Circuit Court for Montgomery County
Case No. 6-Z-15-23/6-Z-15-24

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0773

September Term, 2016

In Re: Adoption/Guardianship of C.M. and L.M.

Meredith,
Kehoe,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: December 9, 2016

Patrick M. ("Father") and Gina H. ("Mother") are the parents of two minor children, L.M. and C.M. After a tumultuous relationship characterized by frequent drug abuse and several incarcerations, the Montgomery County Department of Health and Human Services ("the Department") removed both children from their parents' custody and placed them in foster care. Although Mother consented to the termination of her parental rights, Father withdrew his consent to termination and the case proceeded to a guardianship trial in the Circuit Court for Montgomery County. At the conclusion of the two-day trial, the circuit court, sitting as a juvenile court, found that Father was unfit to care for the children and that it was in their best interests to terminate Father's parental rights.

Father appealed, and now presents one question for our review:

> Did Father receive ineffective assistance of counsel during the guardianship trial?[1]

For the following reasons, we answer no and affirm the judgment of the juvenile court.

BACKGROUND

Father and Mother both have extensive criminal and drug histories. Shortly after the birth of L.M. in August 2013, the Department became concerned with the ability of

[1] In his brief, Father stated his question as:

> Did the Circuit Court Judge err in terminating Patrick M.'s parental rights in this case?

At oral argument, however, Father transformed the issue into an ineffective assistance of counsel claim.

Father and Mother to care for him due to their substance abuse and criminal behavior. In October 2013, the Department began providing services to L.M. and his family. At the time, the family was living with L.M.'s maternal grandmother. On November 1, 2013, Mother filed for a protective order against Father, claiming that he had physically abused her. She obtained a final protective order on November 8, 2013. The protective order was rescinded at Mother's request on February 11, 2014.

During the time period from October 2013 through February 2014, Mother continued to use drugs. She tested positive for PCP five times and failed to appear for several other drug tests. On October 28, 2013, Mother was arrested for driving while impaired with L.M. in the car. On the evening of February 11, 2014, Mother was arrested again for driving while impaired with L.M. in the car. The next day, the Department went to the grandmother's home to place L.M. in shelter care, but could not find him at the house.[2] On February 18, 2014, a juvenile warrant was issued for L.M., along with warrants for Father and Mother. On March 11, 2014, all three were located and L.M. was placed in foster care.

On April 9, 2014, the juvenile court held a hearing and found L.M. to be a Child in Need of Assistance ("CINA"). L.M. remained in a foster home from February 11 through April 25, 2014, at which point he was returned to his grandmother's house. From February 2014 through September 2014, Father maintained almost no contact with

[2] The Department also removed L.M.'s brother, J.H., from mother's care and placed him into shelter care. J.H. is not a party to this case.

L.M. or the Department. A social worker from the Department made several unsuccessful attempts to connect with Father during this period. Father later told the court that he did not bother "stepping up" to care for L.M. because he assumed Mother "was going to step up."

On September 22, 2014, while eight months pregnant with C.M., Mother tested positive for heroin. C.M. was born in November 2014. C.M. remained hospitalized in the NICU for more than one month in order to detoxify from Subutex, which Mother was using to combat her heroin addiction. As a result, C.M. suffered from a number of medical difficulties as an infant. The juvenile court ordered shelter care placement with the Department. The court allowed Mother to visit C.M. during his hospitalization, but suspended Father's visits until he presented himself to the Department.

On December 4, 2014, C.M. was placed in foster care with Mr. and Mrs. R. Father claims his last contact with C.M. occurred during Christmas of 2014, and he admits that C.M. has no bond with him. On January 22, 2015, the juvenile court found C.M. to be a CINA and awarded custody to the Department for foster care placement. The court also ordered that L.M. remain in foster care, with a permanency plan of unification.

In the months that followed, both Father and Mother failed multiple drug tests, including for PCP. Father was also arrested for driving while impaired on March 28, 2015. In May 2015, L.M. was transferred to foster care with Mr. and Mrs. R., reuniting him with his brother C.M. Although L.M. has suffered from significant developmental

and emotional delays, he has shown improvement since being placed in the care of Mr. and Mrs. R.

In August 2015, Father was incarcerated for a couple of days after an arrest for distribution of PCP. Although he was released, according to his lawyer, on October 2, 2015, Father's bond was revoked for violations of pretrial services. As a result Father returned to jail. His sentencing was scheduled for June 28, 2016, and Father remained incarcerated through the time of the guardianship trial in May 2016.

Permanency plan hearings for the children were held on October 13 and 19, 2015. The Department recommended changing their plans to adoption by a non-relative because the parents had not adjusted their circumstances to provide a healthy and safe environment for the children. The juvenile court agreed and changed the boys' plans to adoption by a non-relative. The Department filed termination of parental rights ("TPR") petitions on December 7, 2015. On April 4, 2016, after court-ordered mediation, Mother consented to the termination of her parental rights. At that time, Father also consented to the termination of his parental rights. On May 2, 2016, however, counsel for Father filed a revocation of that consent.

A guardianship trial was held on May 13 and 16, 2016. On June 13, 2016, the juvenile court issued its opinion. After reviewing the evidence and considering each of the required factors under Md. Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), § 5-323(d), the juvenile court found by clear and convincing evidence that Father was "unfit, that [Father] poses an unacceptable risk to [L.M.'s] and [C.M.'s] future[s], well-

being and safety, and that it is in [L.M's.] and [C.M.'s] best interest[s] that the parental rights of [Father] be terminated."

DISCUSSION

I. Appellee's Motion to Strike Affidavit

At the conclusion of his brief in this Court, Father appended an affidavit dated August 10, 2016. The affidavit includes information that was never presented to the lower court. The Department has moved to strike this affidavit, because it was never presented to the court and, therefore, should not be considered on appeal.

It is in Father's affidavit that he makes his claim of ineffective assistance of counsel, wherein he states:

> Prior to the TPR trial my lawyer [ ] never met with me to prepare for trial and so she was unaware of all of the preparations I was making for when I was released from jail, and I was unaware of the exact way to communicate all of those preparations to the Court on May 16, 2016.

The Department is correct when it argues that this allegation was never presented to the juvenile court. Nevertheless, as explained *infra*, a claim of ineffective assistance of counsel in a TPR proceeding may be raised for the first time on appeal. Accordingly, we will deny the Department's motion to strike the affidavit.

However, we will disregard the remainder of Father's affidavit. Father's affidavit primarily details what he has done in the time since the TPR trial. The information contained in the affidavit was not available to the court below and is not relevant to his ineffective assistance of counsel claim; therefore, it will not be considered on appeal. *See*

Higginbotham v. Pub. Serv. Comm'n of Maryland, 171 Md. App. 254, 263, (2006) ("Generally, we may not consider documents that are not in the record before us."); *see also Franklin Credit Mgmt. Corp. v. Nefflen*, 208 Md. App. 712, 724 (2012), *aff'd*, 436 Md. 300 (2013) ("'an appellate court must confine its review to the evidence actually before the trial court when it reached its decision.'") (citation omitted).

II. Ineffective Assistance of Counsel

Father contends that his lawyer never met with him to prepare for the TPR trial, and as a result, she was unaware of the preparations Father was making for his life post-incarceration. Consequently, Father asserts that he received ineffective assistance of counsel during the TPR trial. Father asks this Court to remand this case back to the juvenile court to hear evidence on this issue. The Department counters that Father never raised the issue of ineffective assistance at the trial level, and therefore should be precluded from raising it for the first time on appeal. Moreover, the Department argues that, contrary to his contentions, Father's own testimony during the trial showed that he had contact with counsel prior to trial.

Ineffective assistance of counsel is a claim most commonly raised in the context of criminal cases. Nevertheless, we have previously addressed its applicability to TPR cases. We have observed that:

> Generally, the right to counsel is guaranteed in criminal cases by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. It is also clear that the right to counsel in such cases includes the right to the effective assistance of counsel. However, a case involving the termination of parental rights is a civil proceeding, and, therefore,

> Sixth Amendment and Article 21 protections do not apply. Thus, if there is a right to effective assistance of counsel in TPR proceedings, specifically a proceeding under Title 5, Subtitle 3, Part II or Part III of the Family Law Article, then that right must originate in the Maryland statutes.

In re Adoption/Guardianship of Chaden M., 189 Md. App. 411, 425 (2009), *aff'd sub nom.*, *In re Adoption of Chaden M.*, 422 Md. 498 (2011) (citations and internal quotation marks omitted). This Court acknowledged that the Family Law Article does provide assistance of counsel to indigent parties in a family law proceeding concerning either guardianship or adoption with prior termination of parental rights. *Id.* at 427 (citing FL §§ 5-313 to 5-328; FL §§ 5-331 to 5-342). We concluded "that the right to counsel also includes the corresponding right to the effective assistance of counsel." *Id.* at 428. Therefore, we held "that the right to assistance of counsel in a TPR case includes the right to effective assistance of counsel," because "a parent deserves no less in a proceeding where a fundamental and constitutionally protected liberty interest, such as the right to raise one's child, is at issue." *Id.* at 431. The instant case concerns an indigent party, Father,[3] in a TPR case. Thus, under our holding in *Chaden M.*, ineffective assistance of counsel is a legally cognizable claim for Father.

The Department is correct in its assertion that Father has raised the issue of ineffective assistance of counsel for the first time on appeal. The Court in *Chaden M.*

[3] Father testified to the court that he had no income for the past ten years. Father was represented by a panel attorney for the Office of the Public Defender.

addressed the viability of considering an ineffective assistance claim for the first time on appeal, stating that:

> To the extent that a direct appeal can expedite appellate review of an ineffective assistance of counsel claim in a TPR case, it is appropriate. But, it has been often stated in criminal cases that a post-conviction proceeding is the most appropriate way to raise the claim of ineffective assistance of counsel, because ordinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel. However, where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable. Therefore, unless the record before us provides a fair evaluation of appellant's claims, a remand would ordinarily be necessary.

Id. at 434-35 (citations and internal quotation marks omitted). Therefore, there are instances in which it is appropriate to raise an ineffective assistance claim on direct appeal. However, that determination is entirely dependent on the record before the Court. In *Chaden M.*, the appellant alleged ineffective assistance of counsel because her attorney failed to file a notice of objection in a timely fashion. We found that:

> the record before us permits a fair evaluation of whether [appellant] was denied effective assistance of counsel when her counsel failed to timely file a notice of objection to the Show Cause Order. The late-filing is clear and admitted, albeit qualified by counsel. There is no question of the late-filing being questioned as sound trial strategy. Therefore, there is no need to remand this case for a separate collateral fact-finding proceeding.

Id. at 435. The record in *Chaden M.* contained all the necessary information for the appellate court to render its decision without further evidence taking by the lower court. The record showed that there was an untimely filing by counsel, and there was no dispute

that an untimely filing constituted deficient performance on the part of counsel. Therefore, it was appropriate for this Court to find ineffective assistance on direct appeal.

On the contrary, the existing record in the case at bar provides nothing to support a claim of ineffective assistance. The issue of ineffective assistance was never raised below, and on appeal, the only allegation regarding ineffective assistance is found in an affidavit that Father has submitted to this Court. In his affidavit, Father asserts that he was provided ineffective assistance because his trial counsel never met with him to prepare for the trial, causing counsel to be unaware of the preparations Father was making for when he was released from jail. With no testimony from Father or trial counsel regarding this allegation, there is simply no evidence concerning the extent of communications between Father and his counsel prior to trial.[4] Nor is there any evidence on their preparations for trial. Therefore, unlike *Chaden M.*, the record before us is not sufficiently developed enough to provide a fair evaluation of Father's claims. Accordingly, at this juncture, it would be impossible for this Court to conclude that trial counsel was ineffective.

Furthermore, we hold that the allegations raised by Father are insufficient to warrant a remand. The Court in *Chaden M.* held that the two-prong *Strickland* test for analyzing claims of ineffectiveness of counsel applies in TPR cases. *Id.* at 432-33. The *Strickland* test requires a defendant to show that "counsel's performance was deficient"

[4] Of course, as discussed *infra*, there was testimony regarding the evidence that Father claims in his affidavit should have been presented.

and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In alleging deficient performance on the part of his trial counsel, Father makes only conclusory allegations in his affidavit that his counsel was unprepared for trial. The mere filing of a conclusory affidavit is not enough to satisfy the deficient performance prong.

Moreover, even if this Court were to take Father's allegation at face value, it would still fail to satisfy a showing of prejudice. With regard to his trial counsel, Father's affidavit specifically states:

> Prior to the TPR trial my lawyer [ ] never met with me to prepare for trial and so she was unaware of all of the preparations I was making for when I was released from jail, and I was unaware of the exact way to communicate all of those preparations to the Court on May 16, 2016.

In his brief, Father elaborated slightly on this claim, arguing that:

> His trial lawyer said he needed 6 months to show what he could do. Instead of focusing on what [Father] had plans to do, she focused on the lack of harm to leave the boys in foster care for 6 more months.
>
> In fact, [Father] indicates [ ] that his lawyer never met with him before trial to discuss his plans, his intentions, and the fact that he could absolutely be ready, willing and able to care for his children within 6 months or less. [Father] already knew what he had to do upon release from jail and he has followed through.

Father contends that trial counsel's failure to properly understand or convey Father's post-incarceration plans to the court prejudiced him at the TPR proceeding. We disagree and find that a look at the testimony gathered at the trial shows that this issue was sufficiently covered during the hearing.

In her opening, Father's trial counsel described all the things that Father would testify to when he took the stand. Specifically, counsel stated that Father would "describe his plans for his release and how he's going to live his life. He'll ask the Court not to terminate his rights but give him an opportunity to parent his children after he has his life turned around. He needs another chance." Although we have no testimony on what Father and his counsel discussed prior to trial, counsel's opening statement suggests that they planned to have Father testify regarding his plans for how he would live and care for the children after he was released from jail.

On the second day of the trial, Father took the stand and testified. Father explained to the court that although he was currently incarcerated, he would be released approximately one month after the TPR trial concluded. Father testified to the court about the programs he had gotten involved with while in jail, and how he had started to turn his life around during his latest incarceration. In particular, Father stressed that his attitude towards his responsibilities to his children had changed. The questioning then turned to the issue of what Father planned to do upon his release from jail. The following exchange occurred:

> [Father's Counsel]: So, [Father], if the Court gave you another chance to parent [L.M. and C.M.], when you are released, can we tell the Court what you would do to parent them today yourself?
>
> [Father]: For one, for one, I would take, I'd take whatever recommendations, whatever, first of all, whatever CPS asked me to do to satisfy that side of the, that, that side of

things, I, I would first I would get that, I'd get that out of the way and make sure that I could fulfill everything they say, which I would do at this point, which I didn't show I could do it in the beginning.

Then I'd get myself straight. Like, you know, like everybody says you can't, you can't help somebody else until you can help yourself. I'd make sure that I was straight with [ ] my recovery plan.

The Court: How long do you think that will take?

[Father]: To be honest with you—

The Court: It's not a fair question, but I'm going to ask it anyway.

[Father]: No, no, no, no, I think, I think it is a fair question to be honest with you, Your Honor. Personally, the only situation I have right now that I, I haven't been, that hasn't been addressed is the fact like [the social worker] said the other day that I'm in a controlled environment with the JAS program. So, okay, I'm doing good there, but what happens when he gets let out.

Right now I personally feel like mentally, and physically, and spiritually I'm, you know what I'm saying, I'm sound. But I have to, I have to acclimate to getting outside and doing the same thing I'm doing, you know, just keeping the way I am right now when temptation in life hits me.

So, I guess really I just got to, I, I think that, the biggest problems I have is going to find stability, because, because I don't have no problem. I don't have no problem right now like I'm drug free, you know. Yeah,

I'm in jail, but I'm drug free, and I don't have the desire, and, and, and I, I understand what's, what's going on right now.

The Court: Well, speaking of stability, where are you going to stay when you get out?

[Father]: I have family. I have family. I have an apartment with my, my ex, my ex-fiancée still. Well, she's, they consider her a problem, but I have, I have a, I have a place to get stable off the break.

The Court: Can you fill me in on where, what, and—

[Father]: I have an apartment right now.

During the course of his testimony, Father went on to discuss his relationship with Mother, services he would have available upon release to help him parent, and his plans to keep clean and sober upon release. Father also discussed the extent of his relationship with the two children, telling the court that he had a great bond with L.M., but no bond with C.M.

During the Department's cross-examination, Father was asked to clarify what he was asking the court to do and whether he needed more time to work on himself. The following discussion occurred:

[The Department]: All right. [Father], give us a sense, a reasonable period of time, I'm not holding you to this, but just tell us what, in your mind—

[Father]: **I say six months**.

[The Department]: Just—

[Father]: Sorry. Sorry. Sorry.

[The Department]: —hang on, hang on, we'll get there. Tell me what you think, in your mind, would be a reasonable period of time from when you get released from jail for [C.M. and L.M.] to live with you in a home that accommodate[s] them.

[Father]: Oh.

[The Department]: **Tell us what would be a reasonable period of time for that to happen in your mind.**

[Father]: I, I don't, I don't know how it works to be honest with you. I would say that not for them to come live with me, **but I say six months** for you all to give me a chance to see, okay, if he can't do it, not for them to come with me, to me in six months, but if I can't, **if I can't show you all within six months that I can do everything I'm supposed to do to have my sons**, and I couldn't follow directions, I couldn't piss clean, I couldn't do this, couldn't do that, then there's no, then, then we could just end it right there.

[The Department]: **So, we should go a six-month period of time—I just want to make sure we're totally clear**.

[Father]: **Uh-huh**.

[The Department]: **You would like the Court to take a six-month period of time, and, at the end of that six-month period of time, you would need to be totally clean—**

[Father]: **Uh-huh.**

[The Department]: —right, never having used—

[Father]: Uh-huh.

[The Department]: —once during that period of time.

[Father]: Uh-huh.

[The Department]: **You'd have to have a job—**

[Father]: **Uh-huh**.

[The Department]: —I would assume. You'd have to have been stable on that job, is that right?

[Father]: Yes, sir.

[The Department]: **You'd have to have a home—**

[Father]: **Uh-huh**.

[The Department]: —somewhere at least for you anyway.

[Father]: Uh-huh.

(Emphasis added.)

As demonstrated by this testimony, Father gave the court a clear time frame of six months in which he would be able to get his life together in order to care for his children. Father expressed to the court that he would continue to work with CPS post-incarceration. Father also explained to the court that he would stay clean, and would have a job and stable housing within the six-month time frame.

This same issue arose again during closing arguments. The following colloquy occurred between the court and Father's counsel:

Court: I was going to ask you the same question. What is a sufficient amount of time?

[Father's Counsel]: Well, that's what—nobody has a crystal ball. Who knows what a sufficient amount of time is? [Father] has asked the Court to give him six months, and he has basically said, and I hope the Court will agree that, what harm is there to these children. They're in a placement. They are still seeing the people that are permanent in his life, as the child's attorney has said. Give him six months.

* * *

Court: Yes, but where are we going to be in six months, though? I don't think he even says he's going to have a stable home, or—

[Father's Counsel]: Well, even six months—

Court: —he could—

[Father's Counsel]: —he's been clean and sober, even living in a sober house, and he's been visiting with the children. Where we're going to be is children who are getting to know a man that's totally different today than he was before; a man that's trying to be stable. He has other children, and, obviously, he's very bright. I mean I think you could tell from the testimony, he's articulate, he's bright, maybe he'll go back to college. I don't know, but don't children have the right to get to know or be raised by their biological parent if they have the opportunity?

[Father] is saying, please, Judge, I'm different. I realize I was not—I was a different person when the kids came in. I

> thought mom was going to get her act together. I was a drug addict. He admitted that he was buying PCP. He is now saying, please, I've really done programs. I understand that this is me, I have to change myself. He stated I'm the one who has to step up now; I have to be there for my children; I want to be there.
>
> He's asking for six months, but you have to decide if this is harmful for the children. They're in their foster homes. They've seen the people that are stable. Six months, and these kids are going to know any different, you know; they're going to be in the same environment.
>
> If in six months it doesn't work, terminate his parental rights. If they do, they might end up with a father who they can—a biological relative, a family member who can raise them.

As demonstrated by the statements made above, Father's counsel reiterated Father's plans during her closing argument. In particular, she restated the six-month time period that Father himself had initially given to the court. Counsel also emphasized Father's desire for the court to give him a chance to show that he could provide a stable environment for the children.

Therefore, contrary to Father's affidavit and brief, there was significant testimony and argument made before the court regarding Father's post-incarceration plans. Accordingly, there is nothing in the record to suggest prejudice on the part of counsel's performance, a critical factor of the *Strickland* test. Furthermore, we see no benefit from further evidence-taking given the fact that these issues were already covered below. For

that reason, these allegations are insufficient to warrant remand for further evidence taking.

Moreover, the juvenile court's opinion shows that, although Father's testimony was taken into account, his past behavior was so overwhelmingly negative that the court gave very little weight to it. The court found that "Father's adult life has followed a pattern of drug use, incarceration, minimal attempts at sobriety, followed by relapse and incarceration," with "no sign that Father's situation will improve with more time." The court even stated that, "[w]hile Father testified that he has addressed his substance abuse issues while incarcerated, it is unclear if he will be able to maintain his sobriety when he returns to the community." The court felt that L.M. and C.M. were entitled to security and certainty that they could not have with Father. Finally, the juvenile court noted the following:

> Father's circumstances remain largely unchanged from the inception of this case. He is incarcerated and faces sentencing on substantial criminal charges. During those periods in which he was not incarcerated, Father made little to no progress with his substance abuse, domestic violence, and housing issues; the issues that necessitated the Department's involvement. Neither has Father taken a proactive step to address those issues. The children have not seen him and likely have no memory of him. They certainly do not have a bond with him. He has not complied with court orders for services that might have addressed the issues that brought the children into the Department's care. The Department social worker testified that, at each stage of the proceeding, in her expert opinion, the children would not have been safe or healthy if placed in the Father's care. There has been no change in Father's circumstances that would change that opinion at the time of the instant Merits Hearing. In fact, the continuation of Father's apparent pattern of unsafe behavior, criminal activity, and substance use—with his primary addiction and drug of choice as he testified at the merits

> hearing, being PCP, an extremely dangerous drug—have made it even less likely that such a change in Father's circumstances would ever occur. **Additionally, he makes promises to change, but has not shown through his past actions that he will follow through with the Department's recommendations if given another chance to address the issues that led to the Department's TPR petition.** Therefore, the Court finds, given the clear and convincing evidence set forth above and presented in this proceeding, that Father is an unfit parent for [L.M.] and [C.M.] and likely will not take the steps to become a fit parent in the foreseeable future. As it stands now, Father's future is unstable and uncertain.

(Emphasis added,)

Using its discretion, the court relied on Father's past conduct to conclude that he was unfit and unlikely to change. As detailed by the circuit court, there was substantial evidence to support this conclusion. Therefore, even if we were to consider Father's original question to this Court of whether the juvenile court erred in terminating his parental rights, we would still answer in the negative because Father's conduct up to the time of the trial warranted such a determination.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.