Circuit Court for Montgomery County
Case No. 170930FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1058

September Term, 2021

G.M.

v.

R.J.

Kehoe,
Arthur,
Shaw,

JJ.

Opinion by Arthur, J.

Filed: March 24, 2022

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

The Circuit Court for Montgomery County entered an emergency order that transferred custody, *pendente lite*, from a child's mother to her father. The mother appealed. We affirm, principally because the mother failed to preserve any of the issues that she has raised.

Factual and Procedural Background

Appellant G.M. ("Mother") and appellee R.J. ("Father") are the parents of C., who is now 11 years old.[1] Mother and Father were never married to one another and never cohabited with each other.

C. lived with Mother in Montgomery County. Father, who lived in Montgomery County as well, had periodic access to C. Father and Mother had no formal agreement as to custody.

When C. was old enough to go to school, Mother and Father agreed that she would attend the elementary school in Father's school district. Mother's father would take C. to the school bus stop, and Father would often take care of the child after school.

Father claims that during the summer of 2020 Mother began to threaten to withhold access to C. He engaged an attorney to assert his parental rights.

On August 25, 2020, Father's attorney sent a confidential settlement proposal or demand letter to Mother. Two days later, on August 27, 2020, C. reportedly announced

[1] "C." is a randomly selected letter. It may or may not be the first letter of the child's name.

that she no longer wished to see Father. Father was unable to speak to C. for more than two months and was unable to see her in person for several more months.

On September 10, 2020, Father filed a complaint for custody, child support, and other relief. Among other things, Father requested that he be awarded sole physical and legal custody of C. Mother answered the complaint and filed a counterclaim, in which she requested that she be awarded primary physical and sole legal custody of C.

Simultaneously with his complaint, Father filed a motion for a temporary restraining order and preliminary injunction. In his motion, Father expressed concern that Mother would remove (or "un-enroll") C. from her elementary school. He asked that the court enjoin Mother from doing so. In her response to the motion, Mother stated that she had "no intention of unenrolling" C. from the school "at this time."

In a written order that was docketed on December 4, 2020, Judge Jeannie E. Cho denied the motion for a temporary restraining order and preliminary injunction on the ground that it was "moot." Judge Cho interpreted Mother's response to the motion to provide that the child "shall remain" at her current school "until any court order or agreement provides otherwise." Mother did not challenge Judge Cho's interpretation.

On February 10, 2021, a magistrate conducted a hearing on father's motion for a *pendente lite* hearing. At the hearing, the magistrate recommended that Father's "request for *pendente lite* access be granted in the best interest of [C.]" The magistrate also recommended that Father's access be supervised, but that Father's wife, Ms. L., be allowed to serve as the supervisor.

In explaining the bases for his decision, the magistrate observed that Mother claimed to have kept C. away from Father for two months (from late August 2020 to early November 2020) because "she was respecting the child's wishes." The magistrate found that "the timing of the termination of access" – coming two days after the letter from Father's attorney to Mother – "is very suspect."

Mother claimed that it took more than two months of daily prodding to uncover why C. allegedly did not to want to see Father. The magistrate found it significant that during that two-month period Mother made no effort to reach out to Father to ask him if he knew what the problem was. "She just chose to ignore [Father's] access and also his requests for access during that period of time."

According to Mother, C. eventually accused Father of physically threatening her. Mother, however, did not go to the police or to child protective services, "because she stated that she had no proof."[2] Father denied that he struck, hit, or abused the child; Father's wife, Ms. L., whom the magistrate found to be credible, denied ever seeing him strike, hit, or abuse the child.

The magistrate noted that on multiple occasions Mother referred to C. as "my child," not as "our child." In the magistrate's opinion, Mother's word choice evidenced "a lack of interest in co-parenting."

[2] It appears that the child's therapist may have called Child Protective Services. The record contains no indication about the outcome of the investigation, if any.

Mother filed exceptions to the magistrate's oral recommendations. In a *pendente lite* order that was docketed on April 28, 2021, the circuit court granted the exceptions in part: the court allowed Father to continue to have supervised access to C., but ordered that his access be supervised by a third party rather than by his wife, Ms. L. It appears that Father did not regain in-person access to C. until the court signed the *pendente lite* order.

On the same day that it signed the *pendente lite* order, the court granted Mother's request to appoint a Best Interest Attorney ("BIA") for C. and appointed the attorney whom Mother suggested. Although the court had set a final merits hearing for August 2 through August 4, 2021, the court postponed the hearing until April 12, 2022, because the BIA had a scheduling conflict.

During the summer of 2021, Father complained that Mother was denying him access to C., in violation of the *pendente lite* order. On July 29, 2021, Father filed a petition to enforce the order and to have Mother held in contempt. Among other things, Father alleged that during one of C.'s visits Mother had hidden an Apple AirTag, a Bluetooth tracking device, in C.'s belongings. Mother pressed criminal charges against him, apparently because he did not immediately return the AirTag.

On Friday, August 6, 2021, while the contempt motion was pending, Father learned that Mother intended to withdraw C. from her school in Montgomery County and to move with C. to Charles County, some 50 miles away. On the following Monday,

August 9, 2021, Father filed a motion for what he called "emergency legal custody," as well as a motion for injunctive relief.

On the following day, Tuesday, August 10, 2021, Father filed an amended motion for "emergency physical custody," legal custody, and injunctive relief. Father asked the court to enjoin Mother's attempt to remove C. from the school that she had attended since she was in kindergarten and to frustrate his right of access to his child. Among other things, he cited Judge Cho's order of December 4, 2020, which stated that C. would remain at the Montgomery County school "until any court order or agreement provides otherwise." He asked that the court grant him sole physical and legal custody of C. pending the final merits hearing.

In a letter dated August 10, 2021, Mother's attorney confirmed that she had just informed Father's attorney that Mother had "received notice to vacate her current rental property by August 15, 2021," and that she intended to move to a new home in Charles County "soon after" the settlement, which was "set to take place on August 18, 2021." The letter did not disclose when Mother first learned that she would have to "vacate" her rental property in Montgomery County, but at oral argument Mother's attorney told us that it was sometime in June 2021 – perhaps as much as two months earlier.[3]

On the afternoon of August 9, 2021, a judicial law clerk had reached out to the attorneys about their availability for a hearing. By the following day, the attorneys for

[3] At a hearing before the circuit court on August 12, 2021, Father told the court that online records show that Mother had had a contract on the house since July 13, 2021.

the parties had confirmed their availability for a hearing two days later, at 11:00 a.m. on Thursday, August 12, 2021. Mother's attorneys asked if they could appear virtually. They did not assert that the court was required to conduct an evidentiary hearing before ordering a change in custody or that Father's allegations were insufficient to justify emergency relief.

On the evening of August 11, 2021, Father's attorney sent an email to the judicial law clerk. The email expressed uncertainty as to whether the court intended to take testimony and receive evidence, and it attached potential exhibits. Mother did not object to the exhibits or insist that the court was required to take testimony.

On August 12, 2021, the date of the hearing, Mother responded to Father's amended motion for emergency physical custody. In the response, which consists of eight pages of legal and factual assertions and another 13 pages of exhibits, Mother, again, did not assert that the court was required to conduct an evidentiary hearing before ordering a change in custody. Nor did Mother assert that Father's allegations were insufficient to justify emergency relief.

The hearing occurred as scheduled. It consisted largely of oral representations by the attorneys, including the BIA, interspersed with questions from the circuit court judge, including questions that he posed directly to Mother. Many of the attorneys' representations were essentially undisputed. For example, it was undisputed:

- that C. had attended the elementary school in Montgomery County since she was in kindergarten and that she was about to enter her final year there;
- that C. had many close friends in her Montgomery County community;
- that an earlier order had denied Father's motion for injunctive relief on the premise that it was moot, because Mother had represented that C. would remain at the Montgomery County school "until any court order or agreement provides otherwise";
- that, in a matter of days, Mother intended to move C. to a new school in a new community some 50 miles from Father;
- that the new school year would start in two or three weeks;
- that Mother had cut off Father's access to C. from August 2020 until the entry of the *pendente lite* order in 2021;
- that, after the entry of the *pendente lite* order, Mother had acquiesced in C.'s stated refusal to visit Father and had not insisted or required that the child visit him;
- that Mother had put the AirTag in C.'s belongings and had pursued criminal charges against Father, apparently for not promptly returning it.

Although she was on vacation, the BIA addressed the court. She told the court that Mother had given 10-year-old C. a "tremendous amount of control" over whether to see her father, which, the BIA said, was "not in her best interest." The BIA was not

satisfied with C.'s stated reasons for refusing to visit Father and did not believe that C. faced the prospect of "any amount of harm" when she visits him. The BIA informed the court that the person who had been appointed to supervise Father's visits with C. thought that supervision was unnecessary: the supervisor didn't "understand why she was involved" and thought the requirement of supervision was "a joke." The BIA had heard nothing that led her to believe that C. was in harm's way when she visited Father's house.

The BIA was particularly critical of Mother's decision to put the tracking device (the AirTag) in C.'s belongings and then to bring criminal charges against Father: "[T]he signal it says to my client is, my dad is not safe. I'm not safe with dad."

On the key issue of where C. should go to school, the BIA said: "I am not in any way, shape or form in a position to advocate that it is in her best interest to change schools at this moment." She stressed that this was C.'s final year in elementary school and that she had many friends and peers at that school.

Finally, the BIA questioned the wisdom of separating C. from Father and limiting his access to his daughter.

After the BIA completed her presentation, the court indicated that it was prepared to rule. It asked the parties whether they had "[a]nything else" to add. Neither at that point nor at any other point in the hearing did Mother assert that the court could grant the requested relief only after an evidentiary hearing or that Father had failed to allege an emergency that warranted the court's intervention.

In its oral ruling, the court announced that it put great stock in the BIA's recommendation. The court expressed consternation that Mother had allowed the child to decide for herself whether she would visit Father. The court also expressed consternation that Mother had unilaterally cut off Father's access to the child from August 2020 until the entry of the *pendente lite* order, on the basis of an unsubstantiated claim of abuse. Like the BIA, the court was troubled by Mother's use of the tracking device: in the court's view, Mother had pitted the child against her father and created distrust.

The court found that Father's access schedule had "been derailed and for no good reason." The court also found that Mother had withheld information about her pending move.

The court did not believe that Mother had considered how Father's access schedule "would be completely up[-]ended" by her move. Similarly, the court did not believe that Mother had considered the impact that changing schools would have on C. The court noted that C. had been in the same school since kindergarten, that she had bonded with her teachers and classmates, that it was a good school, and that there was no indication that she was doing poorly at the school or that a Charles County school had something to offer that her current school did not. The court expressly found that "it would be detrimental" and "disruptive" to C. for her to leave her current school at that time.

The court found it significant that, in denying Father's earlier motion for injunctive relief, Judge Cho had stressed that C. would remain at her current school "until

any court order or agreement provides otherwise." Because Judge Cho's statement was based on Mother's representations, the court interpreted the order to reflect a promise or a contract that Mother would not remove the child from her current school until the court permitted her to do or the parties agreed that she could do so. The court reasoned that Judge Cho would not have denied Father's earlier motion on mootness grounds if Mother could have changed her mind and pulled the child out of the school whenever she choose to do so.

For these and other reasons, the court granted Father's emergency motion. As a consequence, the court granted primary physical custody and sole legal custody, *pendente lite*, to Father. The court embodied its ruling in a written order that was docketed on August 26, 2021.

Mother noted a timely appeal.[4]

QUESTIONS PRESENTED

In her brief, Mother poses three questions, which we quote:

I. Did the Circuit Court violate Appellant's rights under the Due Process Clause of the Maryland Constitution in changing custody of the minor child without holding an evidentiary hearing?

II. Did the Circuit Court err in making a determination of best interest of the minor child, resulting in a change of custody, without considering any evidence?

[4] Although the order is interlocutory and is not a final judgment, Mother has the right to appeal under Maryland Code (1974, 2020 Repl. Vol.), § 12-303(3)(x) of the Courts and Judicial Proceedings Article. That provision permits an interlocutory appeal from an order that deprives a parent of the care or custody of a child or that changes the terms of an order pertaining to the care or custody of a child.

III. Did the Circuit court err in finding that an emergency existed to address custody on an interim basis after the entry of a *pendente lite* order?

Mother focuses the final argument on Md. Rule 16-302(b)(2)(A), which requires a County Administrative Judge to develop and implement a case management plan that "include[s] appropriate procedures for the granting of emergency relief and expedited case processing in family law actions when there is a credible prospect of imminent and substantial physical or emotional harm to a child[.]" She complains that Montgomery County's case management plan does not define what constitutes an "emergency." As a result, she says, the plan does not fulfill the stated goal of facilitating consistent rulings in family law cases.

None of these issues are properly before us on appeal, because Mother failed to preserve them for appellate review. *See* Md. Rule 8-131(a) (stating that, "[o]rdinarily," an appellate court will not consider any issue, other than subject matter jurisdiction or unwaived issues of personal jurisdiction, "unless it plainly appears by the record to have been raised in or decided by the trial court"); Md. Rule 2-517(c) (stating that, for purposes of review of any ruling or order other than one on the admissibility of evidence, "it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court").

"The preservation requirement is intended to prevent the trial court from being sandbagged by unseen error." *Jordan v. State*, 246 Md. App. 561, 586 (2020). To put it

bluntly, it is unfair to fault the circuit court for failing to do something that no one asked the court to do.

At oral argument Mother agreed that she had not preserved the issues in this appeal. Specifically, Mother's attorney agreed that she did not tell the circuit court that it was required to take evidence before making a decision about whether to change custody *pendente lite*. Moreover, Mother agreed that the issue of whether there was a "credible prospect of imminent and substantial physical or emotional harm to a child," within the meaning of Rule 16-302(b)(2)(A), "was not presented" to the circuit court.

At oral argument, however, Mother asserted that she was unable to tell the court that it was required to consider evidence before ordering a change in custody *pendente lite*. Her assertion is incorrect. Mother had any number of opportunities to raise that issue: she could have raised it when the court conferred with the parties to set a hearing on two days' notice; or after Father's counsel expressed uncertainty, on the evening before the hearing, about whether the court intended to conduct an evidentiary hearing; or when she submitted her written opposition to the motion on the day of the hearing; or at the outset of the hearing itself; or at the end of the hearing, before the court announced its ruling.

In this regard, we note that when it announced that it was ready to rule the circuit court asked the parties whether they had "[a]nything else" to say. This would certainly have been an opportune moment to raise the issue of whether the court could grant the

requested relief based solely upon its review of the written record in the case and the representations of counsel. Mother, however, said nothing.[5]

At oral argument, Mother also asserted that she raised the issue of whether the court was confronted with an emergency. She cited a passage of the hearing transcript, which reads, in full, as follows:

> Your Honor, the child does not want to go [to visit Father]. We're trying to make her go. This is not an emergency. [Mother] is moving and I, I – forcing this child to blend with [Father] who [sic] she is now refusing even overnights [with] is not going to be in her best interest.

Even in context, it is not entirely clear what Mother was referring to when she said that "this" "is not an emergency." From a grammatical standpoint, "this" would refer to its immediate antecedent, which was the child's refusal to visit Father and Mother's efforts "to make her go." In any event, it is reasonably clear that when Mother made this assertion she was not arguing that C. faced no "credible prospect of imminent and substantial . . . emotional harm to a child," within the meaning of Rule 16-302(b)(2)(A), as a result of being taken out of the school that she had attended since kindergarten and moving more than 50 miles away from her father. Mother certainly was not arguing that the court's case management plan was defective because it does not define the term "emergency."

At oral argument Mother claimed to have told the circuit court that she did not "consent" to the hearing. Again, her assertion is incorrect. In support of her assertion,

[5] The court invited comments from counsel on other occasions in the hearing, both before and after it had announced its ruling.

Mother cites a point in the hearing immediately after Father's attorney had completed his initial presentation, which included an overview of his factual assertions and the relief that he requested. At that point, the court asked Mother's attorney, "Does your client consent to that?," and the attorney responded, "No." Mother's response was not an assertion that she objected to the court changing custody *pendente lite* without hearing evidence; it was an assertion that Mother disagreed with some or all of what Father's attorney had said and did not consent to the requested relief.

In summary, Mother preserved none of the issues that she raises on appeal. But even if Mother had preserved the issues, we would find no error.

There is no serious question that the court was faced with an emergency – which was largely of Mother's making, because of her failure to disclose her impending move until days before it was to occur. The BIA told the court that it was not in the child's best interest for her to change schools and to leave the friends and community that she had known since kindergarten. Moreover, the court recognized that the move, more than 50 miles away to Charles County, would (in the court's words) "upend" the relationship between C. and her father by interfering with his ability to have regular access to her. Had the issue been preserved, the court, in these circumstances, would not have abused its discretion in concluding that "there was a credible prospect of imminent and substantial . . . emotional harm" to C., within the meaning of Rule 16-302(b)(2).

On the issue of due process, Mother relies on *Wagner v. Wagner*, 109 Md. App. 1 (1996). Although *Wagner* repeats the uncontroversial proposition that a parent has a

constitutionally protected liberty interest in the care and custody of her children (*id*. at 25), it offers little other support for her contention.

In *Wagner* a mother had violated several court orders, taken her daughter out of school, stopped reporting to work, and disappeared with the child (*id*. at 17; *id.* at 26); she and the child were eventually found at a woman's shelter in another state, using assumed names. *Id.* at 17. On the father's motion, the court convened a hearing, at which it ordered a change of custody *pendente lite*. *Id*. The mother did not attend the hearing (as she was in hiding), but her attorney attended, attempted unsuccessfully to communicate with mother, and was able to address the court on her behalf. *Id.* at 27. It is unclear from the *Wagner* opinion whether the court heard testimony before it entered its order,[6] but this Court observed that "[t]he court was familiar with the case and the plethora of pleadings that characterized it." *Id.* at 26.

On the mother's appeal, this Court held that "[t]he facts, as presented by Mr. Wagner and accepted by the trial court, warranted swift action" and that a "review of the record finds support for the trial court's immediate transfer of *pendente lite* custody to Mr. Wagner." *Id.* at 26-27. Accordingly, this Court held that the mother was not denied due process and that the court did not err in awarding temporary custody to the father. *Id*.

[6] In referring to the bases for the decision, this Court referred to "the allegations contained in the [father's] petitions, most of which the trial court later substantiated." *Id*. at 27. That statement seems to suggest that the court relied on "allegations" rather than evidence.

In reaching its decision, the *Wagner* Court reiterated a number of general principles regarding the requirement of due process. Due process "is a flexible concept that calls for such procedural protection as a particular situation may demand." *Id.* at 24. "Just what process is due is determined by an analysis of the particular circumstances of the case, including the functions served and interests affected." *Id.* at 23. "[I]t is sufficient if 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." *Id.* at 23-24 (emphasis in original).

Applying those general principles to this case, we are unpersuaded that the circuit court deprived Mother of due process of law by changing custody, *pendente lite*, at an emergency hearing, without taking testimony or requiring the formal introduction of exhibits.

Because Mother had concealed her impending move until days before it was scheduled to occur, the court had no choice but to convene an expedited hearing, without the trappings of a full trial or evidentiary hearing. It is obvious that the court allocated an appropriate amount of time for the hearing, as all of the parties (including Mother) told the court that they had nothing more to add when the court announced that it was prepared to rule. Mother had adequate notice of the hearing and an unfettered opportunity to address the court however she wished – she could, for example, have insisted on the introduction of evidence and introduced evidence of her own. In addition, Mother herself had the opportunity to address the court directly when she (and not her

attorneys) responded to the questions that the court posed to her. Moreover, there was essentially no dispute about the central facts on which the court based its rulings: Judge Cho had based her earlier ruling on the premise that Mother would not remove C. from her Montgomery County school absent an agreement or court order; Mother intended to remove C. without an agreement or court order; C. had attended the school since kindergarten; and the move would separate C. from her friends and disrupt Father's access to his child. Finally, the court's ruling is temporary: it will be superseded by a final ruling after the hearing in April of this year, and it is subject to modification in the meantime upon a showing of a material change in circumstances.

Therefore, if Mother had preserved her due process challenge, which she did not, we would reject it.

In arguing that the court was required to conduct an evidentiary hearing, Mother's appellate brief cites *Burdick v. Brooks*, 160 Md. App. 519 (2004), and *Flynn v. May*, 157 Md. App. 389 (2004). Neither case supports Mother's contention.

In *Burdick v. Brooks*, 160 Md. App. at 526-27, this Court held that a mother was deprived of due process of law when the circuit court ordered a change in custody after a 15-minute status conference. The court had previously advised the parties that the status conference was not a hearing or trial and that witnesses would have no time to speak. *Id.* at 527. "Because the court did not provide notice of a possible custody determination," this Court held that the mother "had no 'opportunity for an **effective argument** on the issue of custody.'" *Id.* (quoting *Van Schaik v. Van Schaik*, 90 Md. App. 725, 739 (1992))

(emphasis added in *Burdick v. Brooks*). Moreover, the mother's lawyer had entered his appearance on the very day of the status conference and was "most likely not entirely familiar with the case's contentious history, much less prepared to argue the custody issue." *Id.*

This case is a bit different from *Burdick v. Brooks*. Here, the court set aside a block of time to conduct a hearing on Father's motion to change custody *pendente lite*. Mother had advance notice of the purpose of the hearing, participated in the scheduling of the hearing, and registered no objection to the time allotted for the hearing or to the proposed format. In addition, Mother had the opportunity to respond to Father's motion before the hearing, and the court placed no restrictions on her ability to address the motion at the hearing itself – Mother could, for example, have demanded evidence, objected to the absence of evidence, and put on evidence herself. Finally, unlike the lawyer in *Burdick v. Brooks*, Mother's lawyers have represented her from the outset of the litigation. Thus, they were not only familiar with the case's contentious history, but also prepared to argue the custody issue. *Burdick v. Brooks* did not require the court to hold an evidentiary hearing in this case.

In *Flynn v. May*, 157 Md. App. at 394-95, a mother had failed to file a timely response to a complaint regarding custody of her child and had failed to file a timely motion to vacate an order of default. At a scheduled hearing on the issue of custody, the mother appeared with witnesses, but the court prohibited her from offering evidence, entered a default judgment against her, and granted custody to the father. *Id*. at 395-97.

On appeal, this Court held that the circuit court had abused its discretion. *Id*. at 411. The mother's default did not deprive her child of the right to have the court consider his best interests before making a decision about which of his parents would have custody of him. *Id*. at 410-11.

This case bears little resemblance to *Flynn v. May*. Here, the court did not prohibit Mother from offering evidence. To the contrary, the court gave Mother every opportunity to present her case on the issue of custody. If Mother did not call witnesses or put on any evidence, it is because she elected not to do so, not because the court stood in her way.

In summary, Mother failed to preserve any of the issues that she raised in this appeal. Even if she had preserved them, however, we would find no error or abuse of discretion on the circuit court's part.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY 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/1058s21cn.pdf