

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 412

September Term, 2016

MATTHEW PHILLIP PLACELLA

v.

REBECCA MARTIN PLACELLA

Wright,
Graeff,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: May 22, 2017

*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 appeal arises from the April 14, 2016, ruling of the Circuit Court for Anne Arundel County granting a Judgment of Absolute Divorce to Rebecca Martin Placella, appellee, from Matthew Phillip Placella, appellant, and awarding her sole legal and physical custody of their child. On appeal, Mr. Placella presents the following questions for this Court's review:

1. Did the trial court err in conducting a trial without the presence of Mr. Placella or his attorney?
2. Did the trial court err in considering the entry of a protective order in a divorce case?
3. Did the trial court err in limiting Mr. Placella to only supervised visitation?
4. Did the trial court err in limiting Mr. Placella to exercise his visitation only in the State of Maryland?
5. Did the trial court err in awarding Ms. Placella attorney's fees?

For the reasons set forth below, we answer the first question in the affirmative, and therefore, we shall vacate the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On April 17, 2004, the Placellas were married. In June 2012, the parties' son was born.

On August 31, 2014, the Placellas separated. On September 8, 2014, Mr. Placella filed a Complaint for Limited Divorce in the Circuit Court for Anne Arundel County.

On September 10, 2014, Ms. Placella filed a petition for a protective order against Mr. Placella in a separate case. Although the record from that case is not currently before this Court, Mr. Placella notes, and Ms. Placella does not dispute, that a consent order was

entered in that case that granted primary custody of the parties' child to Ms. Placella and supervised visitation to Mr. Placella. The docket entries from that case indicate that, on October 10, 2014, a "final protective order [was] dismissed" by the circuit court.

On October 22, 2014, the court in this case issued a Temporary Consent Order, which stated, *inter alia*, that Mr. Placella will have no contact with Ms. Placella, and Mr. Placella "shall submit to weekly urine drug tests." Ms. Placella later testified that she "dropped" the protective order in October when Mr. Placella entered into a Temporary Consent Order, agreeing to have no contact with her and submitting to weekly urine drug tests.

On December 11, 2014, Ms. Placella filed a counter complaint for an annulment, sole custody of their child, and child support, which she subsequently amended on April 22, 2015, to add an alternative claim for limited divorce. Ms. Placella also requested that the circuit court "[e]stablish a supervised visitation schedule for [Mr. Placella]," and order him "to engage in supervised drug testing."

On May 4, 2015, the parties appeared before a circuit court family magistrate for a *pendente lite* hearing. That same day, the magistrate issued a Report, Recommendations and Findings of Fact. On May 6, 2015, Ms. Placella filed exceptions to the magistrate's report, arguing that the court reduced child support based on erroneous findings regarding the parties' incomes and expenses, and it erred in declining to alter Mr. Placella's visitation rights.

On July 6, 2015, the parties appeared before the circuit court for a hearing on Ms. Placella's exceptions. Much of the hearing involved the parties' income and expenses. With respect to visitation, Ms. Placella argued that the magistrate improperly refused to alter the visitation arrangement because there was evidence that Mr. Placella was still using drugs and not submitting to regular drug analysis as required. Mr. Placella argued that Ms. Placella was the only person alleging that he was using drugs, and "[t]hey have no proof." On July 20, 2015, the circuit court found that the magistrate's decision to not alter the visitation arrangement was not erroneous because Ms. Placella testified that, even if Mr. Placella continued to abuse illicit drugs, she was not concerned about visitation as long as Mr. Placella's parents were present during the visit.

On March 2, 2016, the morning of the first scheduled day of trial, Ms. Placella and her attorney were present, but Mr. Placella and his counsel were not. The court advised Ms. Placella that it had received correspondence from Mr. Placella and his attorney that morning, as follows:

This morning when the [c]ourt opened up its email browser, there was an email opened up dated March 2nd at 8:14 a.m. And it said:

"Your Honor, I'm representing myself in this case, but unable to attend this morning's hearing due to illness. This is scheduled as a three-day hearing. I can be there tomorrow at 9 a.m. Please advise. Thanks, Matthew Placella."

The [c]ourt does not know how Mr. Placella, the Plaintiff, obtained my email. The [c]ourt does not respond to parties. The [c]ourt does not deal with ex parte matters. And the [c]ourt responded to Mr. Placella and [Ms. Placella's attorney], I did not have opposing counsel's email, "The Court is unable to offer you advice." . . .

* * *

The [c]ourt then opened up an email which was dated Tuesday, March 1st at 6:17 p.m. [T]hat email says:

“Judge I was” -- in capitals -- “the attorney for the Plaintiff. As of today, my client fired me. And in no uncertain terms that that [sic] I should not show up for court tomorrow. I had a criminal case in Prince George’s County this afternoon and just had returned to the office. Upon my return, I saw this email string.”

The [c]ourt can only assume that he was talking about an email string from [counsel for Ms. Placella].^[1] The [c]ourt notes that that email was addressed directly to the [c]ourt and not CC’d to opposing counsel.

[Counsel for Mr. Placella] said, “I’ll submit a notice tomorrow via MDEC; however, since I was copied on this email, because MDEC is slow at times, I thought it be courteous to inform you of this recent development.” As a side note, the [c]ourt does find it courteous. The [c]ourt also notes that it’s ex parte.

It says, “Since I’m now withdrawn, I believe that my only obligation to Mr. Placella has been fulfilled. Should this be an error, please let me know. Until we speak further on this or any other matter, I will remain. Sincerely, [counsel for Mr. Placella].”

The court advised that it responded to both attorneys: “Counsel, all matters must be filed properly and the Court cannot consider ex parte communication.” The court then noted that its administrative assistant advised that Michael Placella had called that morning.

He said that he was sick, he could not be in court. She told him that the case was scheduled. He said he was [in] New York and that he could not be here today because he was sick. And she said the case is scheduled for today.

¹ The court also noted that it had received an email from Ms. Placella’s attorney the day before, informing the court that counsel had a hearing before a magistrate “and would be running approximately 20 minutes late.” The court indicated that the email was “CC’d to opposing counsel,” and it “hit reply all” and responded that “the [c]ourt will see you when you’re finished” with his case before the magistrate. Counsel for Ms. Placella “sent a thank you.”

With that, the [c]ourt will inform any party present, and I would ask [counsel for Ms. Placella] to step into the hallway, and very briefly just call this case and indicate that if there is anyone present for this case, the [c]ourt is prepared to hear testimony and proceed on the merits.

At that point, counsel for Ms. Placella stepped out of the courtroom and asked whether any of the people in the hallway were Mr. Placella, his attorney, or otherwise interested in the case, but “there was no response from anyone.” The court noted that Mr. Placella had listed twenty-five witnesses in the pretrial order.

The court then stated that it was going to deny the request for an annulment and proceed on the absolute divorce. With respect to the absence of Mr. Placella and his counsel, the court stated: “I can’t control opposing counsel. Well, I can control opposing counsel being here, but I’m just not in the mood to issue a contempt citation. And it looks like counsel tried to at least notify the [c]ourt of what was going on.”

After the court was advised that Mr. Placella lived in the “upper [W]estside of Manhattan,” approximately five hours away, the court stated:

So the case was scheduled for 9, no one has been excused, no proper postponement has been granted. So, [counsel for Ms. Placella], I’m prepared to proceed. So I suggest that you call your witnesses to establish the divorce testimony and corroboration and that will relieve a corroborating witness of the obligation to remain here. And then I would like you to move into the issues of custody, visitation, support, et cetera.

The court reiterated that no proper postponement had been granted, and it would proceed on Ms. Placella’s amended complaint for absolute divorce.²

² The court denied Ms. Placella’s motion to dismiss Mr. Placella’s complaint for a limited divorce, noting that the case had been called, the court would take testimony on

Ms. Placella testified about a protective order she filed against Mr. Placella, and she stated that he should have only supervised visitation with their son because “he’s a drug addict. He is irresponsible and he’s never tak[en] care of [the child], so he doesn’t properly know how.” She stated that, prior to their marriage, Mr. Placella “was arrested at the University of Boston, naked in the women’s bathroom high, and then he was kicked out of school.” Ms. Placella was under the impression that Mr. Placella had stopped using cocaine “until he admitted to [her], on July 5th, 2014, that he started smoking crack cocaine again when [she] was pregnant and had been smoking it every day since then.” On one occasion, Mr. Placella attempted to take \$300 from Ms. Placella’s personal bank account without her knowledge so he could purchase \$280 worth of cocaine and \$20 worth of gas, and on other occasions, he took out cash advances on his credit and debit cards, “sometimes several times per day,” to feed his addiction.

Ms. Placella testified that, during the past year, Mr. Placella was scheduled to visit their son 45 times, but he had missed approximately half of those visits, and he had not seen their son since December 13, 2015. She opposed allowing Mr. Placella to take their son out of the state because “[h]e’s a drug addict and he doesn’t know how to care for a child.”

Although Mr. Placella was under court order to perform urinalysis, Ms. Placella had not received any information regarding his drug use. She was concerned, however, that

Ms. Placella’s complaint, and if Mr. Placella wanted to “show up” in the middle of the testimony, “maybe we’ll start taking testimony” on his complaint.

Mr. Placella was using a device and synthetic urine to cheat on his drug tests because she had seen the device, and he had admitted to cheating on his drug tests in the past.

Ms. Placella also testified that Mr. Placella had been diagnosed with bipolar disorder. She noted that he was a “rapid cycling bipolar,” and he exhibited “erratic behavior” that was “getting worse and worse.”

David Martin, Ms. Placella’s brother, testified that Mr. Placella had admitted to him that “he had started smoking crack pretty much ever since [Ms. Placella] got pregnant. And at that time, it had been over two and a half years.” Mr. Martin testified that Mr. Placella was not a fit person to have custody or unsupervised visitation because “he’s a drug addict.”

At the close of Ms. Placella’s case, which concluded on March 2, 2016, the same day that the trial began, counsel for Ms. Placella made an oral motion to dismiss Mr. Placella’s complaint, which included a request for alimony. The court granted the motion because “the plaintiff has failed to appear and . . . present any testimony.”

The court then ruled from the bench.³ It first found that Ms. Placella was entitled to an absolute divorce. It noted that the parties had been separated since August 31, 2014, which entitled Ms. Placella to a divorce based upon one year of separation.

With respect to custody of their child, the court found:

The mother is a fit and proper parent to have custody and the father is not a fit and proper parent to have custody. He is not taking care of the child on any basis, he is not paying child support, he is not visiting with the child, and he has not cared for the child.

³ The court reiterated its previous comments that “no proper postponement request was filed,” and Mr. Placella’s “counsel was not properly excused from the case.”

This factor weighs heavily in favor of the mother having sole physical and legal custody. The court finds that the mother is of good character and reputation. She works, she is employed, she has no criminal record, she has no psychiatric or psychological issues testified to. And the testimony is that she is a fit and proper parent.

The father's character and reputation suffers when compared to the mother's. He has had a protective order against him, there's testimony he has used and abuses controlled dangerous substances, including cocaine, crack cocaine. That he may have been arrested. He has acted irresponsib[ly]. And he may have mental health issues, including bipolar, which may not be treated.

The mother desires to have sole legal and physical custody. While father has filed pleadings in this case, he has failed to appear, and he has fired his attorney, apparently on the eve of trial. He has not presented any desires to raise the child. There is no agreement between the parties. . . .

The mother has greater potential to maintain natural family relations. . . . The father has poor potentiality of maintaining family relations, he is not even visiting with the child. . . .

The mother makes good money, a little over \$80 some thousand dollars a year. The father makes, according to testimony, over \$100,000 a year. The mother provides great material opportunities to affect the future life of the child. . . . While the father may be able to provide financially for the child, he does not provide future material opportunities that would positively affect the child.

The mother's residence is suitable and stable

The father's residence is absolutely unknown. . . . Mother has never been separated from the child, the father has been separated since the parties separated, and since the protective order was entered. Mother has never voluntarily abandoned or surrendered custody of the child. It appears that the father has.

After a lengthy discussion of the factors relevant to custody, the court found "that it is in the best interest of the minor child that the mother be awarded sole legal and sole physical custody of the minor child." It granted Mr. Placella supervised "visitation with the minor child from Sunday at 10:00 a.m. to 8:00 p.m.," stating that "the child may not leave the

State of Maryland with the father,” and the “visitation shall be suspended until the father has complied with any urine tests which have been ordered and will be ordered by the court. Or, it shall remain suspended unless the mother approves visitation.” It ordered Mr. Placella to pay child support in the amount of \$1,957 per month. The court also awarded Ms. Placella \$16,838.25 in counsel fees.

DISCUSSION

Mr. Placella argues that the circuit court erred in proceeding with the trial in his absence and the absence of his attorney. He contends that, in “cases involving the custody of a minor child[,] the [c]ourt’s controlling concern must be the child’s best interest,” and a “party who fails to strictly comply with the rules cannot be denied an opportunity to participate in a custody trial.” He asserts that the circuit court had several other options including:

- (1) Continue the trial until the next day to afford the [a]ppellant the opportunity to attend. The next day was already blocked off for trial of this matter so there would have been no scheduling problems for the parties, their counsel or the [c]ourt;
- (2) Continue the hearing until an entirely new date. While this option would have caused a significant delay it would not have been detrimental to the child because there was already a pending order which addressed *pendente lite* custody of the minor child;
- (3) Issue a show cause order for the [a]ppellant’s attorney to [a]ppear.

Mr. Placella contends that the court chose not to exercise those options “as a matter of convenience rather than acting with concern for the best interests of the child.”

Ms. Placella argues that the circuit court “properly exercised its discretion when it proceeded with the trial after receiving *ex parte* messages that [Mr. Placella’s] lawyer was not appearing and that [Mr. Placella] was sick.” She asserts that, not only did Mr. Placella

and his lawyer fail to properly request a postponement, “there was evidence that [he] was not being forthcoming with the court.” In that regard, Ms. Placella argues that Mr. Placella’s “lawyer failed to mention any illness, failed to appear on his behalf and no medical evidence was offered.”

The determination whether to grant a motion for a continuance generally is within the trial court’s discretion. *Touzeau v. Deffinbaugh*, 394 Md. 654, 670 (2006). In “exceptional situations,” however, it is an abuse of discretion to deny a request for a continuance. *Id.* at 671. *Accord Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 250 (2011).

The question here is whether this is a case involving exceptional circumstances where refusal to grant a continuance constituted an abuse of discretion. We conclude that this is such a case.⁴

Several cases guide our analysis in that regard. In *Neustadter*, the plaintiff, an Orthodox Jew, filed several motions requesting that the circuit court suspend trial for two days so he could observe a religious holiday, during which he was prohibited from working, including attending trial, and his attorney, as his agent, was prohibited from doing

⁴ To be sure, Mr. Placella did not file a proper motion for a postponement. He did advise, however, in an e-mail, and a phone call, hours before the start of trial, that he was in New York, sick, and could not be in Maryland in court the day of trial. He indicated, however, that the trial was scheduled as a three-day hearing, and he could be there the next day at 9:00 a.m. This implicitly was a request for a continuance. Ms. Placella appears to acknowledge this, stating in her brief that the court’s “refusal to grant a continuance was not an abuse of discretion.”

the same. 418 Md. at 233-35. The court denied his motions and conducted trial on those days, in the absence of both the plaintiff and his attorney. *Id.* at 237.

The Court of Appeals noted the general rule that the ““decision to grant a continuance lies within the sound discretion of the trial judge.”” *Id.* at 241 (quoting *Touzeau*, 394 Md. at 669). It noted, however, that the appellate courts will reverse the denial of a continuance where exceptional circumstances are present. *Id.* at 243. In finding exceptional circumstances in that case, the Court stated that it was

difficult to imagine that a trial court would have refused to accommodate a litigant or counsel who requested a continuance because of family or personal illness, or in order to observe a time of bereavement upon the death of a family member. We note an apt reflection by the intermediate appellate court in *In re McNeil* wherein that court stated, “myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to due process an empty formality.” 21 Md. App. [484, 499 (1974)]. The trial court did not give sufficient weight to the impact on Petitioner of being absent from trial for the Respondent’s entire case-in-chief.

Id. at 250 (parallel citations omitted).

One of the cases cited by *Neustadter*, *In re McNeil*, is analogous to this case to the extent that it also was a child custody case. The mother had called the judge’s chambers that morning ““saying that her child was sick and [she] couldn’t appear in court.”” 21 Md. App. at 486-87. The court decided to proceed in the absence of the mother, noting that “there was no request for a continuance or postponement of this” and the mother “has had every opportunity to do what was necessary and, we will proceed.” *Id.* at 487-88.

In holding that the case was one presenting exceptional circumstances where refusal to grant a continuance was an abuse of discretion, this Court recognized that the there was

“no right more fundamental to any parent than to be given a reasonable opportunity to be present at any judicial proceeding where the issue is whether or not the parent should be permitted to have custody of its child.” *Id.* at 496. We stated that it was “difficult for us to conceive how the judge could enunciate” the “special concern that should be exercised in cases involving the rights of parents to custody of their children,” but “then proceed with the hearing not only in the absence of the [mother], but without making a realistic inquiry into the circumstances of her absence,” or considering “whether the mother’s testimony would be competent or material.” *Id.* at 497-98.⁵

To be sure, we did not “hold that it is never permissible to hold a custody hearing in the absence of one or both parents,” and we recognized that “[u]nder some circumstances such a hearing could be necessary and proper,” but we nevertheless concluded that “no such circumstances were present in the instant case.” *Id.* at 499. We noted that there “was nothing of an emergency nature about the hearing,” and it appeared that the court’s refusal to continue the hearing was “out of concern for the convenience of the other witnesses in the case who were then present in his courtroom.” *Id.* We concluded that it was obvious that the “right of a parent to be present at a hearing involving the custody of her child must be given precedence over minor inconvenience to lesser involved persons,” and a “myopic

⁵ The Court noted that the record “[was] barren of any inquiry by [the judge] as to the nature of the child’s illness, or whether the child was ill at home or hospitalized.” *In re: McNeil*, 21 Md. App. 484, 488 (1974). This Court noted that, although counsel’s initial request for a continuance “was not completely articulated, it is abundantly clear that counsel was attempting to seek [a] continuance because of the absence of his client.” *Id.* at 496.

insistence upon expeditiousness in the face of a justifiable request for delay can render the right to due process an empty formality.” *Id.* Accordingly, we remanded the case for a new hearing to provide the mother an opportunity to be heard. *Id.* at 500; *see also Reaser v. Reaser*, 62 Md. App. 643, 645, 649-50 (1985) (finding “exceptional” circumstances “in which the refusal of the trial court to grant a continuance” to retain an attorney “constituted an abuse of discretion” where “no reason was given for the denial”; “no prejudice to the other side was shown”; “no objection [was] voiced”; “[n]o inquiry was made of appellant as to how long it would take her to get counsel”; and there did “not appear to have been any emergency situations necessitating that the case proceed immediately”).

Here, Mr. Placella informed the court that he was ill and could not be present on the first day of trial, but he could be present at 9:00 a.m. on the following day. The court had a number of options other than to immediately proceed to trial in the absence of Mr. Placella and counsel. These options included requesting more information about Mr. Placella’s illness or requesting medical verification, postponing trial until the next day in a case scheduled for three days, or postponing rendering its decision until the next day, which at the very least would have provided Mr. Placella the opportunity to present his case. *C.f. State v. Hart*, 449 Md. 246, 273 (2016) (“The trial court abused its discretion, because the judge proceeded *in absentia* too hastily: the facts on the record suggest that [the defendant] was involuntarily absent” due to a medical emergency, “and the judge did not inquire as to the seriousness of the [defendant] condition or the expected length of his absence prior to exercising her discretion to proceed without him.”).

Under these circumstances, particularly the nature of the case and the interests involved, and the limited time that Mr. Placella's illness would absent him from travel, we conclude that the trial court abused its discretion in proceeding to begin and end the trial in Mr. Placella's absence. Accordingly, we vacate the judgment of the circuit court and remand the case for a new trial.⁶

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY APPELLANT.⁷

⁶ Because we reverse on the first issue and vacate the court's judgment in this regard, we need not address appellant's remaining contentions.

⁷ Although we are ruling in appellant's favor, under the circumstances of this case, we exercise our discretion to impose costs on appellant.