Circuit Court for Baltimore County
Case No. C-03-FM-19-006292

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0097

September Term, 2021

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JENNIFER WOLF

v.

ALEXANDER S. WOLF, ET AL.

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Fader, C.J.
Nazarian,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Kenney, J.

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Filed: October 13, 2021

This appeal arises from an emergency hearing in the Circuit Court for Baltimore County in a contested divorce case.[1] The Motion for Emergency Hearing was filed by the Best Interest Attorney (BIA) for the parties' children to permit one of the children, S., to participate in the Boy Scouts of America (BSA).[2] Mother challenges the grant of the Emergency Hearing and the resulting order permitting S. to participate in BSA activities with the consent of only one parent.

On appeal, Mother asks:

(1) Whether the trial court abused its discretion by conducting an emergency hearing on an ancillary matter without meeting published standards for obtaining emergency relief.

(2) Whether the trial court erred by denying Mother due process by refusing to take testimony or admit any evidence when the fundamental right to parent her child was at stake.

(3) Whether the trial court erred in ruling on a matter of legal custody without undertaking a proper analysis of the factors required to make an initial custody determination.

For the reasons that follow, we affirm the judgment of the circuit court.

[1] A full-merits trial was then scheduled for July 2021. When no judge was available on that date, the trial was later postponed until July 2022. S. will reach the age of eighteen prior to that date. A Pendente Lite hearing was granted on September 29, 2021, but a date has not yet been set.

[2] We will refer to S.'s parents as Mother and Father in this opinion.

## FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father are the parents of five children. They separated in December 2019. S., their second-eldest child, is 17 years old and has resided with Father since the parents' separation.[3]

Prior to their separation, all of the children actively participated in the BSA. S., their only daughter, began participating in 2019 when girls were allowed to join. She was working to earn the rank of Eagle Scout until Mother objected to her participation in the BSA in November 2020.[4] As a result of her objection, the BSA informed the parties that neither S. nor her younger brothers could participate in BSA activities until both parents agreed on their participation.

The BIA worked with the parties to effect an agreement between them for S.'s continued involvement with the BSA, without success. Because of the time required to earn and complete the prerequisite scouting ranks prior to becoming an Eagle Scout, it was understood at the time that S. had to resume her scouting activities in March of 2021 in

[3] Their oldest child is now emancipated.

[4] In opposition to the request for emergency relief, Mother stated that Father is "obsessed with [the] BSA" and over time a relationship had developed between Father and Eliza Reitz, who also has children involved in scouting and with whom he now lives. Mother complained about inappropriate texts between Ms. Reitz and S. She views S.'s participation in scouting as contributing to the alienation between her and S.

order to achieve the rank of Eagle Scout before her eighteenth birthday.[5] For that reason, the BIA moved for the Emergency Hearing on January 20, 2021. The BIA requested that the court grant Father temporary legal custody or, in the alternative, tie-breaking authority for the limited purpose of reenrolling S. in scouting. The BIA asserted that S.'s inability to resume her scouting activities to become an Eagle Scout presented an immediate and substantial risk of harm that could not await the scheduled merits hearing in July 2021.

In opposition to the BIA's motion, Mother argued that the harm to S. identified by the BIA does not merit emergency relief because S.'s "inability to pursue her interest in achieving the rank of Eagle Scout does not constitute a dangerous or risky circumstance that presents a current threat." Despite Mother's objection to the Emergency Hearing, a magistrate, on February 4, 2021, granted the BIA's request for a hearing that took place on February 12, 2021. At that hearing, the hearing court indicated that it had read the motion for the hearing, including all of the attached exhibits, heard argument from the BIA and both parties' counsel, and had talked with S. on the record in virtual chambers outside the presence of the parties.

After the hearing, the court entered an order "permitt[ing] [S.] to resume her participation in scouting." More specifically, the court ordered "that only the consent of

[5] Ordinarily, one has to achieve the rank of Eagle Scout by their eighteenth birthday. According to Mother's brief, the official BSA website indicates that extensions are now being granted at a local level for those who would not be able to earn Eagle Scout prior to their eighteenth birthday because of the Covid-19 pandemic. This information was not presented in the papers before the circuit court or at the hearing on February 12, 2021.

one parent shall be required for any scouting activities requiring a permission slip, parental consent, or the like. An objection by one parent is not sufficient to overcome the consent of the other."

Mother filed a Motion to Alter or Amend the order, and when that was denied, she filed a timely appeal. Other facts will be added in the discussion of the issues presented.

## I.

## Final Judgments and Courts and Judicial Proceedings § 12-303

The order permitting one parent to consent to S.'s continued participation in scouting was not a final judgment in this case. Nor did the hearing court intend it to be. Courts and Judicial Proceedings § 12-303, however, permits certain interlocutory appeals, including the appeal of an order "depriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order." Md. Code Ann., Cts. & Jud. Proc. § 12-303(3)(x). Here, because the order effectively deprived Mother of an aspect of legal custody of S., the order is appealable. *See In re Billy W.*, 387 Md. 405 (2005); *In re Samone H.*, 385 Md. 282 (2005).

## II.

## The Grant of an Emergency Hearing

*Standard of Review*

We review the grant of the Emergency Hearing in this case for an abuse of discretion. It is an abuse of discretion when "no reasonable person would take the view adopted by [a] trial court," or "when [a trial court] acts without reference to any guiding rules or principles." *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312-13 (1997) (internal quotation marks omitted). In addition, a discretionary decision premised upon legal error is an abuse of discretion because a "court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case." *Arrington v. State*, 411 Md. 524, 552 (2009). Otherwise, the decision will not be reversed unless it is so far "removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* Moreover, it is not an abuse of discretion simply because "the appellate court would not have made the same ruling." *North v. North*, 102 Md. App. 1, 14 (1994).

*Contentions*

Mother contends that holding an emergency hearing to consider whether S. could continue her participation in scouting was an abuse of discretion. She argues that granting an emergency hearing for that purpose was "particularly abusive given that at the time, families across the state were struggling to obtain relief on critical matters related to health and wellbeing." And, because few hearings were being held as a result of Covid-19 restrictions, it was inappropriate for the court to grant a hearing and devote time to an "insubstantial matter."

Recognizing that the "specific standard for obtaining emergency relief in family law is not set by statute," Mother directs us to the website for the Circuit Court for Baltimore County. She argues that it reflects a "policy" that granting emergency relief "requires a showing that there is an imminent risk of substantial and immediate physical harm to a party or minor child."[6] And, based on it being granted at the request of the BIA and on the court's statements that "[n]ormally this case would never be put in for an emergency" had either parent filed the request, she states that "in Baltimore County, access to the courts is based on your [counsel's] relationship with the venue."

The BIA contends that holding an emergency hearing was within the court's discretion and consistent with the Family Differentiated Case Management Plan (Family DCM Plan)[7] of the Circuit Court for Baltimore County. He argues that the hearing was granted by a magistrate and not the hearing court and was probably granted because it was filed by a BIA rather than a parent. Therefore, any perceived relationship between him and the court was not a factor in granting the hearing. He further argues that the court's statements to S. about knowing the BIA would not support a reasonable inference that the court was biased in favor of the BIA.

[6] That website indicates that "emergency relief requires a showing that there is an immediate risk of substantial and immediate physical harm to a party or minor child" and will be "employed only in matters where a risk or threat of serious harm or injury exists."

[7] Under the Family DCM Plan an Emergency Hearing may be requested when "there exists some immediate, substantial risk of injury or harm [to a party or child] before a regularly scheduled hearing will be held."

Father, relying on the Family DCM plan, contends that the court did not abuse its discretion. He argues that the risk of harm to S. was great, and that holding an emergency hearing was appropriate and proper under the circumstances.

*Analysis*

Under the Family DCM Plan, as previously noted, "injury" or "harm" are not limited to physical injury or harm. The BIA stated in the hearing request that there was an "immediate, substantial risk of injury or harm to" S. if she was not able to resume her scouting activities prior to the scheduled merits hearing. It was immediate because, without emergency relief prior to the scheduled merits hearing, she would not be able "to resume scouting activities in time to complete the requirements for Eagle Scout."

Mother views the "potential for [S.] to run out of time to complete her Eagle Scout merit badge" as an "insubstantial" and "trivial matter" and "not a threat to [S.'s] wellbeing." But the magistrate who reviewed and decided to grant the hearing obviously did not consider it in the same light.[8] And what might appear to be "trivial" and "insubstantial" to some could still impact a child's wellbeing. For that reason, the risk of harm has to be considered from the perspective of the child's best interest as it was by the hearing court:

[8] The Family DCM Plan states that "the request for an Emergency Hearing will be reviewed and decided, in the first instance, by a magistrate, unless the matter is specially assigned to a judge. Upon written request sent to the Central Assignment Office, the decision of the magistrate may be reconsidered by the Lead Family Judge."

> [W]ill the world stop spinning if I were to deny this request? No, it wouldn't. But [S.'s] world would become even more chaotic. She would lose the comfort she gets from scouting, the friendships she gets from scouting. She would lose the stability that she gets from scouting. And she certainly would lose the ability to earn Eagle Scout, which is something she worked very hard towards. And I don't think she should be denied the opportunity because her parents cannot agree.

Mother also argued that the hearing was granted because of the relationship between the BIA and the court. During her interview with S., the hearing court stated:

> I will tell you I met [BIA] in the '90's long before you were born . . . but you got a really good lawyer. I mean—and I will tell you also—the whole reason we are here today is because you have a good lawyer. Because we normally wouldn't have an emergency hearing on something like this, particularly if a parent filed this.

And later, when talking to the parties after interviewing S., the court stated:

> Normally, this case would have never been put in for an emergency hearing. I can tell you if [counsel for Father] had filed it, it wouldn't have been put in. And [counsel for Mother], if you had filed it, it wouldn't have been put in. [E234]. The fact that the Best Interest Attorney filed it, I believe caught the eye of the screener because I can tell you, as lead judge of the family law division, it's not something that we see very often where a BIA is asking for relief on behalf of his or her client.

We are not persuaded that the hearing court's comments would in any way indicate that the hearing was granted because the court was biased in favor of the BIA. The court explained that receiving a request for an emergency hearing from any BIA—not this particular BIA—on behalf of a child was unusual and caught the magistrate's attention. And simply because the hearing court in its interview with S. stated having met the BIA in the '90's, and indicated to her that she had a "really good lawyer" representing her does not establish an improper motive in granting an emergency hearing in this case.

In short, and as the hearing court stated, the risk of losing the comfort, friendships, and stability that S. gets from scouting, including the opportunity to pursue the rank of Eagle Scout, would potentially render S.'s life to be even more chaotic. Under these circumstances, granting an emergency request from a BIA to help a child navigate the choppy waters of the parents' contentious divorce was not an abuse of discretion.

## III.

## Due Process Considerations

*Standard of Review*

Once a protected liberty interest is established, the due process inquiry involves considering and balancing the competing governmental and private interests. *See Pitsenberger v. Pitsenberger*, 287 Md. 20, 30 (1980). Due process is a "flexible concept that calls for such procedural protection as a particular situation may demand." *Id.* at 24 (citing *Int'l Caucus of Labor Comm. v. Maryland Dep't of Transp.*, 745 F. Supp. 323, 329 (D. Md. 1990); *Dep't of Transp. v. Armacost*, 299 Md. 392, 416 (1984)). It may be satisfied when "there is at some stage an opportunity to be heard suitable to the occasion and an opportunity for judicial review at least to ascertain whether the fundamental elements of due process have been met." *Wagner v. Wagner*, 109 Md. App. 1, 23-24 (emphasis removed). We review whether a party was deprived of their due process rights de novo. *Regan v. Bd. of Chiropractic Exam'rs*, 120 Md. App. 494, 509 (1998).

*Contentions*

Mother contends that argument by counsel and review of the filings and exhibits was insufficient process when "her fundamental right to parent her child was at stake." More specifically, she contends that she was not afforded the opportunity to testify or respond to statements S. made to the hearing court, and that the hearing court's refusal to take testimony and receive evidence during the Emergency Hearing denied her due process.

The BIA contends that the trial court "never refused to take testimony or admit any evidence" and did not violate Mother's due process rights. Moreover, Mother was not denied an opportunity to be heard because neither she nor her counsel moved to present testimony at the hearing. The BIA, citing *Wagner v. Wagner*, 109 Md. App. 1, 11-12 (1969), states that due process "is a flexible concept that calls for procedural protection as a particular situation may demand," and that the "weightier issues of physical and legal custody" were not at issue. He argues that the "right to be heard is not synonymous with the right to testify," and that Mother presented "her case though filings with the court and her attorney's argument."

Father contends that Mother was properly provided with an opportunity to present her case through her attorney and the filings with the court, including the attached exhibits.

*Analysis*

Mother has a protectable liberty interest in the care and custody of all her children, "and when [the] State seeks to affect the relationship of a parent and child, the due process

clause is implicated." *Wagner*, 109 Md. App. at 25. It is equally understood, however, that a parent's liberty interest in the care and custody of their child is not absolute and subject to the best interest of the child standard. *In re Maria P.*, 393 Md. 661 (2006) (citing *In re Yve S.*, 373 Md. 551, 566-69 (2003)).

Mother cites a handful of cases that she claims demonstrates that her due process rights were violated because she was not afforded the ability to testify at the hearing involving S.'s participation in scouting. She argues that "[t]he requirement of hearing testimony is a precursor to the trial court's insight into the specifics of a custody determination." Other than cases cited for general due process principles, the cases cited by Mother for support involve either a full custody determination or the right to be present at a CINA hearing. *See Flynn v. May*, 157 Md. App. 389 (2004) (determining full custody at a hearing after a pro se mother was denied the opportunity to present evidence or have her five witnesses testify); *In re Maria P.*, 393 Md. 661 (2006) (reviewing the right of a parent to be present at a CINA hearing).

The hearing in this case focused only on whether S. could continue her participation in the BSA. Because an affirmative determination of the question would affect Mother's legal custody rights, the due process clause was implicated. The question is whether it was satisfied.

At the beginning of the hearing there was the following exchange:

> BIA: So I will state that and then also just want to be clear at the outset what the Court's expectations are, whether the Court is expecting an evidentiary

> hearing, that is to say that witnesses will be called to testify about the facts that underlie the issues set forth in the motion or at least at the outset if you are simply looking for argument from counsel and then I guess maybe decide what, if any, evidence you may require after that.
>
> Court: Thank you, [BIA]. I didn't – yes, I was expecting more of argument. I did read everything that's been filed relevant to this issue and all of the attachments to your filings. So I feel like I have a pretty good handle on the background that underlies the dispute.

The hearing court indicated its expectation and that it thought it understood the underlying dispute, but it did not refuse to hear testimony. As to the extent Mother felt the need to rebut statements made by S. in her interview with the court, we see nothing on the record where Mother or her counsel indicated a desire or need to testify.

The court expressly stated that the determination on the scouting issue would have no impact on the global custody case, and that it did not "want to make a decision regarding custody specifically. I really want to make a decision regarding this discrete issue of [S.] continuing her scouting activities." And it further explained:

> Again, I have no opinion as to merits of either parent's case or position in the global case itself. But after this specific issue, I believe that [S.] needs to be allowed to continue along the course that she has put in a lot of work. And to deny her that accomplishment, I believe is unnecessary. And so I'm going to grant the request.

Legal custody "carries with it the right and obligation to make long range decisions' that significantly affect a child's life, such as education and religious training." *Santo v. Santo*, 448 Md. 620, 627 (quoting *Taylor v. Taylor*, 306 Md. 290, 296 (1986)). "'Physical custody, on the other hand, means the right and obligation to provide a home for the child

and to make' daily decisions while the child is under that parent's care and control."[9] *Id.* (quoting *Taylor*, 306 Md. at 296). Allowing one parent to permit S. to continue her scouting activities to which Mother has objected affects to some degree her relationship with S. On the other hand, the BSA scouting program is a program that she has previously allowed all of her children, including S., to participate in.[10] And Mother's right to "make long range decisions that significantly affect [her] child's life" are not otherwise affected. *Id.* at 627.

Here, the circuit court explained to the parties that it had reviewed all of the materials that were filed with the court, which included all of the motions filed and the responses to those motions, along with seventeen exhibits. In addition, the court interviewed S. and heard argument from all three attorneys, including Mother's counsel. On the record before us, we are persuaded that Mother was afforded adequate process on this limited issue. *See Pitsenberger*, 287 Md. at 30.

## IV.

## The Scouting Determination

### *Standard of Review*

The Court of Appeals has explained that:

[9] S. resides with Father.

[10] The extent that Mother's concern about scouting is, in part, related to Ms. Reitz, S. is now living with Father and her, but Ms. Reitz is no longer directly involved in S.'s current BSA troop.

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Maryland Rule 8-131(a)] applies. [I]f it appears the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

*Burak v. Burak*, 455 Md. 564, 616 (2017) (quoting *In re Yve S.*, 373 Md. at 586).

*Contentions*

Mother contends that the circuit court erred as a matter of law and therefore abused its discretion by making a determination to change or modify custody without a full analysis of the *Taylor* factors. *Taylor*, 306 Md. 290. More particularly, citing *Santo v. Santo*, 448 Md. 620 (2016) and *Meyr v. Meyr*, 195 Md. App. 524 (2010), she argues that the hearing court's grant of tie-breaking authority prior to a full *Taylor* factor review was not lawful. In addition, she contends that the BIA, by "siding with [S.]," is, "in essence," the one making the tie breaking decision between the parents, and that granting tie-breaking authority at the BIA's request "could be seen as the court giving improper authority" to the BIA.

The BIA and Father contend that the hearing court did not rule on or consider global custody issues in this case and that its determination that continuing to participate in the BSA was in S.'s best interest was proper without a full analysis of the *Taylor* factors.

*Analysis*

As previously stated, legal custody "carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Taylor*, 306 Md. at 296. In the case, however, of "embittered parents and a relationship marked by dispute, acrimony, and a failure of rational communication, there is nothing to be gained and much to be lost by conditioning the making of decisions affecting the child's welfare upon the mutual agreement of the parties." *Id.* at 305.

The hearing court distilled from the filings, argument, and its interview with S., that the impasse between the parents was causing S. to suffer unnecessarily. Noting that participation in scouting had improved S.'s life and that she found respite in the BSA, the court concluded that continuing in scouting with an opportunity to earn the rank of Eagle Scout would be in S.'s best interest.

With that one exception, the custody status of Mother and Father has not changed. They continue to share legal custody of S. with the right to participate in matters of major significance concerning S.'s life and welfare. As previously addressed, Mother, during the proceedings, has characterized S.'s participation in the BSA as a "trivial," "ancillary," and insubstantial matter. We are not persuaded that that resolution of that single issue required a full analysis of the *Taylor* factors.

Nor are we persuaded that the BIA exceeded his authority or that the grant of tie-breaking authority at the BIA's request was an improper delegation of judicial authority. A BIA is appointed to represent the child's interest in an action related to custody, visitation rights, or support. Md. Code Ann., Fam. Law § 1-202.[11] The order appointing the BIA required that he act "in accordance with the Maryland Guidelines for Practice for Court Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access" (Guidelines) and "perform all duties pursuant to Section 2.2 of the Guidelines." Section 1.1 of the Guidelines empowers the BIA to make "an independent assessment of what is in a child's best interest" and to advocate "for that before the court." And, Section 2.2(h) authorizes the BIA to "file and respond to pleadings and motions" in carrying out his duties. That is what the BIA did here. Petitioning the circuit court to intervene on an emergency basis to resolve an impasse between parents involving a matter concerning the best interest of a child he was appointed to represent was his obligation and within his authority. And the hearing court granting tie-breaking authority to a parent after a hearing was not an improper delegation of judicial authority.

In short, we hold, on this record, that the hearing court's findings were not clearly erroneous or premised on legal error, and that its grant of tie-breaking authority at the BIA's request was not an abuse of discretion.

[11] The statute states that in general, "in an action in which custody, visitation rights, or the amount of support of a minor child is contested, the court may . . . (ii) 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."

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

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0097s21cn.pdf