

Circuit Court for Baltimore County
Case No. C-03-FM-19-003612

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 382

September Term, 2021

ALIVIA HARRISON FRANZONE

v.

JOHN B. FRANZONE

Nazarian,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: November 22, 2021

*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 an order of the Circuit Court for Baltimore County, granting custody of the minor child of Alivia Harrison Franzone and John B. Franzone to Father. In August of 2019, Father filed a complaint seeking a limited divorce and sole or shared physical and sole legal custody of the minor child. In an amended complaint filed in March of 2020, Father requested an Absolute Divorce. Mother filed a counter-claim asking the court to dismiss the case for improper venue or, in the alternative, to transfer the case to the Circuit Court for Montgomery County. Following a hearing on the merits, the court dismissed Mother's counter-claim, granted Father a judgment of absolute divorce and granted him sole physical and legal custody of the minor child. Mother timely appealed and presents the following questions for our review:

1. Did the Circuit Court err in conducting a trial without the presence of Mother or her attorney because Mother was not given a reasonable opportunity to appear?
2. Did the Circuit Court err in granting sole custody to Father because the Merits Hearing was not a full evidentiary hearing?

For reasons set forth below, we affirm.

BACKGROUND

On February 12, 2015, Mother and Father were married in a civil ceremony. One child was born of the marriage and Mother and Father separated in January 2019. Mother continued to live in the marital home with the minor child¹ until July of 2020. Father

¹ In addition to Mother and Father's biological child, Mother has another child who is not biologically Father's, who continued to live with her after the separation.

alleges that from that date until the merits hearing in April of 2021, Mother and child's whereabouts were "entirely unknown and hidden."²

On August 2, 2019, Father filed an action for a Limited Divorce in the Circuit Court for Baltimore County. The complaint included a request for "sole or shared physical and sole legal custody of the minor child."³ In an amended complaint filed in March of 2020, Father requested an Absolute Divorce.

On November 5, 2020, the court heard arguments on both Father and Mother's motions for *pendente lite* relief. All parties appeared at this hearing. The judge, on November 13, 2020, issued an order that required (1) that Mother return the child to Maryland; (2) that Mother return the child to Father's care by November 20, 2020 at 11:00 am; (3) that the child shall remain in Father's custody until Mother establishes a permanent residence in Maryland; (4) that when Mother establishes a permanent residence, physical custody be split 50-50; (5) that the child be enrolled in the Baltimore County Public School System; and (6) that Mother shall not attempt to change the child's residence in the state of Maryland.

On November 16, 2020, Mother's counsel made a Motion to Withdraw, to which Father's counsel objected. The court denied this motion on November 20. That same day,

² There is a criminal matter currently pending in the Circuit Court for Baltimore County on this issue. *See* C-03-CR-21-003109.

³ On September 10, 2019, Mother filed a complaint in the Circuit Court for Montgomery County. The Circuit Court for Montgomery County granted Father's request to dismiss that complaint because the matter was already pending in the Circuit Court for Baltimore County. Mother appealed to this Court, which affirmed the ruling of the trial court. *See Franzone v. Franzone*, No. 39, Sept. 2020 Term.

the court issued an amended custody and access order after Mother failed to comply with the court's November 13th order. This order granted Father temporary sole legal and physical custody of the child and authorized Father and law enforcement to take steps to locate the child and return her to the state of Maryland.

At Father's request, the circuit court judge issued a bench warrant to take physical custody of the child on December 9, 2020. Approximately two weeks later, Father filed a Petition for Contempt, asking the court to issue a Show Cause Order and to find Mother in contempt because she failed to abide by the court orders.

Mother's counsel filed a second Motion to Withdraw on December 29, 2020, which Father's counsel again opposed. The Motion was denied on January 11, 2021. On December 29, 2020, Mother also filed a Motion to Stay Proceedings, alleging that Father's failure to meet his deadline created difficulties in identifying her own expert witnesses. Father's counsel noted their opposition. The judge denied this Motion on January 11, 2021.

Father filed an Amended Complaint on March 12, 2020, asking for an Absolute Divorce. A status conference was held on March 16, 2021. After hearing requests from both parties, the court decided that it would be in the best interest of the child to schedule a merits hearing promptly. At this hearing, the court would also consider Father's Petition for Contempt.

On March 22, 2021, Mother's counsel obtained representation for the purpose of filing a third Motion to Withdraw. This Motion also contained a Request for Ex Parte Review and a Request for Hearing. Father's counsel noted their opposition to the motion. The trial judge granted the Motion to Withdraw on March 29, 2021.

Mother obtained new counsel, who entered a limited appearance on April 13, 2021. That same day counsel filed a Motion for Continuance asserting that additional time was needed for trial preparation. The court denied this motion on April 15, 2020, noting that it would consider a request for postponement if Mother, child, and counsel all appeared in person at the merits hearing scheduled for April 16, 2021. On April 16, 2021, the court held a merits hearing. Father, his counsel, and Mother's counsel were present. However, Mother and child did not appear at the hearing. She alleged that exposure to COVID-19 prevented her from flying to Maryland from Michigan or entering the courthouse. Mother's counsel presented evidence to this effect at the hearing and requested a postponement. After hearing arguments from both counsel, the judge denied Mother's request, stating:

[B]ased on [Mother's] prior conduct, I'm not persuaded that she's unable to be here today. I find that, again, based on past conduct and the lack of any real useful evidence that she's unable to be here, that she's doing so voluntarily and by choice, rather than of necessity. So that the Request for Postponement is denied.

Mother's counsel then requested to withdraw as she was not prepared to proceed on the merits without the postponement. The judge granted this request. Father's counsel proceeded with his case and argued that the petitions for contempt and an absolute divorce should be granted. The judge indicated that he had retained close notes of Father's testimony from the *pendente lite* hearing and he adopted them for the purpose of expediting the hearing. The court granted Father an absolute divorce and sole legal and physical

custody of the minor child. The court also found Mother to be in contempt and issued a body attachment.

Mother obtained new counsel and filed a Motion for Reconsideration and noted her appeal on May 17, 2021. The judge, subsequently, denied the Motion for Reconsideration on July 14, 2021.

STANDARD OF REVIEW

We consider the decision to deny a continuance under an abuse of discretion standard. *See Touzeau v. Deffinbaugh*, 394 Md. 654, 670 (2006); *Markey v. Wolf*, 92 Md. App. 137, 177 (1992). A child custody determination is also reviewed under an abuse of discretion standard. *Santo v. Santo*, 448 Md. 620, 625 (2016). A trial court abuses its discretion when its actions are “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Jenkins v. City of College Park*, 379 Md. 142, 165 (2003). “To constitute an abuse of discretion, the decision ‘has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.’” *Cousins v. State*, 231 Md. App. 417, 438 (2017) (quoting *Evans v. State*, 396 Md. 256, 277 (2006)). “[A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling.” *North v. North*, 102 Md. App. 1, 14 (1994).

DISCUSSION

I.

Mother contends the judge’s decision not to grant her a postponement due to her COVID-19 exposure was an abuse of discretion. Father counters, given Mother’s prior

conduct, the judge’s decision to deny the postponement request was reasonable and was not an abuse of discretion. We agree with Father.

Maryland Rule 2-508(a) states “Generally. On a motion of any party or on its own initiative, the court *may* continue or postpone a trial or other proceeding as justice may require” (emphasis added). Except in specific circumstances, none of which are alleged here, the decision to grant a continuance or postponement is made at the discretion of the trial judge, meaning that to be overturned a decision must be unreasonable or beyond what a court views to be minimally acceptable.

Mother cites *In re McNeil* to support her position that the circuit court abused its discretion by denying her request. There, this Court held that the trial court erred by denying a request for a continuance. We stated “[w]e can think of 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.” 21 Md. App. 484, 496 (1974).

In that case, a mother sought to regain custody of her two minor children after her children were committed to the Department of Social Services (“DSS”). *Id.* at 484. Following a hearing, the Master⁴ recommended the children be returned to their mother and an order to that effect was signed by a judge. *Id.* at 486. DSS filed exceptions, and the matter was scheduled for a hearing before a judge. *Id.* The mother did not appear at the hearing, asserting that she was unable to appear because she was taking care of one of

⁴ Prior to 2015, family magistrates were called masters in many parts of Maryland. <https://mdcourts.gov/media/newsitem/2015/item20150318> (accessed Oct. 29, 2021).

her sick children. No evidence was presented to support her contention and the judge proceeded with the hearing. *Id.* at 487-8. On appeal, this Court held that the judge abused his discretion because he ruled “without making a realistic inquiry into the circumstances of [appellant’s] absence.” *Id.* at 498. We also stated:

We do not hold that it is never permissible to hold a custody hearing in the absence of one or both parents. Under some circumstances such a hearing could be necessary and proper, but no such circumstances were present in the instant case.

21 Md. App at 499.

In the present case, the judge clearly considered the evidence pertaining to Mother’s absence and determined it was insufficient to establish her inability to appear. In our view, the court made a “realistic inquiry.” Father had not seen the child in over nine months, Mother refused to disclose their location and refused to comply with court orders directing her to return the child to the state of Maryland and to multiple body attachments.

Mother also cites *Thanos v. Mitchell*, 220 Md. 389, 392 (1959). *Thanos* was a malpractice suit in which the plaintiff filed a motion for a continuance because she could not appear in court due to mental illness. *Id.* at 390. The motion was supported by uncontradicted affidavits from two doctors stating that the plaintiff was incapable of appearing. *Id.* The court granted the defendant’s request for a dismissal. *Id.* The Court of Appeals reversed, holding that the dismissal was error because there was no dispute that the plaintiff was ill and could not appear. *Id.* at 392-3. The Court also noted there would be no substantial prejudice to the defendant due to the delay. *Id.* at 393.

Unlike in *Thanos*, here there was no sworn testimony attesting to the fact

that it would have been impossible for Mother to appear at the hearing on April 16, 2021.⁵ Mother’s counsel presented an image of a plane ticket from Michigan to Baltimore, a print-out related to a COVID-19 testing appointment, and a copy of Delta Airline’s COVID-19 protocols as proof that Mother had been exposed to COVID-19 and could not appear. The judge noted that the documents were “fairly illegible” and that Mother’s repeated violation of court orders had destroyed her credibility with the court and the judge found that Mother’s absence was “voluntary and by choice, rather than of necessity.” We hold the judge’s decision was based on his examination of the evidence presented to him and his determination that based on past circumstances, Mother was not credible. As a result, it was not an abuse of discretion to deny her request.

II.

Mother further argues that the limited testimony taken at the merits hearing was insufficient to justify the award of full custody to Father. Father contends that although the testimony was limited, the trial court’s adoption of the testimony from the November 2020 *pendente lite* hearing⁶ created a sufficient record to support the custody ruling. We agree.

⁵ Mother obtained new counsel and filed a Motion for Reconsideration shortly after the judge issued his decision here. Mother’s new counsel submitted two affidavits regarding Mother’s inability to appear into evidence prior to the circuit court’s consideration of the Motion for Reconsideration. The denial of the Motion for Reconsideration is not at issue here, and we decline to address it.

⁶ At the merits hearing the trial judge stated that the court had “heard extensively from Mr. Franzone back on October at our hearing the evidentiary hearing I referred to earlier.” It is clear from the context of his statements that the mention of October was a slight error, and he was referring to the *pendente lite* hearing that occurred on November 5, 2020.

Mother argues that this Court’s holding in *Flynn v. May*, 157 Md. App. 389 (2004) is supportive of her position. In *Flynn*, this Court held that “the award of a change of custody by default, without a hearing on the merits, constituted an abuse of discretion.” *Id.* at 391. There, a father filed a petition for primary physical custody of his minor child, and the mother responded *pro se*. *Id.* at 392. Due to mother’s self-representation, there were a number of procedural defects with her answer, which led to a default order. *Id.* at 392-4. The trial judge decided that because mother was in default, her witnesses were not entitled to be heard. *Id.* at 396-7. The court then proceeded in a summary fashion to award primary physical custody to father. *Id.* at 397. On appeal, this Court reversed and remanded, holding that the court “abused its discretion when it ordered a change in the primary physical custody of [the minor child] without permitting witnesses to testify or other evidence to be offered.” *Id.* at 411.

In the present case, there was no order of default, nor was there a request by Mother to present evidence at the merits hearing. Further, there is no indication in the record that Mother was precluded from offering evidence or testimony. In sum, Mother was not prevented from participating, like the mother in *Flynn*. We note that testimony had been presented at the *pendente lite* hearing and the judge stated the following at the April hearing:

[Counsel], if it’s any help to you, the Court heard extensively from [Father] back on October⁷ at our hearing—the evidentiary hearing I referred to earlier. I have close notes of that testimony and will adopt it for the purposes of this hearing

⁷ As noted, *supra*, the hearing the judge referenced actually took place in November of 2020.

and the basis of any Request for Custody.

We observe that the *pendente lite* hearing lasted a full day where the court heard from multiple witnesses. Following argument of counsel at that hearing, the judge stated:

The Court finds that based on the testimony, both parties actively were involved in the care for [the child] to one degree or another. They sought to take care of her health needs, her food, her clothing, education, and also to engage in a wide range of social activities and entertainment appropriate for a five-year-old. So on that, the Court finds that they are both fit parents.

...

In terms of fitness and character of the parties, [Father] is a obviously a successful businessman. He's a prior to his marriage to [Mother], was divorced. He has three daughters, two of whom testified that he was a caring, loving, fully engaged, always present father during their lives. Again, the Court finds that to be credible.

...

Addressing [Mother], the Court is equally impressed with the fact that she cares a great deal about [the child], and that in her way she wants to see what's best for her. I am, however, and this goes directly to fitness as a parent very concerned with the fact and I believe it to be a fact that [Mother] has taken the minor child from the State of Maryland to an undisclosed location and is secreting her away so as to prevent any contact with [Father].

While Mother argues that this procedure was improper, we have found no authority that prevents a judge from re-crediting prior testimony in an ongoing custody action. There were simply no new issues or factual allegations raised at the April 2021 proceeding, other than information about the child's whereabouts and the only person who could testify about that was found to be voluntarily absent.

Mother's argument that the court failed to evaluate each parent's home to determine what would be in the child's best interest is, as Father noted in his brief, at best, illogical.

Mother would not disclose the location of her home to the court, making such an evaluation impossible. She also failed to complete the co-parenting class ordered by the court and never responded to the court's Family Support Services Office when they reached out to schedule a child access evaluation. The combination of her inaction and evasion made it impossible for the court to assess whether she was a fit and proper parent who should have sole or joint custody and whether such an award would be in the best interests of the child.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**