Circuit Court for Montgomery County
Case No. 125294-FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2449

September Term, 2019

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AEMERO ASHENAFI

v.

YESHIMEBET AYANA

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Arthur,
Beachley,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Arthur, J.

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Filed: November 13, 2020

*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.

At a hearing on a father's motion for a final protective order to protect the children from an ostensible threat of physical abuse at the hands of their mother, the Circuit Court for Montgomery County found that the father was intimidating the children into lying and that his conduct was causing the children to suffer emotional damage. The court arrived at those conclusions based solely on the testimony of an expert witness whom the court itself had subpoenaed; the court refused to hear any evidence from the father, including the testimony of the children's pediatrician.

As a result of the findings that it made at this truncated proceeding, the circuit court entered what it called a "temporary" "emergency" order. The temporary emergency order, which has now been in force for 10 months, modified a final custody order under which the father had access to the children on an alternating weekly basis. Under the temporary emergency order, the father is now entitled only to supervised access to the children.

The father appealed, arguing that the court deprived him of his constitutionally protected liberty interest in the care and custody of his children by modifying the final custody order without allowing him to present evidence. We shall reverse the temporary emergency order and remand for further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

Appellant Aemero Ashenafi ("Father") and appellee Yeshimebet Ayana ("Mother") are the parents of two minor children: a daughter, S. (born in 2010), and a son, E. (born in 2013). The parties were never married, but they lived together for a time in Father's home with members of Father's extended family in Montgomery County.

**A. Custody Dispute**

On January 26, 2015, Father filed a complaint in which he sought custody of both children, as well as other relief. Mother filed a counterclaim for custody, child support, and attorney's fees.

After a three-day hearing in November 2015, the Circuit Court for Montgomery County issued an oral ruling granting Mother and Father joint legal custody and shared physical custody with an alternating weekly schedule.

The court memorialized its ruling in an order on December 31, 2015, and in an amended order on January 6, 2016.

**B. Father's Petition for Protection from Abuse**

On December 11, 2019, Father, representing himself, filed a petition for protection from abuse on behalf of the minor children. The petition alleged that Mother had used excessive force in disciplining the children, resulting in bruises and an eye injury.

On that same day, the circuit court granted Father's request for a temporary protective order. The order awarded Father sole custody of the children until the final protective order hearing, which was set for seven days later, on December 18, 2019. The order directed Child Protective Services to investigate Father's allegations of abuse and to report to the court on its findings.

At the December 18, 2019 hearing, the court explained to the parties and their counsel that inconsistencies in the children's statements in the CPS report had raised concerns for the court. Accordingly, the court ordered a further investigation, which was to be conducted by the Department through the Tree House Child Advocacy Center

("Tree House"), a county center that provides medical, mental health, and forensic interviews in cases of suspected child abuse or neglect. The court modified the initial temporary protective order to make custody joint, restored the alternating weekly schedule for physical custody, and continued the case until January 15, 2020.[1]

**C. Final Hearing on Father's Petition for Protection**

On January 15, 2020, Mother and Father appeared in the circuit court, with new counsel, for the hearing on Father's petition for protection from abuse. At the start of the hearing, the court permitted both parties and their counsel to read the updated CPS report, which incorporated a report prepared by Tree House. The court informed the parties that Dr. Evelyn Shukat, the Medical Director of Tree House, was on her way to the court to testify.

After reviewing the Tree House report, counsel for Father asserted that he was "withdrawing the petition for protection." The court responded: "Well, the Court is sitting as an equity court, so we're going to hear from Dr. Shukat anyway."

The court proceeded to call Dr. Shukat, apparently as the court's own expert witness. The court informed the parties that it had subpoenaed Dr. Shukat "so that she could be available to [counsel] to answer any questions . . . relat[ing] to the petition."

[1] At the hearing on January 15, 2020, the court seemed to say that it had signed a written order stating that custody would remain joint and reinstating the alternating weekly schedule. No such order appears in the record or on Maryland Judiciary Case Search. The record does contain an order dated December 18, 2019, by which the court ordered the parties not to have any discussions with the children "concerning any allegations of abuse or any other aspect of this matter" while CPS and Tree House were conducting their investigation.

In response to questions from the court, Dr. Shukat explained that she had observed a forensic interview of both S. and E., conducted by a social worker at Tree House through a two-way mirror. After the interview, she had spoken separately with each child and then with Mother, who had brought the children to the appointment. Dr. Shukat had also conducted a medical examination of each child.

Dr. Shukat first testified with respect to S., the parties' 10-year old daughter. She stated that during the social worker's interview S. repeatedly expressed concern as to whether her answers would be shared with Father. According to Dr. Shukat, S. told the social worker that "her father made her tell social workers and the therapists that her mother hits her, abuses her, and is not a good person." S. reportedly stated that, if she does not do these things, her father "yells at her, screams at her, and becomes very angry." According to Dr. Shukat, S. "concentrates in her mind how she can avoid her father's anger," and, as a result, she has "lost focus and interest in school." Dr. Shukat testified that S. did not have a suicidal ideation, but does pinch or hit herself when she gets anxious and "wants to, in her words, escape this life and live in another time." Dr. Shukat explained that she had obtained a medical release to speak with S.'s therapist, who confirmed that S. had shared the same information with her.

With regard to E., the parties' six-year old son, Dr. Shukat testified that he "basically said the same things" as his sister. E. reportedly told the social worker that Father "tells him to tell people that his mother hits him or abuses him" and if E. does not comply, his television privileges are taken away.

Dr. Shukat testified that both children denied being hit by either of their parents and that her medical examinations revealed "no evidence of physical trauma." She opined that, based on her evaluation, both children are subject to emotional neglect by Father and should see a trauma therapist. She recommended that Father's visits with his children be supervised so that Father's pattern of "intimidation won't continue." Dr. Shukat also recommended that both children "reside in one home and not alternate because it's . . . emotionally chaotic for them."

On cross-examination by Father's counsel, Dr. Shukat testified that she based her report entirely on what she had observed during the children's four-hour visit at Tree House. She had not reviewed the children's medical records, but had spoken with their pediatrician several months earlier, in August 2019. At that time, the pediatrician had voiced her concern regarding Father's allegations that Mother was abusing the children and had requested Dr. Shukat's advice on what to do. Dr. Shukat testified that she had called CPS, who took her information, but "told [her] no details of the case." Dr. Shukat confirmed that her understanding of the children's medical history was based on what Mother had told her.

The court proceeded to hear argument on whether Father should be permitted to withdraw (or dismiss) his petition for a protective order. Mother's counsel voiced no objection, but requested that the court "take further action relating to the recommendations of" Dr. Shukat. The court interpreted this request as an oral motion to modify custody "on an emergency basis."

The court eventually dismissed the petition for a protective order, but reopened the custody case, in the court's words, "sua sponte." The court went on to find "that circumstances have changed," based on the reports that it had received.

After reciting Dr. Shukat's observations and recommendations, the court concluded that it was faced with an emergency and stated its intention to issue an "emergency temporary custody order."

The court began to read an order, which it appears to have already prepared. As the court recited that it had "heard from both parties," Father's counsel's objected, stating: "I have not been heard from." Counsel asked to be heard. The court ordered him sit down.

In light of the objection, the court conceded that, although it had heard from Father on the request to withdraw the motion for a final protective order, it had not heard from any witnesses on Father's behalf. The court agreed that its order would state that it had heard no factual information from anyone other than Dr. Shukat.

The court proceeded to read the provisions of its order. The court found, first, that shared physical custody was not in the children's best interest. Consequently, the court awarded "temporary sole physical custody" to Mother and ordered that Father's access be supervised, a minimum of one time a week, through the Montgomery County Visitation Home. In addition, the court allowed Father to have frequent supervised telephone calls with the children.[2]

[2] At oral argument in this appeal, Father asserted that because of the COVID-19 pandemic, the County has closed the center at which he was to have supervised access to

The court stated that its order superseded the previous custody orders. The order would "remain in full force and effect until further order."

After it had announced its ruling, the court permitted Father to make a proffer of what his evidence would have shown had the court allowed him to call witnesses. In brief, Father said that he would have called the children's pediatrician, who was present in the courthouse. According to Father, the pediatrician would have testified that the children had seen the doctor on multiple occasions for injuries sustained while they were under Mother's care and that there were medical reports to document these injuries.

Among other things, the pediatrician would reportedly testify that S., outside of Father's presence, said that she had injured her thigh when Mother pushed her in the bathtub; that Mother will hit her if she does something to upset Mother; that she suffered a bruised hip because Mother pinched her while she was in Mother's care; that Mother gets angry, hits her, and pinches her and her brother; that she does not feel that it is safe to be around Mother; and that she does not like to report these problems because Mother has warned her of further punishment.

In addition, the pediatrician would reportedly have testified that the parties' son, E., had visited her for burns and injuries to his head and hand caused by Mother. According to Father's proffer, on one occasion in August 2019 when E. had suffered a head contusion, the pediatrician interviewed the children separately, outside of Father's

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the children. Consequently, he says that he has not been in his children's physical presence since the onset of the pandemic.

presence. Both children reported that "they don't feel safe with the mother[,] . . . [that] [s]he gets mad all the time, and that she pushed [E.] in the bathtub and had [E.] lie as to the source of the injury."

The court accepted Father's proffer, but announced its decision to stand by its ruling.

As the hearing came to an end, the court distributed signed orders dismissing the petition for a protective order and modifying custody. The court emphasized that the order modifying custody was not intended "to just go in perpetuity."

The order modifying custody was docketed on January 24, 2020. On February 4, 2020, Father noted an interlocutory appeal.[3]

**D. Developments After the Hearing**

Maryland Judiciary Case Search indicates that on January 15, 2020, the date when the court announced the "temporary" "emergency" order, the circuit court set a "review hearing" for April 23, 2020. The court cancelled that hearing in early April 2020, apparently because the COVID-19 pandemic had forced the temporary closure of the courts for all but emergency matters.[4]

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[3] The order is appealable under Maryland Code (1973, 2020 Repl. Vol.), § 12-303(3)(x) of the Courts and Judicial Proceedings Article, which permits an immediate appeal of an interlocutory order that deprives a parent of the care and custody of a child, or changes the terms of such an order.

[4] On March 20, 2020, the Chief Judge of the Court of Appeals issued an administrative order that authorized courts to conduct "remote" hearings in emergency and other matters. The circuit court evidently did not think that the review of the temporary emergency order was an emergency matter.

According to Maryland Judiciary Case Search, the court initially rescheduled the "review hearing" for July 2, 2020. It appears, however, that on June 19, 2020, the court cancelled that hearing and rescheduled it for September 20, 2020, because the courts were still closed for all but emergency matters.

On September 20, 2020, the court conducted what Maryland Judiciary Case Search refers to as a "review hearing." According to Maryland Judiciary Case Search, the hearing (a video-conference) lasted less than 25 minutes. At oral argument, we were informed that the court heard no evidence or argument at this "review hearing" and that the purpose of the hearing was to set a date for a scheduling conference.[5]

According to Maryland Judiciary Case Search, a magistrate conducted a scheduling hearing on September 29, 2020. Under the schedule, the court will conduct a "status hearing" on December 14, 2020, and a custody modification hearing beginning on April 19, 2021.

In summary, the temporary emergency order has now been in effect for 10 months, and it appears that the order is intended to continue in effect until at least next April, 15 months after it was issued.

## QUESTION PRESENTED

On appeal, Father does not argue that the court should have ended the hearing once he had withdrawn the only motion that the hearing had been convened to address.

[5] Meanwhile on August 31, 2020, the Maryland Judiciary had moved to Phase IV of the COVID-19 recovery plan, under which the courts resumed non-jury trials and other contested matters.

He does not challenge the court's decision to call Dr. Shukat as the court's expert and to conduct a direct examination of her. He does not contest the court's conclusion that it was faced with an emergency. He does not take issue with the court's assertion that it had the power, on its own motion, to order a change of custody. He does not question the court's ability to order a temporary change of custody based on an oral motion to which he did not have the requisite opportunity to respond in writing.

Instead, Father presents this Court with a single question: Did the circuit court abuse its discretion by modifying custody without hearing evidence from Father, who was present, with witnesses, in the courtroom?[6]

For the reasons stated below, we shall conclude that the court abused its discretion and that the abuse of discretion was not harmless. We shall reverse the decision below and remand the case with directions to the circuit court to conduct an evidentiary hearing to allow the parties to address the concerns raised by the court through Dr. Shukat. The court must convene and conclude that hearing within 30 days of the date of our mandate. The temporary emergency order shall remain in effect as a pendente lite order until the court has concluded that hearing.

## STANDARD OF REVIEW

"[A]ppellate courts apply different standards when reviewing different aspects of a custody or visitation decision." *Gizzo v. Gerstman*, 245 Md. App. 168, 191 (2020). The

[6] In contravention of Md. Rule 8-504(a)(3), Father's brief does not actually contain a statement of the questions presented. We have formulated the question presented by rephrasing the caption of Father's first argument.

appellate court will not set aside the trial court's factual findings unless those findings are clearly erroneous." *Id.* (citing *Burak v. Burak*, 455 Md. 564, 616-17 (2017)). "To the extent that a custody decision involves a legal question, . . . the appellate court must determine whether the trial court's conclusions are legally correct, and, if not, whether the error was harmless." *Gizzo v. Gerstman*, 245 Md. App. at 191-92 (citing *Burak v. Burak*, 455 Md. at 617). The "ultimate decision will not be disturbed unless the trial court abused its discretion." *Id.* at 192 (citing *Burak v. Burak*, 455 Md. at 617).

This case presents the pure legal question of whether the circuit court was required to hear Father's evidence before it entered an order that diminished his right of access to his children.

## ANALYSIS

Under the Fourteenth Amendment to the United States Constitution, parents have a liberty interest in raising their children as they see fit, without undue interference from the State. *See*, *e.g.*, *In re Yve S.*, 373 Md. 551, 565 (2003); *accord Wagner v. Wagner*, 109 Md. App. 1, 25 (1996) (stating that parents have "a protectible liberty interest in the care and custody of [their] children"). Before a court may interfere with that liberty interest, it must afford due process of law to the affected parent. *Wagner v. Wagner*, 109 Md. App. at 25 (stating that, "when a state seeks to affect the relationship of a parent and child, the due process clause is implicated"). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

It should go without saying that, unless a court affords a parent a meaningful opportunity to be heard, it may not interfere with the parent's liberty interest in the care and custody of a child, except on a brief, temporary basis, such as when a court enters a temporary protective order, valid for seven days, under Maryland Code (1984, 2019 Repl. Vol.), § 4-505 of the Family Law Article. In this case, however, the temporary emergency order was apparently intended to last for at least three months. In part because of the COVID-19 pandemic, the order has now lasted for 10 months. The circuit court appears not to have any plan to reassess the order until almost 15 months will have passed. Yet Father has had no opportunity to present any evidence and to be heard on the merits, and he will have no such opportunity for at least another five months.

Whether we look at the order as it was originally conceived or as it has operated in practice over the course of the last 10 months, we have no difficulty in concluding that Father has been deprived of liberty without due process of law. The court abused its discretion in entering the temporary emergency order without allowing Father any opportunity, much less a meaningful opportunity, to present his case.

It is, however, not enough for Father to show that the court abused its discretion in some way; he must also show prejudice. *See Crane v. Dunn*, 382 Md. 83, 91 (2004) ("[i]t is the policy of this Court not to reverse for harmless error and the burden is on the appellant in all cases to show prejudice as well as error"); *accord Flores v. Bell*, 398 Md. 27, 33 (2007) ("an error that does not affect the outcome of the case is harmless error").

We are satisfied that the error was not harmless. We are unwilling to accept that the court was so wedded to its initial impressions that it might not have revised them in

some material way had it heard from the children's pediatrician, who was present and prepared to testify on Father's behalf.[7]

For these reasons, we reverse the temporary emergency order. The order is transformed into a pendente lite order that "shall remain in force and effect" until the completion of further proceedings. *Simonds v. Simonds*, 165 Md. App. 591, 599 (2005).

Because the temporary emergency order has been in effect for 10 months and is apparently intended to remain in effect for at least another five, we shall require the circuit court to conduct further proceedings in the form of an evidentiary hearing for the limited purpose of permitting both parties to address the concerns, raised by the court through Dr. Shukat, that resulted in the temporary emergency order. The court must convene and conclude the hearing within 30 days of the date of the mandate in this case. The court may extend that deadline only with the consent of all parties.

In imposing these requirements, we are cognizant of the scheduling pressures that circuit courts face. We are especially cognizant that the Circuit Court for Montgomery County (the most populous political subdivision in the State) is the busiest in Maryland. *See Maryland Judiciary 2018 Statistical Abstract* at 13. We are also cognizant of the scheduling delays that have resulted from the ongoing pandemic. It is, however, simply

[7] At oral argument, Mother asserted that Father's due process concerns were addressed when the circuit court entertained the proffer about what his witness would say. We could not disagree more. Father was required to make the proffer in order to preserve his point for appeal. *See*, *e.g.*, Md. Rule 5-103(a)(2); *Merzbacher v. State*, 346 Md. 391, 416 (1997). An erroneous decision to exclude evidence is not cured merely because the aggrieved party has complied with the obligation to proffer what the excluded evidence would show.

inconceivable that a supposedly temporary emergency order, depriving a father of access to his children without allowing him the opportunity to present evidence, could somehow remain in effect for 15 months before any judicial decision as to whether it should become permanent.

**ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, DATED JANUARY 24, 2020, REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO CONVENE AND CONCLUDE A LIMITED EVIDENTIARY HEARING WITHIN 30 DAYS OF THE DATE OF THE MANDATE IN THIS CASE AND FOR OTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; THE CLERK SHALL ISSUE THE MANDATE FORTHWITH; APPELLEE TO BEAR ALL COSTS.**