Circuit Court for Prince George's County
Case No. CAD-17-00172

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1154

September Term, 2018

SHARDAI COLLINS

v.

DWAYNE HAYNES

Graeff,
Nazarian,
Arthur,
JJ.

Opinion by Graeff, J.

Filed: March 7, 2019

Shardai Collins, appellant, appeals the July 18, 2018, order of the Circuit Court for Prince George's County granting *pendente lite* custody of her minor child, J.H., to the child's father, Dwayne Haynes, appellee. She presents the following questions for this Court's review, which we have rephrased slightly, as follows:

> 1. Did the trial court err when it provided a *pro se* litigant with legal advice by directing him to file an additional motion to bring the issue of custody before the court?
>
> 2. Did the trial court violate Ms. Collins' due process rights in holding an evidentiary hearing and entering a *sua sponte* order transferring custody from Ms. Collins to Mr. Haynes less than two hours after Mr. Haynes filed an improperly pled motion for modification?
>
> 3. Did the trial court fail to properly evaluate the "best interests of the child" in awarding temporary custody to Mr. Haynes, who had been granted only supervised visits by the same court less than a year prior?

For the reasons set forth below, we shall reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Ms. Collins and Mr. Haynes are the parents of one minor child, J.H, who was born in September 2016.[1] They were never married.

On August 31, 2017, following an evidentiary hearing on the merits, the circuit court issued an order awarding Ms. Collins sole custody of J.H., with Mr. Haynes having supervised visitation. The court ordered that Ms. Collins and Mr. Haynes be awarded joint legal custody of J.H., with Ms. Collins having "final decision making authority."

[1] Mr. Haynes testified that he had other dependent children, with whom he had unsupervised visitation.

On May 21, 2018, less than nine months later, Mr. Haynes filed a Petition for Protection from Child Abuse in the District Court for Charles County, alleging that, on May 18, 2018, Ms. Collins had been admitted to the hospital for a drug overdose. He requested that the court grant the petition for the well-being of himself and J.H.

That same day, the court issued a temporary protective order against Ms. Collins based on reasonable grounds to believe that Ms. Collins "allegedly took a large amount of prescription medication while caring for [J.H.]."[2] The case was transferred to Prince George's County, and on June 5, 2018, the circuit court issued an order extending the temporary order until a hearing scheduled for July 10, 2018.[3]

On June 6, 2018, the Charles County Department of Social Services (the "Department") filed a report regarding the Temporary Protective Order, which stated, in pertinent part, as follows:

> On May 19, 2018, Ms. Collins attempted to overdose on prescription medication resulting in her being transferred to the hospital and her child being placed in a temporary foster home. . . .
>
> According to Mr. Haynes, this was not the first time Ms. Collins has taken too much medication. Ms. Collins did not deny this but stated that this was the first time [she did so] with her child present. By deliberately taking too much medicati[on] with [J.H.] present, Ms. Collins placed the child at significant risk of harm. [J.H.] was asleep in his crib . . . . until someone would have come to the apartment. Ms. Collins is new to her job and area. She indicated that she does not know anyone in the area making it

[2] The District Court noted in its order that, "per petitioner," J.H. had been placed in the temporary care and custody of the Charles County Department of Social Services (the "Department").

[3] The reason for the extended order was that the initial order had not been served and the report by the Department of Social Services had not been completed.

> concerning if anyone would have to come to check on the child. Therefore[,] the Department is making the following recommendations:
>
> > 1. [J.H.] remain in the care and custody of his father, Mr. Dewayne Haynes. [4]
> >
> > 2. Ms. Collins has supervised visitation with [J.H.] until further stated by the [Department] or the courts.
> >
> > 3. The family receives In Home Services to ensure the safety of the children.
> >
> > 4. Ms. Collins actively participates in her mental health services.

On July 18, 2018, the circuit court held a hearing on Mr. Haynes' Petition for Protection from Child Abuse. Ms. Collins was represented by counsel and Mr. Haynes proceeded self-represented.

Counsel for Ms. Collins moved to dismiss the petition because there was no abuse.[5] Counsel argued that Mr. Haynes was merely attempting to redo the custody litigation.

Without any response from Mr. Haynes, the court stated that it was "going to pass this," explaining to Mr. Haynes that the only thing in front of the court was the request for the protective order, and there was "some validity" to the argument that there was not "an

[4] The record indicates that, contrary to this recommendation, J.H. was not in the care and custody of Mr. Haynes. Rather, Ms. Collins had sole physical custody of J.H. until May 19, 2018, at which time he was temporarily put in foster care and then placed with his aunt.

[5] Pursuant to Md. Code (2017 Supp.) § 4-506(c) of the Family Law Article ("FL"), a judge may enter a final protective order when there is a "preponderance of the evidence that the alleged abuse occurred." FL § 4-501(b)(2) states that "abuse" includes "abuse of a child as defined in Title 5, Subtitle 7 of that article." FL § 5-701(b), in turn, provides that abuse includes "physical or mental injury of a child under circumstances that indicate that the child's health or welfare is harmed or at substantial risk of being harmed."

act of abuse." The court stated, however, that the report from the Department "raises concerns in my mind as to the appropriate arrangement," so it advised Mr. Haynes to "go down the hallway and . . . file a motion for modification of the custody arrangement."

The following then occurred:

> [ATTORNEY FOR MS. COLLINS]: I would object to that. He has supervised visits for a reason.
>
> THE COURT: Okay. And Child Protective Services recommended that she have supervised visitation for a reason. So the Court's obligation is to look out for the best interests of the child. I don't know what the facts will show and I'm going to give you all a full hearing to talk about it.
>
> But in the meantime, you file a motion for modification so it will be before me. And we're going to see—if your client is claiming that the statements from the Child Protective Services investigator are not correct, we'll see if we can get her here.
>
> * * *
>
> I'm going to have a full hearing, at which I'll hear all the evidence surrounding all of it and we'll see about what's the appropriate situation.

Proceedings resumed less than two hours later, and the court stated that Mr. Haynes had filed a motion for modification of custody. The record reflects, however, that the motion Mr. Haynes filed was a "Motion for Modification and or Contempt," which asked the circuit court to "hear [his] plan for [J.H.] to have a successful relationship with both parents." The motion did not include a specific request for a modification of custody or that he be given physical custody of J.H.

The court advised counsel that Mary Cupples, the author of the Department's report, was on vacation and not available to testify that day. The court asked counsel what

they wanted to do.[6] Counsel stated it renewed the motion to dismiss the protective order, but if that motion was not granted, it wanted to proceed with the hearing that day. When the court asked if counsel objected to a continuance to allow Ms. Cupples to be present, counsel said yes, noting that there was an emergent need that the court understand what would happen if J.H. were put in Mr. Haynes' custody that day.[7]

Mr. Haynes then testified. He explained that he did not "bring us here today for any child abuse to" J.H., but he was "advised to file a protective order." He then testified that he had limited access with J.H., and Ms. Collins had told others that he was sleeping with clients, which hurt his business. He stated that J.H. had never lived with him, although J.H. had spent the night with him two times. He testified that his visitation was cancelled after Ms. Collins made accusations that he had been sleeping with the person supervising his visitation with J.H.

Ms. Collins testified that J.H. had "severe health issues," including asthma and allergies, and he had been hospitalized several times due to the condition. J.H. used an

[6] Earlier, when the court indicated that the hearing would include, not only the petition for a protective order, but also the court's suggested motion to modify custody, counsel for Ms. Collins argued that the author of the Department's report should be there and there should be a more current report. The court said that, if Ms. Collins wanted an investigation, it would postpone the hearing and extend the protective order. Counsel objected to the matter proceeding this way, but she stated that she did not want the protective order extended because Mr. Haynes' sister no longer wanted to care for J.H.

[7] When counsel began closing arguments, however, she indicated her belief that they were addressing only the protective order issue. When the court said it was also considering the modification, counsel again objected because they did not have proper notice of the modification case.

oxygen machine and took several medications, including steroids for asthma and prescription strength Claritin for allergies.

Pursuant to a court order that took effect in 2017, Ms. Collins began taking J.H. to supervised visits with Mr. Haynes at the Children's Rights Counsel.[8] She cancelled the visits, however, after an incident on October 18, 2017. When she picked up J.H. that day, J.H., who had a fever, was barefoot, had not been "fed in five hours," and had not been given his Tylenol. Ms. Collins called the Coordinator at the Family Support Division of the Prince George's County Circuit Court, expressed her frustration, and indicated that she was cancelling subsequent visits. Mr. Haynes made no effort to schedule additional visits.

Ms. Collins discussed what occurred on May 19, 2018. She stated that she had just moved and started a new job, she had no one helping her with J.H, and she was feeling anxious. It was 7:00 p.m. and J.H. was asleep. She took medication that her doctor had prescribed, but she took "two extra" of one of the medications. She fell asleep, but at midnight she woke up, and her stomach was "throbbing," and she felt dizzy and nauseous. She called poison control and was told that she was likely suffering a rare reaction to the medication that had caused her blood pressure to increase dramatically. Poison control offered to call 911 so Ms. Collins did not have to hang up and dial another number.

When the EMT's arrived, they took Ms. Collins' vitals, but they did not inform her whether they were normal. They told her that she needed to go to the hospital immediately

[8] The Children's Rights Council is an organization that facilitates supervised visitation in child custody cases.

or she would die. She told the EMT's that J.H. was sleeping and she did not have a babysitter, but they advised they could not transport him to the hospital. They told her that they would have someone from Child Protective Services "sit with [J.H.] temporarily until a relative show[ed] up at the hospital." She testified that she trusted them and went to the hospital.

At the hospital, Ms. Collins had blood work done. There was no indication of an overdose in the blood work. The doctors never advised her that, by taking too much medication, she was placing J.H. at risk. Her doctor wrote new prescriptions for all the medications after the incident.

Ms. Collins testified that, in taking more than the prescribed dose of medication, she did not intend to harm either herself or J.H. She just felt "overwhelmed because [she] didn't have a helping hand," and she took the medication to reduce her anxiety. When asked if she had any relatives who could assist her in raising J.H., Ms. Collins listed both her sister in Falls Church and Mr. Haynes' sister.

Ms. Collins had tried to call Mr. Haynes on the night of the incident, but the call went straight to voicemail. Because the same thing happened when she tried to call him the previous weekend, she assumed that Mr. Haynes had blocked her number.

After the incident, Ms. Collins continued to take her prescribed medications. She also had sought counseling to help support her, as well as engaging in Bible study with her sister.

During closing argument, Mr. Haynes stated that he was "doing all he [could]" to have J.H. come to his mother's and sister's daycares so that J.H. could build a relationship

with J.H.'s siblings. Mr. Haynes stated that he wanted J.H. to "be safe and . . . be able to grow with both of his parents in his life." He did not explicitly ask the court to award him custody of J.H.

Counsel for Ms. Collins initially argued that modifying custody was inappropriate because Ms. Collins was not afforded the statutorily required 30 days to respond to the allegations, and she was not provided adequate notice of the custody hearing. She argued that, because the only pleading properly before the court was Mr. Haynes' petition for a protective order, the court should limit its findings to whether abuse occurred. And she argued that no abuse occurred because there was no evidence that Ms. Collins placed J.H. in harm or substantial risk of harm.

Counsel for Ms. Collins objected to the use of the term "overdose" during the hearing and in the Department's report, arguing that it could not be proven in the absence of expert testimony.[9] She contended that Mr. Haynes made "no attempt to follow-up or to change the supervised visits or to even communicate with Ms. Collins . . . after November 2017," and the record showed that Ms. Collins had "been attempting to allow visitation, until an issue happened with CRC." Finally, counsel noted that Ms. Collins

[9] Counsel for Ms. Collins noted that the Department worker who wrote the incident report took "no time to actually talk about any symptoms that she observed, any records that she observed of Ms. Collins, that indicated that she had overdosed or had not been in the right mind to take care of the child." Additionally, she argued that the worker failed to "indicate in her report any investigation she [had] done into looking at the results of any testing she took of Ms. Collins, any blood work that she took of Ms. Collins."

was seeking therapy for her anxiety, and that she was "currently open and willing to co-parent with Mr. Haynes."

The court then issued its ruling. It first found that J.H. "is blessed with two parents that both care about his interests." It then found that Mr. Haynes' visitation ceased in October 2017 due to Ms. Collins' concerns that Mr. Haynes was flirting with the person who was supposed to be supervising the visitation. It stated that Ms. Collins' "current explanation and testimony that that supervision at the CRC stopped because there w[ere] problems with CRC's care simply is inconsistent with her own [prior] statements."

With respect to the incident in May, the court stated:

> In May of this year, Ms. Collins found herself a new job, in a new area, a new apartment, and she felt alone and overwhelmed. I find that she intentionally took extra medication, beyond the dosage that was prescribed. I find that she did that in an effort to relieve her anxiety, her extreme anxiety, given her feelings of being overwhelmed under the circumstances.
>
> She didn't do it with the intention to commit suicide, but as she testified that the Poison Control people told her in taking more than the prescribed dosage of that particular medicine, she put herself at risk of potential death—and with a year and-a-half old child in her care and nobody around to pick up for her.[10]
>
> It apparently is not the first time. And I find again credible the first time that she had been intentionally taking more than the prescribed dose, which is not again to say that I find that she intended to commit suicide.
>
> But all that leads me to conclude that Ms. Collins has issues that she is attempting to address with her doctor . . . Dr. Akoro. But that she still has those issues that need to be addressed.

[10] The court subsequently stated: "[S]o we're clear, she did overdose, she took doses beyond what was prescribed. It wasn't fatal, but the fact that she needed to be rushed to the hospital or that she might die, indicates that it might have been fatal."

> In addition—so I find that she needs to continue to participate in mental health services.
>
> In addition, I find that she has improperly stopped the visitation with father by her false allegations of flirting at the supervised center.

The court then addressed the request for a protective order. It noted that Mr. Haynes responded to Ms. Collins' hospitalization by filing a protective order. The court stated:

> The District Court in Charles County issued a protective order because, frankly, I think everybody was trying to do what they could to look out for the interests of this child, when his mother was hospitalized under those circumstances.
>
> However, considering all the evidence, I do not find that this is an act of child abuse, as defined under the Domestic Violence Statute. There was no evidence, there is no evidence of physical or mental injury to the child by the mother under circumstances that indicate the child's health and welfare is harmed.
>
> However, there is evidence that the child's health and welfare was certainly placed at risk, given what happened that evening.
>
> So I'm going to deny the protective order[.]

The court then stated that it was "going to grant an emergency *pendente lite* order in the custody case[], awarding custody to Mr. Haynes . . . with supervised visitation with the mother." It included the following conditions:

> [T]hat the mother, Ms. Collins, actively participate in mental health services with Dr. Akoro and anyone else that Dr. Akoro or anyone else may prescribe. That both families receive in-home services from [the Department], as deemed appropriate by [the Department].

Finally, the court stated:

> And then I'm going to direct that this be set for a scheduling conference, for this is a temporary order. For a scheduling conference at which the parties

> can put out a further schedule, so we can ascertain when her mental health is stabilized and addressed completely, whether supervision is needed, whether—what the appropriate long-term custody and visitation arrangements are.
>
> This is temporary until all that can be finalized.

That same day, July 18, 2018, the circuit court issued a Pendente Lite Order. It ordered that Mr. Haynes be granted *pendente lite* custody of J.H. and incorporated the other provisions set forth in its oral ruling.

This appeal followed.[11] At oral argument on March 1, 2019, almost eight months after the temporary order, Ms. Collins advised that there had not been another hearing on the custody issue.

STANDARD OF REVIEW

In reviewing child custody determinations, we employ three interrelated standards of review. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). The Court of Appeals has explained these three levels of review, as follows:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] if it appears that 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

[11] The circuit court's order granting *pendente lite* custody to Mr. Haynes, while interlocutory, is appealable under Md. Code (2012 Repl. Vol.) §12-303(3)(x) of the Courts and Judicial Proceeding Article ("CJP"), which provides that a party may appeal from an order "[d]epriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order." *See Miller v. Bosley*, 113 Md. App. 381, 385 (1997) (reviewing a *pendente lite* custody order on the merits, pursuant to CJP § 12-303(3)(x)).

> are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). "[A]n appellate court does not make its own determination as to a child's best interest; the trial court's decision governs, unless the factual findings made by the lower court are clearly erroneous or there is a clear showing of an abuse of discretion." *Gordon v. Gordon*, 174 Md. App. 583, 637–38 (2007). A trial court's findings are not clearly erroneous "'if there is competent or material evidence in the record to support the court's conclusion."' *Scriber v.* State, 236 Md. App. 332, 345 (2018) (quoting *Brown v. State*, 234 Md. App. 145, 152 (2017)). An abuse of discretion exists "'where no reasonable person would take the view adopted by the [trial] court' or where the court acts 'without reference to any guiding rules or principles.'" *Johnson v. Francis*, 239 Md. App. 530, 542 (2018) (quoting *Powell v. Breslin*, 430 Md. 52, 62 (2013)).

DISCUSSION[12]

Ms. Collins contends that the circuit court erred in issuing the *pendente lite* order granting Mr. Haynes custody of J.H. We agree, given that the case came before the court on a petition for a protective order that the court readily acknowledged was without merit, the court *sua sponte* directed Mr. Haynes to file a motion for modification of custody and then immediately proceeded to hear the motion, and Mr. Haynes did not request custody or argue that there was an emergency situation requiring a modification of custody.

[12] Since Mr. Haynes did not file a brief in this case, our discussion is limited to responding to Ms. Collins' contentions.

As indicated, the parties appeared at the hearing prepared to address a petition for a protective order. When counsel for Ms. Collins moved to dismiss the petition because there was no "abuse" that permitted a protective order, the court acknowledged the validity of the argument. Instead of proceeding to rule, take evidence, or hear further argument, however, the court *sua sponte* directed Mr. Haynes to "go down the hallway and . . . file a motion for modification of the custody arrangement."

Ms. Collins contends that the court erred in directing Mr. Haynes, a self-represented litigant, to file a motion to modify custody, arguing that, in doing so, the court "effectively acted as legal counsel for [Mr. Haynes]." She claims that the court's conduct in this regard afforded Mr. Haynes a "tactical advantage over [Ms. Collins]," which "ultimately resulted in custody of [J.H.] being taken from [her] and given to [Mr. Haynes]."

Although a court may inform a self-represented litigant of "the nature of civil adversarial proceedings," it may not act as legal counsel for a party. *Tretick v. Layman*, 95 Md. App. 62, 70 (1993). The purpose of the requirement that courts not "aid either party in the presentation of his case" is to preserve our adversarial form of justice, which cannot function properly if the court "substantially help[s] either party." *Id.* at 69–70. Thus, in *Diggs v.* State, 409 Md. 260, 293, 295 (2009), the Court of Appeals reversed the defendant's conviction after concluding that the trial court judge acted as a "co-prosecutor" rather than as an impartial arbiter.

Here, we agree with Ms. Collins that, by directing Mr. Haynes to file a motion, the court acted as an advocate for Mr. Haynes, rather than as an impartial arbiter of the

proceeding. The court's rationale was that it needed to act in the child's best interest. Even if, arguendo, that would justify the court's actions, reversal is required here because the court granted custody to Mr. Haynes in a situation where Ms. Collins was not given notice prior to the hearing that the issue of custody would be addressed, and there was no request by Mr. Haynes for custody.

Ms. Collins contends that the circuit court violated her "due process rights by *sua sponte* holding an evidentiary hearing on custody with less than two hours' notice, with no pending request for a modification of custody by either party." Parents have a "protect[a]ble 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 is implicated." *Wagner v. Wagner*, 109 Md. App. 1, 25, *cert. denied*, 343 Md. 334 (1996) (internal citations omitted). "'At the core of due process is the right to notice and a meaningful opportunity to be heard.'" *In re Ryan W.*, 434 Md. 577, 609 (2013) (quoting *Roberts v. Total Health Care, Inc.*, 349 Md. 499, 509 (1998)). Due process does not "require procedures so comprehensive as to preclude any possibility of error," but only "reasonable procedural protections, appropriate to the fair determination of the particular issues presented in a given case." *Wagner*, 109 Md. App. at 24. Accordingly, we assess an "asserted denial of due process" based on the "the totality of the facts in a given case." *Id.*

Here, the parties appeared before the court on July 18, 2018, to address Mr. Haynes' petition for a protective order. Pursuant to Maryland Code (2017 Supp.) § 4-506 of the Family Law Article ("FL"), a judge may enter a final protective order based on a finding that abuse has occurred. Abuse includes "physical or mental injury of a child

under circumstances that indicate that the child's health or welfare is harmed or at substantial risk of being harmed." FL § 5-701(b); FL § 4-501(b).[13] Thus, at the time of the hearing, Ms. Collins reasonably anticipated that the only issue that would be addressed was whether abuse had occurred. And based on the record here, and the court's findings, she had reason to believe that the court would find that no abuse occurred and her son would be returned to her.

Instead, the court *sua sponte* directed Mr. Haynes to "file a motion for modification of the custody arrangement." Prior to that time, Ms. Collins had no notice that the issue of custody would be addressed at that hearing. Under these circumstances, the hearing violated Ms. Collins due process rights. *See Burdick v. Brooks*, 160 Md. App. 519 (2004) (modification of custody at a hearing scheduled for a status conference violated mother's due process rights); *Van Schaik v. Van Schaik*, 90 Md. App. 725 (1992) (father's due process rights were violated where his joint legal custody was terminated at a hearing scheduled to address visitation).[14]

Moreover, we note that Mr. Haynes never asked for custody. Pursuant to Rule 2-305, a pleading "shall contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for the relief sought." A motion to modify custody

[13] *See supra* note 5.

[14] Counsel made clear her view that the court should dismiss the request for a protective order, return the child to Ms. Collins, and rule on Mr. Haynes' motion at a later time. The court advised, however, that if it postponed the hearing it would continue the protective order and custody would not be given to Ms. Collins. Under these circumstances, Ms. Collins' subsequent objection to the court postponing the hearing to obtain testimony from the Department was not a waiver of the due process argument.

of a child is a pleading for purposes of the Maryland rules. *See McMahon v. Piazze*, 162 Md. App. 588, 592, 597 (2005). *See also Huntley v. Huntley*, 229 Md. App. 484, 492 (2016) ("[P]leading requirements apply equally in the family law context.").

In the context of a motion to modify custody, a parent must show a "material change in circumstances," i.e., a change that "may affect the welfare of child." *Wagner*, 109 Md. App. at 28. *See Jose v. Jose*, 237 Md. App. 588, 599 (2018) (A party requesting a modification of custody must show: (1) a "material change in circumstances" and; (2) that the requested modification is in the "best interests of the child.").

Here, as Ms. Collins notes, Mr. Haynes' motion for modification did not allege sufficient facts to show a material change in circumstances or "even request a change in custody." Nor did Mr. Haynes request custody at the hearing or argue that there was an emergency requiring the court to act on the motion that day. Mr. Haynes merely asked the court to "hear [his] plan for [J.H.] to have a successful relationship with both parents."

Under these circumstances, we conclude the circuit court erred in awarding temporary custody of J.H. to Mr. Haynes. Accordingly, we reverse the temporary custody order, which results in reinstatement of the original custody order granting Ms. Collins sole physical custody of J.H., pending any further custody hearing.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. COSTS TO BE PAID BY APPELLEE.