Circuit Court for Montgomery County
Case No. 147588FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1861

September Term, 2017

LISA MODICA

v.

CHAD ROACH

Eyler, Deborah S.,
Meredith,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 27, 2018

Lisa Modica, the appellant ("Mother"), proceeding *pro se*, challenges a temporary custody order entered on an emergency basis by the Circuit Court for Montgomery County. The order modified a permanent custody order entered by the Probate and Family Court, Middlesex Division in Massachusetts ("the Massachusetts court"); granted Chad Roach, the appellee ("Father"), temporary sole legal custody of Mother and Father's daughter ("Daughter"); and directed that Mother's visitation with Daughter, which was unsupervised and in Massachusetts, be temporarily supervised and in Maryland. The court entered its order following a hearing on an *ex parte* motion that Father filed after Mother refused to return Daughter to him, in violation of the Massachusetts custody order.

Mother presents the following questions on appeal, which we have consolidated and reworded:

> 1) Did the circuit court violate Mother's due process rights by granting Father temporary custody of Daughter?
>
> 2) Did the circuit court err by exercising jurisdiction over this matter?
>
> 3) Did the circuit court abuse its discretion by granting temporary custody to Father as a punitive measure against Mother instead of considering Daughter's best interests?
>
> 4) Did the circuit court err by not scheduling an expedited hearing on Mother's emergency motion for temporary custody?[1]

[1] Mother presents her questions as

(Continued…)

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

The parties' romantic relationship began in 2002, in Pennsylvania. At that time, Mother had a five-year-old son ("Son") from a prior relationship. Father became a father figure to Son. In 2003, Daughter was born to Mother and Father. The parties never married, and their relationship came to an end in 2010. In November 2010, in the Court of Common Pleas of York County Pennsylvania ("the Pennsylvania court"), Mother filed suit for primary physical custody of Son and Daughter and for permission to relocate to Boston, Massachusetts with the children. On March 28, 2011, the Pennsylvania court entered a Final Order of Custody granting Mother primary physical custody of Son and

(…continued)

1 Did the Court err in entering an order as a result of a hearing for which Appellant was not properly noticed, in violation of Appellant's due process rights?

2 Did the Court err in issuing an order when jurisdiction of the matter was still unclear and not properly asserted?

3 Did the Court err in entering an order changing custody of the child without a best interests hearing or findings?

4 Did the Court abuse its discretion in deferring Appellant's Emergency Motion regarding the issue of abuse in Appellee's home?

5 Did the Court err in entering an order changing custody during an ex parte hearing?

6 Did the Court abuse its discretion by changing custody as a punitive measure?

Daughter and the parties shared legal custody. It also granted Mother's request to relocate to Massachusetts. The court awarded Father substantial visitation with Son and Daughter during the summer months.

In July 2011, Mother moved to Massachusetts. She married Jason Silks some time thereafter. In 2012, Father moved to Maryland and married Amber Roach.

Between 2012 and 2013, in the Pennsylvania and Massachusetts courts, Mother and Father filed multiple motions to modify the March 28, 2011 custody order and petitions for contempt for noncompliance with that order. During that time, the Massachusetts state court regularly entered temporary custody orders incorporating stipulations by the parties. In May 2013, judges from the Pennsylvania, Massachusetts, and Maryland courts held a conference call and determined that Massachusetts would retain jurisdiction over the case.

On July 10, 2013, the Massachusetts court appointed a guardian ad litem to investigate and report on issues concerning the children. The guardian ad litem filed his report with the Massachusetts court on November 20, 2013. He recommended that Son and Daughter be sent to Maryland immediately, that Mother should have visitation, and that Mother should not talk negatively about the case or Father in front of the children. Father moved the court to adopt the guardian ad litem's recommendations that same day. The court held an emergency evidentiary hearing. At the conclusion of the hearing, the court granted Father's motion and adopted the guardian ad litem's recommendations; ordered that primary physical custody of the children be transferred temporarily from

Mother to Father; and granted Mother visitation. On November 25, 2013, the court issued written findings of fact related to the emergency evidentiary hearing and the guardian ad litem's report. It found:

> a. It is not in the best interests of the children to remain in Mother's care and custody.
>
> b. It is in the best interest of the children for custody to be transferred immediately from Mother to Father.
>
> c. The children are suffering emotionally, mentally, educationally, and socially in Mother's care.
>
> d. It has been shown that the children flourish emotionally, mentally, educationally, and socially when in the care of Father.
>
> e. [Son] will soon be eighteen (18) years of age and outside the jurisdictional reach of this Honorable Court. [He] needs immediate intervention in order to become a productive member of society.
>
> f. [Daughter] is become [sic] increasingly depressed in her Mother's care and would benefit greatly from living with Father in Maryland and being around her friends and being engaged in activities on a daily basis.
>
> g. The Father has demonstrated his ability and desire to provide the children with the services that they require educationally, mentally, emotionally, and socially.

In accordance with the court's order, the children moved to Maryland on November 20, 2013.

In July 2014, Son turned eighteen years old. He returned to Massachusetts to live with Mother.

On February 13, 2015, in the Massachusetts court, Father filed a Complaint for Modification of Foreign Judgment (the Pennsylvania court's March 28, 2011 Order of

Custody). He sought primary physical custody of Daughter and implementation of a parenting plan for Mother. The case was tried over six days in June, July, and August 2015.

On February 24, 2016, the Massachusetts court entered a new custody order pertaining to Daughter and a 46-page memorandum opinion setting forth the history and facts of the case and the reasons for the court's decision. The new custody order granted Father sole physical custody of Daughter; granted Mother "parenting time with [Daughter] one weekend every other month to be mutually agreed upon by the parties"; granted Mother "two consecutive weeks in July and two consecutive weeks in August of summer vacation with [Daughter]"; and granted shared legal custody.

In accordance with the February 24, 2016 custody order, Daughter was scheduled to stay with Mother from July 2, 2017, to July 16, 2017, and from August 7, 2017, to August 21, 2017. According to Mother, on July 16, 2017, Daughter complained of being ill, of abuse at the hands of Father and his wife, and of feeling suicidal. Mother took Daughter to a physician who referred Daughter to Lahey Health Behavioral Services ("Lahey Health"), an outfit that provides mental health counseling. Daughter was assessed by clinician Jose Rigueiro, M.S. Rigueiro reported that Daughter was "not in acute psychiatric distress and current psychological presentation and symptoms do not suggest a need for inpatient level of care services." He discharged Daughter and provided her information about resources she could access if she were to experience distress. Mother returned Daughter to Father later that evening.

On August 7, 2017, Daughter returned to Massachusetts for the second two weeks of scheduled visitation. Mother claimed that during that visit Daughter revealed that she had intentionally burned her arm with a curling iron and threatened to commit suicide if she were returned to Father. On August 18, 2017, in the Massachusetts court, Mother filed an *ex parte* motion for change of custody. The court set a hearing for August 23, 2017. Father filed an opposition and moved to dismiss, asserting that the court lacked jurisdiction. On August 24, 2017, the court granted the motion to dismiss, concluding that it lacked jurisdiction because Maryland, not Massachusetts, was Daughter's home state. The court declined to exercise emergency jurisdiction over the matter as the circumstances did not "warrant an emergency assertion of jurisdiction [because] Mother had ample time to secure an order in the Maryland courts[but] chose to wait until the child returned to Massachusetts and brought the action here for her own tactical advantage." The court noted, "[w]hile the Court does not rely on this point, it is mindful that there is history of this type of behavior [by Mother]. In June 2012, she brought [Son] to a hospital for complaint of suicidal ideation in an effort to thwart an order of custody."

The visitation schedule called for Daughter to be returned to Father, in Maryland, on August 21, 2017. Mother did not return Daughter to Father after the Massachusetts court denied her motion for change of custody, however. Mother claimed that Daughter threatened self-harm after being told that she was going to be returned to Father. On August 25, 2017, Mother took Daughter to Lahey Health for a second evaluation. Daughter met with Veronica Dacey, MFT. Dacey noted that Daughter "has suicidal

ideation due to having to return to Maryland where she lives with her father [and] step mother . . . ." In her discharge plan, Dacey stated that Daughter could return home with her mother, where she felt safe, but that she would undergo partial hospitalization on August 30, 2017, for further evaluation.

On August 26, 2017, Mother emailed Father saying Daughter needed to undergo further counseling and asked if Father "agree[d]" to allow Daughter to stay in Massachusetts for that purpose. Father did not respond to the email.

On August 29, 2017, Mother's Massachusetts counsel informed Father's Massachusetts counsel via email that he intended to file another emergency motion for custody modification on August 30, 2017, and to ask for the motion to be heard that same day, although he would reschedule the hearing if requested. Father's counsel responded, asking that the hearing be scheduled for September 1, 2017. Mother's counsel filed the emergency motion on August 30, 2017, but agreed to request a hearing on the matter for September 1, 2017.

Meanwhile, on August 30, 2017, Father, through Maryland counsel, filed multiple papers in the Circuit Court for Montgomery County, including a request to register the February 24, 2016 Massachusetts custody order; a motion to modify that order; an emergency motion to order return of Daughter to Father and to modify and temporarily suspend Mother's visitation and contact (the "*Ex Parte* Motion"); and a Rule 1-351 certificate explaining that Father had notified Mother and her counsel via email of the *Ex Parte* Motion and of his intention to have the motion heard that same day. "[A]t

approximately 12:20 p.m.," Father's Maryland counsel emailed Mother and Mother's Massachusetts counsel (Mother did not have Maryland counsel at the time) a copy of all those papers along with a cover letter, which stated that counsel would "be walking" the documents to "the Family Duty Judge, Cynthia Callahan" at 3:30 p.m. The email provided the phone number for Judge Callahan's chambers. Also, at 12:14 p.m., Father's Maryland counsel texted Mother, stating: "Please be advised we have filed an emergency Motion and other pleadings in Maryland and have emailed them to you and [your attorney]. We intend to present the emergency to the Judge at 3:30 p.m. today."[2]

On August 30, 2017, at 3:55 p.m., Judge Callahan held a hearing on Father's *Ex Parte* Motion. Mother did not contact the judge's chambers. The judge granted the request to register the Massachusetts court order. She explained that the order clearly provided that Daughter was to be returned to Father, and that Daughter needed to be returned to Maryland to start school. She expressed some reservation about temporarily modifying Mother's visitation to take place in Maryland but decided to grant that request out of concern that if Daughter returned to Massachusetts Mother would violate the custody order again. The judge ruled that Daughter was to be returned to Father immediately, with law enforcement authorized to assist; that Father be granted temporary sole legal custody of Daughter; that Mother be given supervised visitation of Daughter in Maryland; and that Mother not have visitation during the upcoming Labor Day weekend

[2] Mother was served in person with the copies of the documents on August 30, 2017 after the hearing had taken place.

because she had kept Daughter longer than permitted in August. Finally, the judge set a September 7, 2017 scheduling conference for Father's motion to modify the Massachusetts custody order.

On August 31, 2017, the circuit court entered its order as follows:

> ORDERED, that [Father's] Verified Emergency Motion to Order Return of the [Daughter] and Modify and Temporarily Suspend [Mother's] Visitation and Contact be and the same is hereby Granted; and, it is further,
>
> ORDERED, that the [Mother] shall immediately turn the minor child over to the [Father]'s care and custody; and it is further,
>
> ORDERED, that law enforcement are authorized to take any and all steps necessary to effectuate the immediate transfer of the minor child to [Father]; and it is further,
>
> ORDERED, that [Father] is granted temporary sole legal custody of the minor child pending further Order of this Court; and it is further,
>
> ORDERED that [Father] shall retain sole physical custody of the minor child as set forth in the Order from the Plymouth Probate and Family Court of February 24, 2016; and it is further,
>
> ORDERED, that [Mother] shall have supervised visitation with the minor child . . . in Maryland, with an agreed upon or Court ordered supervisor until further order of the Court; and it is further,
>
> ORDERED, that in light of [Mother]'s extended August visit with [Daughter] (the visit was to end of August 21, 2017 but Mother refused to return the minor child), [Mother]'s next weekend visitation shall be in November of 2017 and all visitation shall be in the State of Maryland[.]

On September 1, 2017, the Massachusetts court heard argument on Mother's second motion to modify custody. Father attended with Massachusetts counsel and filed a motion to dismiss and a copy of the circuit court's August 31, 2017 order. The Massachusetts court dismissed Mother's motion, opining (again) that it did not have

general or emergency jurisdiction. It explained that Daughter "was not admitted in patient" and that "Mother has had the opportunity to secure an Order in the Maryland Court, including securing an Order after receiving[] the August 24, 2017 Order" that denied her first emergency motion to modify custody.

On September 5, 2017, Mother traveled to Maryland, leaving Daughter in Massachusetts, and filed an emergency motion for temporary sole legal and physical custody of Daughter. Although she was present in Maryland, Mother did not ask the court to hear her motion and rule on it at that time. Accordingly, the court set the matter to be decided "in normal course upon the filing of an affidavit of service or answer."

On September 7, 2017, Daughter was returned to Father by the Middlesex County Sheriff's Department. That same day, the circuit court held a scheduling conference, which Mother attended. Mother asked the court to conduct an emergency hearing on her motion. The court responded that Mother would have to file an affidavit of service regarding her motion and a separate request for her motion to be heard on an expedited basis. Mother did not do so. The court scheduled a hearing for February 27, 2018, on Father's motion to modify the Massachusetts custody order and Mother's emergency motion for temporary custody.

On September 11, 2017, Mother filed a motion to vacate or alter or amend the circuit court's August 31, 2017 order ("Motion to Vacate"), pursuant to Rule 2-534. Maryland counsel entered a limited appearance for Mother regarding that motion. Counsel argued that Mother was not afforded the opportunity to be heard before the court

entered its order, explaining that Father had notified Mother of the hearing on his *Ex Parte* Motion only three hours beforehand via text and email, and that Mother had not actually received that notice until after the hearing had taken place. Counsel stated that Mother was in court in Massachusetts when Father's Maryland counsel emailed and texted her on August 30, 2017, and that she could not check her phone. Father opposed Mother's Motion to Vacate, arguing that it was unlikely that Mother had been in court in Massachusetts when she was notified of the Maryland hearing because Massachusetts counsel for both parties had agreed, on the morning of August 30, 2017, that the hearing on Mother's second emergency motion would not take place until September 1, 2017.

On October 27, 2017, the circuit court entered an order denying Mother's Motion to Vacate. On November 13, 2017, Mother filed a notice of appeal.[3]

DISCUSSION

Mother's appeal focuses on the circuit court's August 31, 2017 order.[4] That order directed that Daughter be returned to Father, as required by the Massachusetts custody order; granted temporary sole legal custody of Daughter to Father; and directed that Mother's visitation with Daughter take place in Maryland and be supervised temporarily.

[3] On February 15, 2018, the parties filed a joint motion to postpone the custody modification hearing that was set for February 27, 2018. The court granted that motion and the hearing was rescheduled for October 15, 2018.

[4] Mother's Motion to Vacate the court's August 31, 2017 order was timely filed, thus extending the appeal period to 30 days after entry of the order denying the Motion to Vacate. *See* Md. Rule 8-202.

Before considering Mother's appellate contentions, we explain, for context, that the court had the authority to register, enforce, and modify the Massachusetts custody order.

Pursuant to the Maryland Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Maryland Code (1999, 2012 Repl. Vol.), sections 9.5-101 to 9.5-318 of the Family Law Article ("FL"), Maryland courts "shall recognize and enforce a child custody determination of a court of another state if the [foreign] court exercised jurisdiction in substantial conformity with th[e UCCJEA]. . . ." FL § 9.5-303(a). Foreign custody orders are to be registered in compliance with FL section 9.5-305 and enforced pursuant to FL section 9.5-306(a), which states that "[a] court of this State may grant relief normally available under the law of this State to enforce a registered child custody determination made by a court of another state." There is no dispute in this case that the court properly registered the Massachusetts court's February 24, 2016 order granting physical custody to Father and that it had the authority to enforce that order, which Mother was violating by failing to return Daughter to Father after her scheduled visitation.

In addition, a Maryland court may modify a registered order when it has jurisdiction to do so. *See* FL § 9.5-306(b) ("A court of this State shall recognize and enforce, but may not modify, *except in accordance with Subtitle 2 of this title*, a registered child custody determination of a court of another state.") (emphasis added). As pertinent, under FL section 9.5-203, a court has authority to modify a registered foreign custody order when the court

> has jurisdiction to make an initial determination under § 9.5-201(a)(1) or (2) of this subtitle and:
>
> > (1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under §9.5-202 of this subtitle or that a court of this State would be a more convenient forum under § 9.5-207 of this subtitle . . . .

Section 9.5-201 provides that

> (a) . . . [A] court of this State has jurisdiction to make an initial child custody determination only if:
>
> > (1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State; [or]
> >
> > (2) a court of another state does not have jurisdiction under item (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9.5-207 or §9.5-208 of this subtitle, and:
> >
> > > (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
> > >
> > > (ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships[.]

A child's home state is "the state in which a child lived with a parent or person acting as a parent for at least 6 consecutive months, including temporary absence, immediately before the commencement of a child custody proceeding[.]" FL § 9.5-101(h)(1).

Here, the circuit court had authority to modify the Massachusetts custody order under the UCCJEA, specifically FL section 9.5-203. It is undisputed that the court had home state jurisdiction under FL section 9.5-201(a)(1). Daughter had been living in Maryland with Father since November 2013, and Father has had sole physical custody of her in Maryland since February 2016. Furthermore, the Massachusetts court declined to exercise jurisdiction, finding that Maryland, not Massachusetts, was Daughter's home state. *See* FL § 9.5-203(1).

I.

Mother contends the circuit court erred by temporarily modifying legal custody and visitation because it violated her due process rights in doing so. Specifically, she argues that she was not given proper notice of the hearing on the *Ex Parte* Motion because notice via email and text is not permitted by the Maryland Rules. Father counters that, given the circumstances of the case, he gave Mother reasonable notice of the hearing on the *Ex Parte* Motion.

Parents have "a protectible liberty interest in the care and custody of [their] children . . . and when a state seeks to affect the relationship of a parent and child, the due process clause [of the Fourteenth Amendment] is implicated." *Wagner v. Wagner*, 109 Md. App. 1, 25 (1996) (citations omitted). "Due process . . . is a flexible concept that calls for such procedural protection as a particular situation may demand." *Id.* at 24 (citations omitted). At a minimum, however, due process generally "'requires that a party to a proceeding is entitled to both notice and an opportunity to be heard on the

issues to be decided in the case.'" *In re Katherine C.*, 390 Md. 554, 572 (2006) (quoting *Blue Cross of Maryland, Inc. v. Franklin Square Hosp.*, 277 Md. 93, 101 (1976)). We review alleged due process violations *de novo*. *Regan v. Bd. of Chiropractic Exam'rs*, 120 Md. App. 494, 509 (1998), *aff'd sub nom. Regan v. State Bd. of Chiropractic Exam'rs*, 355 Md. 397 (1999).

Mother maintains that she was not properly notified under Rule 2-121, which governs how service of process is to be made when an action is commenced, as that rule does not permit service of process by email or text.[5]

[5] Rule 2-121 provides:

> **(a) Generally.** Service of process may be made within this State or, when authorized by the law of this State, outside of this State (1) by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it; (2) if the person to be served is an individual, by leaving a copy of the summons, complaint, and all other papers filed with it at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion; or (3) by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: "Restricted Delivery--show to whom, date, address of delivery." Service by certified mail under this Rule is complete upon delivery. Service outside of the State may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice.
>
> . . .
>
> **(d) Methods Not Exclusive.** The methods of service provided in this Rule are in addition to and not exclusive of any other means of service that may be provided by statute or rule for obtaining jurisdiction over a defendant.

Whether service was properly made under Rule 2-121 is not relevant, however, because Father moved for *ex parte* relief under Rule 1-351, which provides:

> No Court shall sign any order or grant any relief in an action upon an ex parte application unless:
>
> > (a) an ex parte application is expressly provided for or necessarily implied by these rules or other law, or
> >
> > (b) *the moving party has certified in writing that all parties who will be affected have been given notice of the time and place of presentation of the application to the court or that specified efforts commensurate with the circumstances have been made to give notice.*

(Emphasis added.)

Rule 1-351 applies to emergency child custody proceedings. *See Cabrera v. Mercado*, 230 Md. App. 37, 89–91 (2016). In that case, a mother absconded to Puerto Rico with the parties' infant after obtaining a temporary protective order against the father. The father filed an emergency motion for the return and temporary custody of the infant. That same day he sent emails and regular mail to the mother and her counsel notifying them that a hearing on the emergency motion would take place three days later. He included the emergency motion as an attachment to the emails.

Neither the mother nor her counsel attended the hearing. The father presented the court with copies of the emails that he had sent them. The court granted father temporary legal and physical custody of the infant, stating it was "'satisfied that [the father] made good faith attempts to provide notice of th[e] appearance to'" the mother. *Id.* at 52.

The mother appealed, arguing that she was not properly served before the court issued its temporary custody order. Although the challenge to the temporary order was moot because the court already had issued a permanent order, we opined on the merits to establish a rule for future conduct. We held that notice via email was proper under the circumstances. We also explained that proper notice under Rule 1-351 is consistent with UCCJEA notice requirements.

Under FL section 9.5-205, a person must be provided with "notice and an opportunity to be heard in accordance with the standards of [FL] § 9.5-107" before a court may issue a child custody order against that person. FL section 9.5-107, entitled "Notice to persons outside State," states:

> (a)(1) Notice required for the exercise of jurisdiction when a person is outside this State may be given in a manner prescribed by the law of this State for service of process or by the law of the state in which the service is made.
>
> (2) *Notice shall be given in a manner reasonably calculated to give actual notice* but may be by publication if other means are not effective.

(Emphasis added.)

In this case, Mother was living in Massachusetts. She refused to return Daughter to Father, in violation of the Massachusetts custody order. When Father filed his *Ex Parte* Motion, nine days had passed since the date Mother was supposed to return Daughter to Father. On August 30, 2017, at 12:20 p.m., Father's counsel emailed Mother and Mother's Massachusetts counsel informing them that a hearing on Father's *Ex Parte* Motion was scheduled for 3:30 p.m. that day before Judge Cynthia Callahan in the

Circuit Court for Montgomery County. The email included a copy of the motion and the telephone number for Judge Callahan's chambers so Mother could participate in the hearing by telephone. In addition, Father's counsel sent Mother a text message at 12:14 p.m. telling her about the hearing and the email. Pursuant to Rule 1-351(b), Father filed a certificate detailing his efforts to notify Mother and explaining that he had notified her of the place and time of the hearing.

Mother did not call Judge Callahan's chambers before or during the hearing. She maintains that she did not see the text or email until after 4:00 p.m. on August 30 because she was with her Massachusetts lawyer preparing for a hearing she thought was going to take place in Massachusetts that same day. She claims that Father knew she would be occupied that day and that she would not be able to receive any texts or emails. Mother's assertions are not supported by the record. Email correspondence between the parties' Massachusetts lawyers shows that by the morning of August 30 they had agreed that the Massachusetts hearing would take place on September 1, not August 30. By the time Father's counsel sent the emails about the hearing in Maryland, Mother's Massachusetts counsel knew the hearing in Massachusetts would not be taking place on August 30.

Under the circumstances, Father made efforts to inform Mother of the hearing that were "reasonably calculated to give [her] actual notice" in compliance with the UCCJEA and Rule 1-351, and therefore her due process rights were not violated. *See Lohman v. Lohman*, 331 Md. 113, 133 (1993) ("The phrase '. . . reasonably calculated to give actual notice' is the due process minimum requirement." (quoting *Mullane v. Cent. Hanover*

Bank & Trust Co., 339 U.S. 306, 314 (1950)). The hearing was on a request for a temporary custody modification that was in response to Mother's continued violation of a custody order. Father provided her sufficient notice to enable her to participate in the hearing by telephone.[6]

II.

Next, Mother contends the circuit court lacked "clear jurisdiction" to enter its August 31, 2017 order because, by that date, another proceeding had commenced in Massachusetts, specifically, her August 30 emergency motion for custody modification. "Whether the [circuit] court correctly asserted jurisdiction is an issue of statutory interpretation that we review *de novo* to determine whether the court was legally correct." *Cabrera*, 230 Md. App. at 80 (citing *Breslin v. Powell*, 421 Md. 266, 277 (2011)).

Mother relies on FL section 9.5-206(a). That statute provides, in relevant part, that "a court of this State may not exercise its jurisdiction under this subtitle if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the

[6] In a separate section of her appellate brief, Mother also attacks the court's *ex parte* order on the grounds that it was "prohibited by statute." She cites Rule 16-302, which requires the "County Administrative Judge [to] develop and . . . implement a case management plan for the prompt and efficient scheduling and disposition of actions in the circuit court."" Subsection (b)(2)(A) of that Rule, "Family Law Actions," states that the "plan shall include 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 or vulnerable adult." Mother reads this to say that an *ex parte* order in a child custody proceeding only can be issued upon a showing of a credible prospect of imminent and substantial harm. She is incorrect. Rule 16-302 is administrative in nature and does not limit the scope of *ex parte* orders that are permissible under Rule 1-351.

child has been commenced in a court of another state having jurisdiction substantially in conformity with this title[.]" Thus, a Maryland court that has jurisdiction under FL section 9.5-201 must decline to exercise jurisdiction if another custody proceeding has already been commenced in another state that has jurisdiction in substantial conformance with the UCCJEA and a court from that state does not determine that Maryland is a more appropriate forum. *See* FL § 9.5-206(b)(3) ("If the court of the state having jurisdiction substantially in accordance with this title does not determine that the court of this State is a more appropriate forum, the court of this State shall dismiss the proceeding."); *see also Apenyo v. Apenyo*, 202 Md. App. 401, 420 (2011) ("Let it be carefully noted that the dismissal of a case pursuant to §[] 9.5-206 . . . is not based on the fact that the court lacks jurisdiction over the case. It is based on the very different ground that the court, albeit having presumptive jurisdiction in the first instance, nonetheless declines to exercise that jurisdiction for . . . the . . . reason[] spelled out in [FL § 9.5-206]. The lack of jurisdiction, by contrast, would be based on a failure to have satisfied § 9.5-201.").

Even if we were to assume that the child custody proceeding in Maryland was commenced after the child custody proceeding in Massachusetts (both parties filed emergency motions in the two state courts on August 30, 2017, and it is unclear from the record which was filed first), the circuit court properly exercised jurisdiction. FL section 9.5-206 only prohibits Maryland courts from exercising jurisdiction over a child custody proceeding when a simultaneous proceeding is underway in a court of another state "having jurisdiction substantially in conformity with" the UCCJEA. On August 30,

2017, the Massachusetts court no longer had jurisdiction over this matter. On August 24, 2017, the Massachusetts court entered an order stating that it did not have general jurisdiction and was declining to exercise emergency jurisdiction. It explained that Maryland was the Daughter's home state and that Mother could have sought temporary custody there. The circuit court was presented with the Massachusetts order addressing jurisdiction and therefore was aware of it when it issued its order. Furthermore, there was no change of circumstances between August 24 and August 30 that somehow would have shifted jurisdiction from Maryland back to Massachusetts and, contrary to Mother's assertions, Massachusetts did not reobtain jurisdiction merely because she filed a second emergency motion for custody modification on August 30.

III.

Mother contends the circuit court improperly granted the temporary custody order as a punitive measure against her, not as a measure to advance the best interests of Daughter. This contention lacks merit.

"Custody and visitation determinations are within the sound discretion of the [circuit] court, as it can best evaluate the facts of the case and assess the credibility of witnesses." *Boswell v. Boswell*, 352 Md. 204, 223 (1998) (citing *Beckman v. Boggs*, 337 Md. 688, 703 (1995)). The court abuses its discretion when "'no reasonable person would take the view adopted by the . . . court . . . or when the court acts without reference to any guiding principles . . . .'" *Sibley v. Doe*, 227 Md. App. 645, 658 (2016) (quoting *Bacon v. Arey*, 203 Md. App. 606, 667 (2012)).

In ruling on custody modifications, the court determines whether there has been a material change in circumstances and, if so, whether modification is in the child's best interest. *See Wagner v. Wagner*, 109 Md. App. 1, 28 (1996) (citing *McCready v. McCready*, 323 Md. 476 (1991)). "[T]he best interest standard has been espoused by the Court of Appeals as the dispositive factor on which to base custody awards." *Id.* at 38 (emphasis omitted) (citations omitted). The court may consider a multitude of factors,[7] its ultimate goal being to "look at each custody case on an individual basis to determine what will serve the welfare of the child . . . ." *Id.* at 39 (citing *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 503 (1992)); *see also Montgomery Cty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 419 (1977) ("The best interest standard is an amorphous notion, varying with each individual case[.]"). Indeed, the child's best interest is "'not considered as one of many factors, but as the objective to which virtually all other factors speak.'" *Wagner*, 109 Md. App. at 89 (quoting *McCready*, 323 Md. at 481). Moreover, because custody determinations must be made in a child's best interest, they should not be made as a punitive measure against a parent. *See Burdick v. Brooks*, 160 Md. App. 519, 528 (2004) ("[T]he circuit court's goal should be to determine what custody

[7] These factors include: parental fitness; the parties' character and reputation; the desire of the natural parents or any agreements between the parties; the potentiality of maintaining natural family relations; child preference; material opportunities affecting the future life of the child; the child's age, health, and sex; the parents' residence and opportunities for visitation; length of separation from the natural parents; prior voluntary abandonment. *Montgomery Cty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 420 (1977).

arrangement is in the best interest of the minor children, and not to punish a disobedient parent.").

In the case at bar, Father had been granted sole physical custody of Daughter on February 24, 2016, by the Massachusetts court. Mother had been granted visitation in Massachusetts one weekend every other month and for four weeks in the summer, two consecutive in July and two consecutive in August. Legal custody was shared. Father filed his emergency motion because Mother had failed to return Daughter to him after the 2017 August visitation. Judge Callahan's August 31, 2017 order did not change physical custody. Physical custody remained in Father, and Mother was ordered to return Daughter to Maryland as she already was required to do.

The changes effected by Judge Callahan's order, both temporary and on an emergency basis, were 1) for mother's visitation to take place in Maryland, not Massachusetts, and to be supervised; 2) for Mother to lose her September 2017 weekend visitation; and 3) for Father to have sole legal custody.

In support of his motion, Father informed the court that Mother was refusing to return Daughter on the basis that she (Daughter) was suicidal. He argued that the allegations of suicidal ideation were pretextual and presented the August 24, 2017 Massachusetts order that included the finding that Mother had at least on one other occasion "brought her child to a hospital for complaint of suicidal ideation in an effort to thwart an order of custody." In addition, Father provided the court with the February 24, 2016 Massachusetts custody order, which included findings of Mother's "historical

failure to timely return the minor child in the past and its disruptive effect on the child's routine" and that Daughter was doing better academically and socially while living with Father in Maryland and that Father was in a better position to support Daughter financially. The Massachusetts court's custody determinations aimed to "limit[] the number of disruptions to [Daughter]'s regular routine."

The evidence before Judge Callahan was sufficient to show that Mother's conduct in keeping Daughter in Massachusetts and making unsupported allegations that she was suicidal was a material change in circumstances that was harmful to Daughter and that changing visitation to take place in Maryland, supervised, and changing legal custody to Father served Daughter's best interests, at least until a full hearing on the merits. Daughter was set to return to school in Maryland, where she had flourished, but Mother's actions were preventing her from doing so. As the judge explained in her oral ruling, Father was being granted sole legal custody so he could enroll Daughter in school and schedule mental health evaluations for her in Maryland. The judge shared Father's concern that Daughter would not be returned to him the next time she went to Massachusetts to visit Mother:

> [T]he reality is that [M]other has known that the child was supposed to be back here for school. She's been told that the child has to come back here for school. . . . I note that . . . this is not the first time this behavior has occurred, that [M]other has in the past been slow or resistant to returning [Daughter].

Mother's September 2017 visitation was eliminated because she had kept Daughter in Massachusetts for nine additional days in August.

There was nothing the least bit punitive in the court's rulings. They were reasonable given the circumstances, which included that Mother's misbehavior was contrary to Daughter's best interests.

IV.

Finally, Mother contends the circuit court abused its discretion by not holding an expedited hearing on the emergency motion for temporary custody she filed on September 5, 2017. As stated above, although Mother filed that motion on September 5, 2017, she did not take any steps to present the motion to the court to be decided on an expedited basis. For that reason, the court set the motion to be decided "in normal course upon the filing of an affidavit of service . . . ." Two days later, the parties' lawyers appeared before the court at a scheduling conference. When Mother requested an expedited hearing, the court responded that even though it was not inclined to grant the request it would consider it if Mother filed an affidavit of service and "file[d] a separate request . . . which w[ould] be heard on an emergency basis." Mother failed to do so.

Ordinarily, a party may only appeal a final judgment. *See* Md. Code (1974, 2013 Repl. Vol.), section 12-301 of the Courts and Judicial Proceedings Article ("CJP"). The order denying an emergency hearing was not a final judgment. It was an interlocutory order that was not within the exceptions for interlocutory orders that are subject to appeal under CJP section 12-303. Therefore, it was not appealable. Even if it was, there was no abuse of discretion by the court in scheduling Mother's motion to be heard at the merits hearing in which Father's custody and visitation issues would be decided.

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