school in Connecticut, which might prove disruptive if the court ultimately decided that they should remain with Father in Maryland.

Judge Ryon vacated Judge McGann's order, "out of an abundance of caution," and added that she would include another provision requiring that "the children shall not be relocated out of Maryland or [the children's Catholic] school until such time as the matter can be heard" at the final custody hearing.

After Judge Ryon's ruling, Mother returned to Maryland and rented a furnished condominium in Chevy Chase, so that she could continue to exercise shared custody pending the court's decision on whether to change custody and allow her to take the children to Connecticut.

C. Final Custody Hearing

On November 10, 2014, the parents' cross-motions to modify custody and child support came before a domestic master. Over a full day of hearings, the master heard testimony from Father, Mother, and other witnesses. Both parties were represented by counsel.

1. Father's Case

Father testified that both children were heavily involved in after-school sports activities and that he played a significant role in this part of their lives. He said that when he had visitation with the children, he adhered to their usual schedules, including picking

them up from school and assisting them with homework. He said that his parents saw Daughter and Son once or twice a week, came to their sporting events, took them on annual Christmas shopping outings, and lent the family money to cover the cost of the children's tuition.

Father said that Daughter's school placed her on an "accommodation plan" to address her ADHD, but he could not recall whether it was a "503" or a "504" plan.[4] He said that he addressed Daughter's problems with ADHD by helping her with homework and by ensuring that she took her prescribed medication. He admitted that there had come a time when he was reluctant to give her the medication because of the severe side effects. He said that he and Mother resolved a conflict over this issue by changing medications. He also said that, with regard to joint medical decisions, Mother would sometimes notify him in advance, sometimes notify him on "the day of" a decision, and sometimes notify him "after the fact."

Father observed that Daughter recently had been struggling in her religion class. He said that he offered to tutor her on some subjects because she also "had some problems with her reading because of ADHD, [and] therefore, her English skills were down . . . ." The school told him, however, that Daughter would not need tutoring, as she was "doing very well."

On cross-examination, Father conceded that Daughter had a speech impediment that had worsened over the past year and that she had been sucking her thumb since she

[4] These terms apparently refer to sections 503 and 504 of the Rehabilitation Act of 1973.

was a baby. He said that, following a referral from her orthodontist, Daughter had twice seen a speech pathologist, whom Mother had researched and contacted. He could not recall whether a device or procedure had been recommended for Daughter, but he did remember "them mentioning an apparatus." The apparatus was never installed in Daughter's mouth, but Father could not remember why. He denied that the reason was that he had objected to the orthodontist's recommendation. Father said that he generally followed the advice of third-party professionals, and he said that he had been following the speech pathologist's suggestions. He said that Daughter was now in the middle of a ten-day program to address these issues.

Although the children have their own rooms in his residence, Father acknowledged on cross-examination that they "frequently" sleep in his bed with him.[5]

Father confirmed that Son's teacher believed that Son might also have ADHD. Mother wanted Son to get tested, but Father resisted because he believed testing might cause undue stress for Son. Father later testified, however, that he also believed that the testing was unnecessary because Son was doing well in school and showed no "outward signs" of the disorder.

Father had brought the children to the courthouse for the hearing, and he claimed to have exercised good judgment in doing so. He said that he had asked the court to appoint a best interest attorney for the children and that he had brought them to court "because [he] asked for the kids to be heard by the trier of fact and it was not denied."

[5] Mother later testified that she too sometimes allowed the children to sleep with her, in her one-bedroom condominium in Chevy Chase.

In addition to a number of witnesses testifying in his support, Father's mother testified that her son was a supportive and loving father and said that she regularly observed him helping the children with extracurricular activities. She and her husband saw the children once or twice a week, and on days when Father was ill but had visitation, they would supervise the children in their home. She said that she and her husband had been directly paying the children's annual private school tuition fees.

2. Mother's Case

Mother testified that after the divorce she moved her belongings to Connecticut partly because her new husband lived there, but also because she had been having financial difficulties in Maryland and had long wanted for herself and her children to be closer to her parents and siblings in Connecticut. She said the target date for total relocation with the children would be when the custody motions were finally resolved. She said that when she decided to relocate, she met with Father three times regarding custody modification and that when those efforts were unsuccessful, she mailed him a letter stating her intentions. Mother and Father held three more meetings, this time with a mediator. When those meetings did not yield a resolution, Father filed his custody modification motion.

Mother said that over the summer of 2014, the custody and visitation schedule remained as it had been during the school year, aside from allotted times for vacation. She said that she and the children had now been to Connecticut many times and that the children knew and had become closer with their new stepfather and his two children.

Mother spoke about the Catholic school that she hoped for the children to attend if she were permitted to obtain primary physical custody. She said that the school was highly regarded and that it was similar to the children's parochial school in Maryland. Her new husband was on the school's Board of Directors, one of his children attended the school, and one of the school's sisters was holding two places for the children pending the outcome of litigation. She said that when her children visited the school, they "felt very comfortable there . . . because the atmosphere is so similar to what they're experiencing now[.]" She had discussed Daughter's accommodation plan with the same sister, and her new husband had told the school about Daughter's speech-related problems.

Mother testified that during their marriage she and Father had agreed that she would take on the role of primary caregiver, working part-time and taking the lead on matters such as working with the children with their homework. She had been in control of scheduling medical appointments and "follow-up care" for the children. She denied Father's claim that since the divorce she had only sometimes kept him informed of developing medical issues, but she did admit that on two occasions she had needed to "seize the moment" and, immediately thereafter, had informed Father of what occurred. She said that if she were to obtain primary custody, she would continue to inform Father of every joint decision regarding the "health and welfare of the children."

Mother testified that, despite Daughter's pediatrician's recommendation about her ADHD, Father was cautious and pushed back against the idea of testing until Mother finally convinced him to accede. She also said that when a school administrator

recommended testing for Son to see if he too had ADHD, Father again resisted testing. She said that when she scheduled an appointment for Son, Father called the psychologist to cancel it.

To conclude, Mother expressed "numerous concerns" over whether Father would be adequately equipped to have primary physical custody. She was most concerned about what she saw as his lack of experience in addressing or managing Daughter's ongoing medical needs. She did not believe that Father knew just how intensive the children's school needs can be, stating that "[w]hen they arise they seem to get brushed under the rug." She said Father "has been combative on every issue with every doctor and every professional" and that "[t]o get something implemented there's a process that he goes through [that] seems to take months." Mother explained Daughter's orthodontic and speech problems in some detail and asserted that some of those complications might have resulted from Father's unwillingness to agree "to have her orthodontics put in place."

D. Master's Findings and Recommendations

On December 4, 2014, the master resumed the proceedings and set forth, in extensive detail, the testimony recounted above. Her exhaustive oral opinion extends over more than 40 pages.

The master found "overwhelming [evidence] that the children have a close bonded, supportive, mutual, loving relationship with each of the parents." She emphasized that the children had developed strong friendships in Maryland and

substantial bonds with Father's parents. In addition, she found that both parents, and particularly Father, were very involved in the children's extracurricular activities.

Nonetheless, the master emphasized that "participating in extra-curricular activities is not the same [as] and can be distinguished from day-to-day caretaking regarding food, . . . their clothing, their medical, their academic needs[.]" The master found that this "primary caretaker" role had belonged to Mother, who "has always generally been and continues to be the [one] who takes the lead[,]" and who most often scheduled medical appointments and spent the most time with the children on school issues. The master found that, except on two occasions, Mother regularly kept Father apprised of joint decisions regarding the children's welfare and consistently allowed him to provide input.

By contrast, the master found that Father often was "riding on the coattails" of his former wife's decision-making. She expressed concerns as to whether Father had a full understanding of Daughter's educational needs, "what her deficits may be, and how to address those deficits[.]" She noted Father's inability to recall specifics about Daughter's accommodation plan, whereas Mother recalled "significant details." She found that Father offered inadequate reasons for resisting Son's ADHD testing, which "raised some concerns" about his parental judgment. She also found that Father "tends to minimize" Daughter's ADHD and academic disabilities and that, in contrast to Mother, Father did not appear to recognize that there may be some connection between the two. Similarly, she found that Father had resisted the efforts to get the orthodontic appliance for

Daughter. She appears to have criticized both parents for allowing the adolescent children to sleep in bed with them.[6]

The master credited Mother's testimony that the children had begun to adapt to potential life in Connecticut, developing healthy relationships with Mother's new husband and his family. She found that the parochial school in Connecticut seemed close in quality and rankings to the school the children had been attending, and she looked favorably on Mother's success in securing two seats pending the resolution of the custody dispute. The master emphasized, as "a very significant factor," that Mother had "selected and arranged for appropriate medical care for the children in Connecticut," including finding Daughter a local speech pathologist.

The master then made her recommendations. She recited the proper legal standard, which we discuss in greater detail below, and she noted the many factors that courts regularly consider, among them "the certainty and stability of a primary caretaker," whether the non-custodial parent is "involved in any significant way in the children's lives," whether changing custody would have adverse effects on the children, and "which parent can be counted on" to keep the other parent involved and up to date with information.

In balancing these and other factors, with express reference to the findings of fact, the master highlighted the inestimable value of maintaining stability in the children's home and daily lives. She stated: "[W]hat makes this case and pretty much all relocation

[6] The master said: "Neither child should be sharing a bed with Dad or Mom, as the case may be, and particularly, [Daughter] should certainly not be sleeping with her father at age 12 . . . ."

cases so difficult [is that the] case law tells the Court that in determining the best interest of the child, consistency and stability" in the residence, neighborhood, and friends is a key goal. She continued: "I still come back to the same problem: keeping the children in a community where they've always lived." "That's a big deal to me," she added. The master stated that she had struggled with this decision and had gone "back over [her] notes many times[.]"

Nevertheless, the master found that, in this case, although stability was important, she did not "believe that [it] trumps the other factors." She placed great weight on the high value of maintaining stability for the children, not just in the current home life but with the parent who had played the role as their "primary caretaker" and who had been most in touch with their important needs. The master noted testimony indicating that Mother had been that primary caretaker on many key issues and had taken steps to ensure that the children's needs would continue to be met following any permanent move. The master presumed that the relocation would require adjustment, but she concluded that, in light of Mother's considerable efforts to minimize future disruptions in the areas of school, home, and health, "nothing that [she] heard . . . would lead [her] to believe that [the move] would [have] a significant adverse impact on the children." "It would simply be an adjustment."

Lastly, the master concluded that Mother's reasons for moving were credible and genuine, and not born of any attempt to create more distance between Father and the children. She found that Mother had been always "consistent [in] providing [Father] with

information and updates" and that she had developed an access schedule that was sensitive to Father's ability to see his children.

By contrast, the master expressed concern over whether Father would be "as supportive of the children's relationship and contact and access with their mother" as he would be regarding their relationship with and access to himself. The master surmised that one reason that she had no testimony from Father regarding the sharing of information was that he had "never been in the position of taking the initiative to obtain information and therefore share it and extend it" to Mother. She noted Father's decision to file an emergency motion for temporary custody, which did not reach Mother's new address. While she understood Father's "panic over the children possibly relocating," the master commented that "the way in which he manipulated the situation," by failing to serve his motion on Mother in Connecticut, "gives great pause to the Court."

In light of this exhaustive discussion, the master found that Mother's move to Connecticut constituted a material change of circumstances. "After considering and balancing all of the factors and the evidence," the master found that "it is in the children's best interest to remain in the primary physical care and custody of [Mother]." The master added that she had "every confidence that [Mother] will continue to provide for all of the needs of the children, will keep [Father] updated, [and] will support [Father's] . . . continued involvement in the children's lives, their activities, [and] their educational and medical needs."

The master recommended that the parents continue to exercise joint legal custody, with tie-breaking power belonging to Mother. She laid out a detailed visitation schedule,

including liberal email and telephone access, but required that Father give 72 hours' notice before attending any "school and extracurricular activities of the children[.]" Finally, she recommended that the children remain in Maryland "through the end of the current either semester or grading period."

D. Circuit Court Ruling

Father filed exceptions and two sets of amended exceptions, alleging clear error with respect to many of the master's findings of fact. Among other things, Father asserted that the master had acted against the best interests of the children when she denied his requests for a best interest attorney, a custody evaluation, and a court interview with the children. He challenged the master's requirement that he give Mother 72 hours' notice before attending school and extracurricular activities. He argued that it was "inappropriate for the master to give the weight she did to her personal beliefs regarding ADHD[,]" considering that "[t]here was no expert testimony given regarding ADHD in this case[.]"

The exceptions hearing occurred on March 26, 2015, before Judge Ryon. There, Father invoked general grievances over the master's "attitude" and "disrespectful" tone and over what he viewed as her harsh treatment of him. He asserted that the master had disregarded Mother's earlier violation of the provision of the custody agreement requiring either an agreement or a court order before she could relocate with the children. He requested a reversal or, in the alternative, "a remand, for new trial with a judge." Until a new court order was issued, he asked that that the children remain in their school in Maryland.

In tackling these issues, the court first recognized Father's clear displeasure with the outcome. The court observed that, in considering competing assertions and contradictory testimony, the master had reached a "very well thought out recommendation[.]" The court stated, "I don't know that bias towards counsel or dissatisfaction with a decision is a reason for exceptions in the first place." The court then discussed all of Father's exceptions, including his claim of ambiguity in the proposed summer visitation schedule; his contention that the master singled him out for criticism for allowing the children to sleep in bed with him; and his claim that the master overlooked Mother's plans to move prematurely in disregard of the custody agreement.

Addressing the Master's final recommendations, the court said that it had independently reviewed the full record, including "all of the relevant portions of the file, the underlying order, [and] the Master's recommendations[.]" The court ruled:

> I don't find that any of the Master's findings of fact, first level findings of fact, were erroneous. As to the inferences drawn and the conclusions reached from those facts, after exercising independent judgment based on the record, the Court is going to overrule the plaintiff's exceptions, with the exception of the 72-hour written notice. I would strike that . . . .

In a written order that reflected this ruling, the court overruled all of Father's exceptions, save for the exception to the provision requiring Father to provide 72 hours' notice to Mother before attending any of the children's school and extracurricular activities. The court awarded Mother primary physical custody, and it maintained joint legal custody, while setting forth a detailed visitation schedule. The court ordered that Father have full access to the children's healthcare providers, teachers, and academic and

medical records, and it ordered that both parties enjoy "liberal telephone, email and internet access with the minor children."

DISCUSSION

Father challenges the factual and legal basis of the court's ruling on the custody modification request. He also alleges abuse of discretion and legal error in the court's denial of his respective motions for a best interest attorney, a custody evaluation of the children, and a court interview with the children.

I. Primary Physical Custody Order

We first ask whether the circuit court's decision not to modify physical custody in Father's favor was based on clearly erroneous findings of fact and thus should be reversed. For the reasons that follow, we hold that the court's ultimate decision was not in error, as it was fully supported by evidence in the record.

A. Legal Framework

Resolution of a custody-modification request requires a two-step process. First, the circuit court must determine whether a material change in circumstances has occurred since the last custody order. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). A "material change" is one that affects the welfare of the child. *Id.* at 171 (citing *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005)). The pending relocation by a custodial parent may constitute a material change warranting custody modification. *See Domingues v. Johnson*, 323 Md. 486, 500 (1991).

If the court finds that a material change has occurred, it proceeds to the second step, of considering the child's best interests as if the proceeding were one for original

custody. *McMahon*, 162 Md. App. at 594 (citations omitted); *see Wagner v. Wagner*, 109 Md. App. 1, 29 (1996). The two steps of the analysis are often interrelated inasmuch as each addresses the same paramount concern:

> Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child. Thus, the question of "changed circumstances" may infrequently be a threshold question, but is more often involved in the "best interest" determination, where the question of stability is but a factor, albeit an important factor, to be considered.

Gillespie, 206 Md. App. at 171 (quoting *McCready v. McCready*, 323 Md. 476, 482 (1991)); *accord Domingues*, 323 Md. at 498-500.

The burden is on the moving party to satisfy both stages of this analysis. *See Gillespie*, 206 Md. App. at 171-72 (quoting *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008)). In this case, involving cross-motions, each party had the burden to demonstrate that the court should modify custody in his or her favor.

To warrant modification of custody in light of an alleged change in circumstances, "a party must establish that the modification is necessary to safeguard the welfare of the child." *Shunk v. Walker*, 87 Md. App. 389, 398 (1991). Factors the trial court *may* use in this determination include:

> "the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rationale [sic] choice, the preference of the child."

Reichert v. Hornbeck, 210 Md. App. 282, 305 (2013) (quoting *Wagner*, 109 Md. App. at 39; *accord Braun v. Headley*, 131 Md. App. 588, 610-11 (2000) (citing *Montgomery Cnty. v. Sanders*, 38 Md. App. 406, 420 (1977)) (noting similar factors).

"Courts are not limited or bound to consideration of any exhaustive list of factors in applying the best interests standard, but possess a wide discretion concomitant with their 'plenary authority to determine any question concerning the welfare of children within their jurisdiction[.]'" *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 503-04 (1992) (citation omitted); *see Taylor v. Taylor*, 306 Md. 290, 303 (1986) (in noting "'transcendent importance'" of child's best interests, stating that no one factor "has talismanic qualities and that no single list of criteria will satisfy the demands of every case") (internal citation omitted).

In the end, in light of these various factors, the trial court is in the best position to determine what is in the child's best interest, and the ultimate determination of which parent should be awarded custody rests within its sound discretion. *See Robinson v. Robinson*, 328 Md. 507, 513-14 (1992).

B. <u>Standards of Review</u>

Our review of the circuit court's ultimate conclusion must take into account the master's role in the process. "[T]he Master . . . is required to assess the credibility of the witnesses who testify." *Levitt v. Levitt*, 79 Md. App. 394, 399 (1989). "After establishing the factual record, the Master may then draw conclusions from the first-level facts and use these conclusions to make recommendations." *Id.* Where the master has considered all evidence and submits a proposed order to the circuit court, exceptions to

the master's recommendation warrant the court's independent consideration. *Leineweber v. Lieneweber*, 220 Md. App. 50, 60-61 (2014) (citation omitted); *accord Levitt*, 79 Md. App. at 399 (the court is "free to disregard" the master's recommendations).

In general, where the court relies on a master's report, it "'should defer to the [master's] fact-finding . . . where [it] is supported by credible evidence, and is not, therefore, clearly erroneous.'" *Kierein v. Kierein*, 115 Md. App. 448, 453 (1997) (quoting *Wenger v. Wenger*, 42 Md. App. 596, 602 (1979)). Nonetheless, this Court has sometimes distinguished between "first-level facts," such as how much a parent earns, how much the medical bills are, and how much the cost of housing is (*Wenger*, 42 Md. App. at 607), and more abstract "[s]econd-level facts," which are "'conclusory or dispositional'" in nature, and "to which the circuit court need not give as much deference." *In re Priscilla B.*, 214 Md. App. 600, 624 (2013) (quoting *Wenger*, 42 Md. App. at 607); *accord McAllister v. McAllister*, 218 Md. App. 386, 407 (2014). When faced with exceptions, the court "must exercise its independent judgment, consider the allegations[,] and decide each such question." *Kierein*, 115 Md. App. at 454 (citation and quotation marks omitted).

The court must also exercise its independent discretion to make the final custody decision; it "may not defer to the master as to the ultimate disposition of the case." *Id.* at 453. As the Court of Appeals explained in *Domingues*, 323 Md. at 491-92:

> The ultimate conclusions and recommendations of the Master are not simply to be tested against the clearly erroneous standard, and if found to be supported by evidence of record, automatically accepted. That the conclusions and recommendations of the master are well supported by the evidence is not dispositive if the

> independent exercise of judgment by the [court] on those issues would produce a different result.

In conjunction with this unique adjudicatory framework, Maryland appellate courts practice limited review of a circuit court's ultimate custody decision. "Appellate discipline mandates that, absent a clear abuse of discretion, a [trial court's] decision that is grounded in law and based upon facts that are not clearly erroneous will not be disturbed." *Bagley v. Bagley*, 98 Md. App. 18, 31-32 (1993) (citing *Domingues*, 323 Md. at 492 n.2; *accord Wagner*, 109 Md. App. at 32 (stating that when trial court finds that moving party has satisfied its burden and established justification for change in custody, "those findings must be accorded great deference on appeal, and will only be disturbed if they are plainly arbitrary or clearly erroneous") (citation and quotation marks omitted).

C. Analysis

Father argues that the circuit court erred because it based its ruling on factual findings that, he says, were clearly erroneous in light of the evidence presented to the master. He runs through a catalog of factual challenges – too many to detail here – including many citations, in bullet-point form, spanning more than a dozen pages, to whole swaths of the master's findings of fact and the inferences drawn therefrom.[7] At some points he challenges the master's findings because other testimony at the hearing pointed in the opposite direction. At other points he challenges findings by emphasizing

[7] It is quite likely that Father's 35-page brief, with its pages of single-spaced bullet points, lengthy, single-spaced footnotes, and 1.5-spacing throughout the text, contained more words than the 43-page, double-spaced brief that Mother filed. For that reason, even though Mother's brief violated the page limits of former Rule 8-503(d), we denied Father's motion to strike Mother's brief and granted Mother's motion to file a brief that exceeded the 35-page limit.

other findings that better support his position. At still other times he points to minor factual inaccuracies that had little if any bearing on the master's final recommendations.

We are not insensitive to Father's concerns, nor to his sincere belief that the outcome of this difficult and contentious case was unjust. Yet there is no factual reason to reverse the court's ruling, which was based on findings (by the master) that were amply supported by evidence on the record. The master conducted a full-day hearing that gave Mother, Father, and the supporting witnesses enough time to offer their testimony and competing versions of events. The master then engaged in a thorough and evenhanded review of the evidence presented. She discussed her findings in exhaustive detail, while reaching credibility determinations and drawing inferences that were supported by the testimony.

The master noted testimony, for instance, supporting her findings that both parents are significantly involved in their children's daily lives and that the children had established strong family and school connections in Maryland. The master also heard ample testimony, however, to support her findings that Mother was and had been the primary caretaker, who had taken the lead on most of the important educational and medical decisions. Similarly, the master heard testimony to support her findings that Father, while very involved in sports-related and extracurricular activities, was far less involved in most major medical and academic decisions and indeed had difficulty recalling some salient details, such as the details of Daughter's accommodation plan. In addition, the master heard testimony to support the finding that Father, more than once, had either resisted the recommendations of third-party professionals regarding the

children's welfare or had interfered with Mother's attempts to follow through on the recommendations.

Although the master noted that the children enjoyed stability in Maryland, she also credited testimony that the children were adjusting well to Connecticut, in large part because Mother had gone to great lengths to minimize any disruptions that could attend a move. Lastly, the master noted testimony supporting the conclusion that Mother's reason for moving was genuine, and that, despite the distance from Maryland, she would keep Father informed of developments and would allow him to provide input on joint decisions regarding the children.

These findings are subject to the legitimate disagreement of either or both of the parties. But on our review of the extensive record, we cannot say that any of the master's findings are clearly erroneous. The circuit court, in turn, did not err in its independent assessment of the master's findings in the face of Father's numerous exceptions. The court considered and discussed on the record each of the factual exceptions, and it found them all to be wanting. In particular, having fully reviewed the record, the court specifically stated, "I don't find that any of the master's findings of fact, first level findings of fact were erroneous." We see no reason to disagree.

Meanwhile, to the extent that Father challenges the court's ultimate ruling in light of the findings of fact (it is unclear from his brief that he does), we see no abuse of discretion. The court considered the master's careful review of various factors, under established precedent, as well as the master's conclusion that, although stability in the children's daily life is important, their interests were best served, in this particular case,

by maintaining physical custody with the parent whom the court viewed as having been the children's primary caregiver over the years. Taking full note of Father's concerns, the court tailored a detailed plan that ensured that he would have ample visitation as well as nearly unhindered email and telephone access with his children.

Each relocation case presents unique circumstances, and in cases such as this one, where both parties are fit and loving parents, there are never any simple solutions. In light of all the evidence presented, we cannot say the court's final decision here was improper.

II. Requests for Best Interest Attorney, Custody Evaluation, and Court Interview with Children

Md. Code (1984, 2012 Repl. Vol.), § 1-202(a)(1)(ii) of the Family Law Article ("FL"), permits the trial court to appoint a lawyer who shall serve as a best interest attorney ("BIA") to represent the minor child in any action "in which custody, visitation rights, or the amount of support of a minor child is contested[.]" *See McAllister v. McAllister*, 218 Md. App. 386, 402 (2014). In his complaint Father requested that the circuit court appoint a BIA. The court denied the motion in an order entered July 8, 2014.

Father then moved the court to order a custody evaluation of the children or, in the alternative, to interview them to hear their preferences. In an order that was entered on July 29, 2014, the court approved the master's recommendation that the custody evaluation motion be denied and that the decision about an interview be deferred for

determination by the trial judge. At a later proceeding, the master explained that she saw no urgent need to order another evaluation.

Father unsuccessfully reasserted his motions at the hearing before the master. The master explained that based on the parties' financial statements, she had concluded that they lacked sufficient funds to cover the potential costs of a BIA. She added that appointing a BIA at such a late date would unduly extend proceedings that already had gone on for too long – indeed, the BIA would have to interview the children, decide whether to waive their privileges, and formulate a recommendation about custody. As to the custody evaluation, the master stated that because of limited resources the court generally does not order post-judgment custody evaluations; that the children had already been "way too involved" in their parent's custody battles; and that she had heard nothing that "either [party] has a serious mental health issue that needs to be investigated." Notably, a custody evaluation had already been performed as recently as January 2013, as part of the original divorce proceedings.[8]

At the hearing before the master, Father asked the master to interview the children. The master declined, reasoning that the children were "way too young." In addition, the master expressed concern that Father might have had "poisoned the well" and created loyalty conflicts by bringing the children to the hearing.

[8] In her brief, Mother remarks on the irony of Father's insistence on a custody evaluation: because it would involve interviews by a psychologist, in-home visits, and tests, and questions about the parents, a custody evaluation would almost certainly be more intrusive than the ADHD testing that Father had opposed for Son.

The circuit court addressed these requests again at the exceptions hearing. The court reminded Father that the BIA and custody-evaluation requests already "were denied by orders, one entered July 8th, one entered July 29th" and that "the way to have gotten that reviewed prior to the hearing date would have been to file a motion to reconsider to the judge." The court supported the master's rationale for why an evaluation was unwarranted and stressed that "in this court the rule is no evaluations post-judgment, [and] your burden [was] to show good cause for an exception." As to the request for an interview with the children, the judge said that "the Master has a great deal of discretion" and that "Master Segel found . . . that the children had already been too involved in the case and that they were too young, and she didn't want to subject them to any more direct involvement." The court did not disagree with the master's conclusion.

On appeal Father reasserts these challenges. He recognizes that, with respect to each decision, the court enjoys considerable discretion on how to rule. He nevertheless insists that by denying each motion, the court failed to satisfy its obligation to act in the best interests of his children. We address each challenge in turn and conclude that the court has not abused its discretion.

A. Interview Request

In custody disputes such as this one, "[t]he trial court has 'the discretion to interview a child.'" *Karanikas v. Cartwright*, 209 Md. App. 571, 590 (2013) (quoting *Marshall v. Stefanides*, 17 Md. App. 364 (1973)). Under the all-inclusive "best interest of the child" standard, although the child's preference to live with one parent "is a factor that *may* be considered in making a custody order, . . . the court is not required to speak

with the children." *Lemley v. Lemley,* 102 Md. App. 266, 288 (1994) (citing *Levitt*, 79 Md. App. at 403) (emphasis in *Lemley*); *accord Karanikas*, 209 Md. App. at 590 (stating that "'the court has the discretion whether to speak to the . . . children and, if so, the weight to be given the children's preference as to the custodian'") (quoting *Leary v. Leary,* 97 Md. App. 26, 36 (1993) (citation omitted), *abrogated on other grounds*, *Fox v. Willis*, 390 Md. 620 (2006)).

In reaching a decision about whether to speak with the children, courts may choose to be guided, for example, by the child's knowledge and maturity, *see Leary*, 97 Md. App. at 30 (quoting *Ross v. Pick*, 199 Md. 341, 353 (1952) (stating that "'the child's own wishes may be consulted and given weight if he is of sufficient age and capacity to form a rational judgment'"); or by the potential for emotional distress caused by the child's involvement in a custody dispute, *see Marshall*, 17 Md. App. at 369 (noting that courts are confronted "with an attempt to balance the right of the parents to present evidence as to what they deem to be in the best interest of the child as against possible severe psychological damage to the child").

Here, we see no basis to declare that the master abused her considerable discretion in denying Father's request that she interview the children. Although hearing from the children may, at times, assist the court in its challenging task of arriving at a just result, it is by no means a required step. The circuit court reasonably agreed with the master's conclusions that the children were too young to be heard from; that they already were too involved in a battle that had gone on longer than expected; and that there was some

suggestion that the children, having been brought to court by Father himself for the hearing, might not be a reliable source of information.

We therefore affirm.

B. BIA Request

A circuit court in a custody action "may . . . appoint a lawyer who shall serve as a best interest attorney to represent the minor child and who may not represent any party to the action." FL § 1-202(a)(1)(ii). Court-appointed counsel in custody disputes may be instrumental in "provid[ing] the circuit court with an opportunity to hear from an individual who will speak for the child." *Hosain v. Malik*, 108 Md. App. 284, 299 (1996) (citing *Levitt*, 79 Md. App. at 404) (citation omitted). Indeed, a court may deem it necessary, under the peculiar facts of a given case, to appoint counsel to protect the child's interests. *See, e.g., Levitt*, 79 Md. App. at 403-04 (concluding that trial court on remand should appoint counsel for five-year-old child in extended and fraught custody modification proceeding).

Yet, all indications are that a court's decision in this area is highly discretionary. FL section 1-202 provides that the court "*may*" appoint a BIA. Nothing in the case law applying the statute supports Father's apparent argument that, because a court has the authority to appoint a BIA, it therefore is *required* to do so in order to further the child's best interests. It is well known that, to constitute abuse of discretion, a decision ordinarily must "'be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *King v. State*,

407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994) (internal citations omitted)). We see no such abuse in the facts before us.

Father places great weight on Md. Rule 9-205.1, which cross-references FL section 1-202, and which "applies to the appointment of child's counsel in actions involving child custody or child access." Md. Rule 9-205.1(a). He insists that the circuit court failed to adhere to the rule's strict mandates. We do not agree.

Paragraph (b) of the rule appears to provide guidance for courts deciding whether to appoint child's counsel. It suggests that the appointment of counsel "*may be most appropriate*" (emphasis added) in cases involving any of a list of possible "factors, allegations, or concerns[,]" the last of which is "any other factor that the court considers relevant." Md. Rule 9-205.1(b).[9] It further suggests that courts "*should* consider the

[9] The "factors, allegations, or concerns" for which appointment of child's counsel "may be most appropriate" are as follows:

(1) request of one or both parties;
(2) high level of conflict;
(3) inappropriate adult influence or manipulation;
(4) past or current child abuse or neglect;
(5) past or current mental health problems of the child or party;
(6) special physical, educational, or mental health needs of the child that require investigation or advocacy;
(7) actual or threatened family violence;
(8) alcohol or other substance abuse;
(9) consideration of terminating or suspending parenting time or awarding custody or visitation to a non-parent;
(10) relocation that substantially reduces the child's time with a parent, sibling, or both; or
(11) any other factor that the court considers relevant.

Rule 9-205.1(b).

nature of the potential evidence to be presented, other available methods of obtaining information, including social service investigations and evaluations by mental health professionals, and available resources for payment." *Id.* (emphasis added).

Nothing in this part of the rule (which to date has not been discussed or cited by any Maryland appellate court) appears to bind a circuit court to any particular course of action under any particular set of facts. The provision is stuffed with advisory language, suggesting what courts "should" consider when approaching this decision, or advising that appointment "may be most appropriate" where any of several factors are present. Indeed, Rule 9-205.1(b) contains no language instructing trial courts that they must consider the "factors, allegations, or concerns" that it enumerates, or even that they must appoint counsel *if* they find the presence of any such factors. Nor does the rule require courts to make findings on these factors, or to recite such findings on the record. The absence of mandatory language is clearly not accidental: in the next paragraph, Rule 9-2.501(c)(1) dictates the contents of an order appoint child's counsel, saying that it "*shall*" meet specific requirements, while Rule 9-2.501(c)(2) dictates that "the court *shall* send a copy of the order appointing counsel to each attorney of record and to each party." (Emphases added).

For this reason, we take no issue with the circuit court's decision, in keeping with common practice, to deny Father's BIA request without comment in a written order. In any event, the master explained the bases for the ruling. We cannot say that the reasons

given, including the protracted nature of the proceedings to date and the potentially high BIA fees that would result, were unreasonable.[10]

Father cites the Committee Note to Rule 9-205.1, which states that "[a] court should provide for adequate and effective child's counsel in all cases in which an appointment is warranted, *regardless of the economic status of the parties*." (Emphasis added.) It is clear from the rest of the Committee Note, however, that the Rules Committee simply envisioned the discretionary appointment of pro bono counsel. *See id.* ("[b]efore asking an attorney to provide representation pro bono publico to a child, the court should consider the number of other similar cases the attorney has recently accepted on a pro bono basis from the court"). The Committee Note does not compel a court to ignore the parents' ability to fund the potentially exorbitant costs of a BIA. To the contrary, the actual text of the rule itself informs the court that it "should consider," among other things, "available resources for payment." Md. Rule 9-205.1(b). The court did not violate Rule 9-205.1 by following the language of the rule and considering the "available resources for payment" of a BIA.[11]

[10] In July 2014, when the court denied the initial request for a BIA, both parents were representing themselves. Given the importance and urgency of the custody issues at stake, the court could reasonably have inferred that neither party had been able to make the financial arrangements to engage counsel even for themselves at that time.

[11] The court had reasons, other than the lack of financial resources, not to appoint a BIA. Those reasons included the additional delay that the appointment would entail in a case in which both parties had acted as though there was some urgency in reaching a resolution. The potential for appointing pro bono counsel would not obviate the problem of additional delay.

In short, nothing in either FL section 1-202 or Md. Rule 9-205.1 appears to bind the circuit court's hands in the exercise of its broad discretion to rule on a BIA request in light of what it believes, under the circumstances, serves the child's best interests. Accordingly, we affirm.

C. Custody Evaluation

Father challenges the circuit court's denial of his request for a custody evaluation of the children. Yet, while he includes this issue in the heading for the question presented for appeal, he devotes not one sentence of his brief to arguing the point. We are thus constrained to consider that argument waived for failure to satisfy Md. Rule 8-504(a)(6), which requires a brief to supply "[a]rgument in support of the party's position on each issue." *See HNS Dev., LLC v. People's Counsel for Baltimore Cnty.*, 425 Md. 436, 458 (2012) ("[a] necessary part of any argument are case, statutory, and/or constitutional authorities to support it"); *see also Rollins v. Capital Plaza Assocs.,* 181 Md. App. 188, 202 (2008) (refusing to seek out law to sustain position where party cited no legal authority).

Nevertheless, even if the issue were before us, we would not find an abuse of discretion. Nothing in the Code or the Maryland Rules appears to discuss when a court should or must order a custody evaluation. Father, moreover, directs us to no case law discussing or even citing to any applicable standards in this area. As with so much of a family law judge's work, this appears to be one more quintessentially discretionary call, subject, as ever, to the court's faithful consideration of what actions it believes would assist it in furthering the child's best interests.

At the custody hearing, the master gave Father several reasons for the court's earlier order denying his request: that the court generally does not order post-judgment custody evaluations because it lacks the resources to do so; that the children were "already way too involved" in the custody battle; and that nothing led her to believe that "either [party] has a serious mental health issue that needs to be investigated." We cannot see how the circuit court, in echoing these explanations at the exceptions hearing, abused its discretion, and Father has made no argument for why we should do so.

We therefore affirm.

III. Claim of Legal Error

In the last of Father's challenges, he claims that the master and the circuit court "erred in applying applicable case law." It is, however, hard to make out precisely what Father is trying to argue here. The body of this section consists almost entirely of a string of lengthy quotations from Maryland cases addressing well-worn legal principles and rules, including the principles that the best interests of the child are paramount and that a trial court in a custody modification hearing must thoroughly consider and make findings with respect to a number of important factors.

Here, the master and the trial judge correctly recited and followed the applicable law with regard to custody modification motions. The master, as primary fact-finder, painstakingly reviewed the evidence and made a comprehensive record of her factual findings. She incorporated those findings into the required legal framework and carefully discussed her conclusions as to why, in considering the relevant factors, she reached the result that she did. In overruling most of Father's exceptions and affirming the master's

conclusions, the trial court engaged in a conscientious exercise of its independent judgment. The court committed no legal error.

CONCLUSION

The master and the circuit court had the unenviable task of deciding which of two able and devoted parents should have primary physical custody of their children when one of the parents moved hundreds of miles away from Maryland. Under the evidence in this case, neither the master nor the circuit court were compelled to resolve the issue as they did, by awarding primary physical custody to Mother. Nor, however, were they compelled to resolve the issue as Father wanted, by awarding primary physical custody to him. We affirm the difficult decision of the court below.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY ALL COSTS.