

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2511

September Term, 2014

IN RE: ADOPTION/GUARDIANSHIP
OF JOSEPH E., JR.

Wright,
Graeff,
Kehoe,

JJ.

Opinion by Kehoe, J.

Filed: August 17, 2015

*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.

This is an appeal from a judgment of the Circuit Court for Howard County terminating a child in need of assistance proceeding. The subject of the proceeding was Joseph E., Jr. The appellant is Joseph E., Sr., his father. The appellee is the Howard County Department of Social Services (the “Department”).¹ Appellant presents one issue for our review:

Did the trial court commit reversible error when it refused to permit Appellant to participate in a CINA proceeding via telephone from his prison in Virginia?

We shall affirm the judgment of the circuit court.

Background

Joseph, Jr. has been in the physical and legal custody of his mother, A. E., since birth. CINA proceedings were initiated in May 2014 after one-year-old Joseph was left unattended in his mother’s home for several hours. Thereafter, the Howard County Department of Social Services removed Joseph from his mother’s custody and placed him in shelter care, pending further CINA proceedings. At the time of the incident, and throughout the duration of the CINA proceedings that followed, appellant was incarcerated in Virginia.

Following a hearing before the Family Magistrate,² Joseph was determined to be a CINA in June 2014. In an effort to be present for the hearing, appellant filed a request for

¹Joseph, Jr. has also filed what his counsel styles an “appellee’s brief.” The title of the brief is procedurally inapt. We will discuss the disconnect between Joseph, Jr.’s appellate contentions and the procedural status of the case later in this opinion.

²Pursuant to Md. Rule 1-501, effective March 15, 2015, the designation of “master for juvenile causes” was changed to “family magistrate.” Although the proceedings at issue before us took place before the rule change, we will employ the designation “family magistrate” in this opinion.

a postponement as well as a request for a transportation order. Both requests were denied by the family magistrate. Thereafter, appellant, through counsel, filed motions to participate in each subsequent review hearing by telephone. These motions were denied by the circuit court.

Appellant's counsel renewed the motions to permit appellant to participate by telephone during the course of the CINA proceedings. In addressing the motions, the magistrate commented that the decision had been made by the circuit court and that it was not within the scope of her authority to gainsay the court's ruling and that a previous attempt at participation via telephone had been unsuccessful. With regard to the previous attempt to achieve participation by telephone, the magistrate informed appellant's counsel as follows:

We had actually attempted in a different case to have a telephone participation and we found that the person on the other end didn't hear a word that was said. It was our telephone technology [that] did not lead to a meaningful participation in the Court hearing.

During the final review hearing, on December 17, 2014, appellant, through his counsel, also requested that the court postpone termination of the CINA case until after his February 2015 release. Noting that appellant raised "an interesting issue," the family magistrate nonetheless denied the motion. The magistrate commented that "our job here today is to worry about little Joseph and what's in his best interest," and concluded that Joseph's best interest was not served by prolonging the CINA proceeding. The magistrate also observed that "the law is clear where there is a fit parent who's ready and able to take

custody of the child that we are to close our case.” The Department, Joseph’s counsel, and Joseph’s court appointed special advocate all recommended that the CINA proceeding be terminated and that Joseph be returned to the custody of his mother. Appellant’s counsel objected to the Department’s proposal on procedural rather than substantive grounds, explaining to the family magistrate:

Your Honor, we object [to] the proposal that is submitted by the Department. And not on the grounds that the mother has not complied with the request of the Department. It is certainly our understanding that [Ms. A. E.] has done that and has made great improvement.

We object, Your Honor, on the grounds that [appellant] has every right under the law to be present at these proceedings and to have a say.

The family magistrate recommended to the juvenile court that the CINA proceeding be terminated. No one, including appellant, filed exceptions to the family magistrate’s report and recommendations, and the court accepted them, terminating the CINA proceeding and returning Joseph to the custody of A. E.

Analysis

I. Appellant’s Contentions

Appellant asserts that the juvenile court erred when it closed the CINA proceeding because he, as Joseph’s father, had a constitutionally-protected right to participate in the proceedings in person or by telephone and the juvenile court and the family magistrate were obligated to “make all reasonable efforts to effectuate such participation.” (In his brief, Joseph makes the same contentions.) We do not agree.

Appellant’s argument places insufficient weight upon the fact that he was represented by counsel throughout the CINA proceeding. We considered arguments very similar to those raised by appellant in an analogous factual context in *In re Adoption No. 6Z980001*, 131 Md. App. 187, 193 (2000), a termination of parental rights case in which the court denied an incarcerated parent’s motion to listen to the proceeding via speaker telephone. We acknowledged that although “telephone testimony is a recognized way to satisfy due process. . . . it is not the *only* recognized way to insure that an incarcerated parent is afforded the opportunity to participate in a meaningful way in the termination process.” *Id.* at 194 (emphasis in original). This Court made clear that “what process is due” is determined by the facts of each case, and that due process is satisfied where “meaningful access to the courts” is provided. *Id.* at 199. In determining that the parent was provided “a meaningful opportunity to participate in the proceeding,” this Court considered the following:

[A]ppellant was afforded a full and fair opportunity to defend while represented by able counsel. Appellant was given the opportunity to appear by deposition, and did so. Certified copies of the audiotapes of the trial were made, provided to the appellant, and appellant was given sixty days to review the tapes and to prepare a written statement. Moreover, appellant does not claim that any specific portion of the trial was affected by his absence or that his inability to testify via telephone hampered any specific portion of trial preparation or strategy.

Id. at 199.

Returning to the case before us, appellant was represented by counsel who, from our review of the transcripts, appears to us to have been competent. Appellant did not ask for transcripts of the hearings, but he certainly had an opportunity to consult with his lawyer

between the hearings, and his counsel’s comments indicate that such consultations occurred. Moreover, on appeal, appellant does not suggest that the outcome of the proceeding would have been different had he been able to participate remotely. Nor does appellant point to any evidence that he could have presented to the family magistrate if he had participated remotely. We conclude that, because he was represented by an attorney, appellant’s right to due process was satisfied in the CINA proceeding.

There is an additional basis for our decision. The proper focus of any CINA proceeding is the best interest of the child. *In re Blessen H.*, 163 Md. App. 1, 15 (2005). At the conclusion of the final hearing in Joseph’s CINA proceeding, the magistrate found that “Joseph is not a child in need of assistance.” Appellant did not contest this finding before the family magistrate, before the juvenile court, or before this court. In light of this, it is impossible for us to conceive how *Joseph* would benefit from remanding this matter for further proceedings. To put it another way, even if the juvenile court had erred in denying appellant’s request to participate telephonically—and the court did not—any such error would have been harmless because it would not have altered the outcome.

Finally, appellant contends that the juvenile court and the family magistrate failed to “make all reasonable efforts to effectuate [his] participation” in the CINA proceedings. There is nothing in the record that gives us a basis on which to evaluate this contention, and any consideration would be based only on speculation. The only information in the record as to why the juvenile court denied appellant’s requests for remote participation is the family

magistrate’s observation that such attempts had been unsuccessful in the past. It was appellant’s responsibility to provide a record on which we could decide whether the court’s efforts were reasonable under the circumstances.

We fully appreciate the significance of appellant’s argument and the importance of allowing parents to participate in CINA cases. In light of the importance of the interests at stake, we believe that an appellate court should decide what efforts are necessary, on the part of CINA courts, to permit remote participation by incarcerated parents upon a more fully developed record than the one before us.

II. The Department’s Motion to Strike

Joseph has filed what purports to be an appellee’s brief in which he asserts that the juvenile court erred by failing to allow his father to participate telephonically in the CINA proceeding. The Department has moved to strike the brief, asserting that Joseph should have filed a cross-appeal if he wanted to challenge the court’s judgment. The Department is entirely correct. *See Maxwell v. Ingerman*, 107 Md. App. 677, 681 (1996) (“[I]f a timely cross-appeal is not filed, we will ordinarily review only those issues properly raised by appellant.”).

We will nonetheless deny the Department’s motion in this case because we do not believe that a lapse of this nature should prevent us from considering Joseph’s contentions. *See Flynn v. May*, 157 Md. App. 389, 410-11 (2004) (Where the best interest of a child is

at stake, a court may overlook procedural lapses that might be dispositive in other types of cases.).

**THE JUDGMENT OF THE CIRCUIT COURT
FOR HOWARD COUNTY IS AFFIRMED.
APPELLANT TO PAY COSTS.**