UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2307

September Term, 2014

IN RE: ADOPTION/GUARDIANSHIP OF
JOY D. AND MALACHI D.

Wright,
Berger,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: August 13, 2015

On December 16, 2014, the Circuit Court for Baltimore City, sitting as Juvenile Court (Hon. Edward R. K. Hargadon), issued an order terminating the parental rights ("TPR") of appellant Crystal D. with respect to her natural children, Joy D. and Malachi D., and which granted the Baltimore City Department of Social Services ("BCDSS" or "Department") guardianship with the right to consent to adoption. Appellant challenges neither the court's factual findings nor its ultimate conclusion. In her appeal to this Court, she contends that the court violated her due process rights, raising the following questions:

1. Was Appellant denied a reasonable accommodation under the Americans with Disabilities Act?

2. Was Appellant denied the right to counsel at a critical stage of the termination of parental rights proceeding?

For the reasons set forth below, we answer these questions in the negative, and shall affirm the judgment of the juvenile court.

FACTUAL BACKGROUND

For nearly two decades, appellant had been involved with BCDSS and the courts with respect to her five children, all by different fathers. This Court has set forth a substantial amount of history regarding appellant and respondents, Joy (DOB 9/21/02) and Malachi (DOB 6/11/07), which we recognize for purposes of this opinion. *See, In re: Joy D.,* 216 Md. App. 58, 61-74 (2014); *In re: Joy D. and Malachi D.,* No. 1894, Sept. Term 2013 (filed May 2, 2014); and *In re Malachi D. and Joy D.,* No. 3006, Sept. Term 2010 (filed September 20, 2011), *cert. denied,* 424 Md. 56 (2011). Because appellant does not dispute

the court's factual determinations supporting its decision, we will recite only those facts necessary to provide context to our discussion of her contentions.

In 1998, the court found appellant's oldest child, Joshua, to be CINA, but after growing up in foster care, he legally became an adult without further intervention. In 2003, appellant's parental rights with respect to her two older children, Linda and India, were legally terminated. In 2007, the Department filed its first CINA[1] petitions regarding Joy and Malachi, whom the court found to be CINA in July 2012. The Department then filed TPR petitions for Joy and Malachi in August 2013.

The trial to terminate appellant's parental rights and to grant the Department guardianship over Joy and Malachi began on February 18, 2014, and concluded ten months later, in December 2014. During its course over the year, hearings were often postponed, at appellant's request.[2] Testimony took place on only two days: September 18 and October 10, 2014.

On September 18, 2014, appellant authorized her attorney to proceed in her absence. During that hearing, counsel asked the court whether appellant could testify via telephone,

[1]"CINA" means "child in need of assistance" and is defined as "one who requires court intervention because he or she has been abused, neglected, and/or has a developmental disability or mental disorder, and his or her parent, guardian, or custodian are either unwilling or unable to provide proper care and attention to the child and the child's needs." Md. Code Ann., Courts and Judicial Proceedings Article ("CJP") § 3-801(f) and (g) (2013 Repl. Vol.).

[2] Hearings were delayed largely due to appellant's pregnancy and pending delivery, and the record reflects the birth of appellant's sixth child during the summer of 2014.

due to her disability, but attorneys for both the Department and for the children objected. Although the court initially denied the informal request for a party who had received a summons and was therefore supposed to be present, noting that individuals with mental health issues always came in to testify, the court suggested that an allowance would be made if counsel produced a doctor's certificate or opinion confirming that appellant should not come to court. Said the court: "I need to know medically what is keeping her from being here. . . . Otherwise, it's your client has just chosen not to be here."

The following day, on September 19, 2014, trial was again postponed because of appellant's emergency room admission. At that hearing, a case worker for BCDSS, Diana Wade Williams, testified that since appellant last saw her children in November 2013, she had frequently said that she had no intention of testifying or otherwise participating in the TPR trial for Joy and Malachi, "even if she has to go back and forth to the hospital to show proof that she cannot be present." Appellant's counsel asked again that appellant be permitted to testify by telephone. The court then ruled, over objections by the Department and the children, that appellant could testify by telephone if she produced some medical evidence regarding her inability to come to court, thus granting appellant's motion upon a showing of good cause.

At the hearing on October 7, 2014, appellant's counsel introduced a note that appeared to be from a doctor, but the court quickly determined, as a matter of fact, that the note was

invalid.[3] [**T6. 2-9; E. 27-29**]. Trial testimony then continued, during which Williams testified that on September 30, 2014, while at the Department of Social Services, appellant "indicated to me that she would not be coming to this hearing today." According to Williams, appellant did not recite any reason, but just told her that she "did not want to come [so] I will not be showing up and I will not be available by phone."

At the conclusion of trial, the court issued orders terminating appellant's parental rights for both Joy and Malachi, and also ordered, *inter alia,* that the Department be granted guardianship of Joy and Malachi with the right to consent to adoption.

DISCUSSION

Standard of Review

Ordinarily, when reviewing of a juvenile court's decision with regard to termination of parental rights, an appellate court simultaneously applies three different but interrelated standards of review. First, factual findings are reviewed for clear error. Second,

> "if it appears that the [juvenile court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [juvenile court] to be founded upon sound legal principles and based upon factual findings that are not clearly erroneous, [its] decision should be disturbed only if there has been a clear abuse of discretion."

[3]After being contacted by the court, the doctor sent a letter confirming that she did not write the note which said it was not recommended that appellant appear for court. Rather, she had no reason why appellant could not attend court. The court referred to this apparent attempt to file a fraudulent doctor's note as a "sham."

In re Yve S., 373 Md. 551, 586 (2003) (emphasis and citations omitted)); *In re Adoption/Guardianship of Ta'Niya C.,* 417 Md. 90, 100 (2010). The appeal before us comes in a slightly different posture, given appellant's contention that the juvenile court violated her rights pursuant to the ADA, 42 U.S.C. § 12132, and that she was denied the right to counsel at closing argument.

I. Whether court violated Americans with Disabilities Act

Appellant first argues that we should reverse and remand the juvenile court's TPR ruling, despite the fact that she does not contest the court's factual basis for reaching its decision. Appellant contends that she was denied a reasonable accommodation under the Americans with Disabilities Act ("ADA") because the court denied a request to testify by telephone. Conceding that she never filed either a formal ADA accommodation request form[4] or a formal motion pursuant to Maryland Rule 2-513(d), appellant contends that the court abused its discretion by failing to refer to ADA's guiding principles and by ignoring the principles within Rule 2-513 governing telephone testimony.

The Department maintains that the juvenile court properly exercised its discretion when it denied appellant's request to participate by telephone, and, even if it did err, a violation of the ADA is not a sufficient basis upon which to warrant reversal in this case.

[4]The Maryland Judiciary provides a Request for Accommodation for Person with Disability, No. CC-DC-049, which is to be submitted to the court "not less than thirty (30) days before the proceeding for which the accommodation is requested."

The Department further argues that not only did the court fail to err, but appellant failed to demonstrate any resulting prejudice of the alleged error. Joy and Malachi maintain that the court did not violate appellant's rights, given that appellant had previously testified in several trials involving them and her other children, and presented no evidence of an inability to come to court in this proceeding. Moreover, they maintain that the record provides clear and convincing evidence that appellant was unfit as a parent, and sufficient exceptional circumstances existed demonstrating that termination of parental rights was in their best interest.

The ADA, codified at 42 U.S.C. §12132 (1990), provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Despite appellant's appearance at several earlier CINA proceedings regarding Joy and Malachi before the same juvenile court judge, appellant's trial counsel informally requested that she be permitted to participate by telephone.

As conceded by appellant, no formal ADA request seeking accommodation as the result of a disability had been filed. Rather, her mental health condition had consistently been denied by appellant. Even a mental illness is not automatically defined as a form of disability which would entitle one to evade a subpoena or compliance with a court's procedural rules. The court indicated that appellant could testify by phone, but asked for some medical evidence providing a basis. Given appellant's history in this case, it was not

unreasonable for the court to require good cause in order to allow her to testify by telephone. Such a request cannot be labeled as exclusion or discrimination. *See, e.g., Goldblatt v. Geiger,* 867 F.Supp.2d 201, 210 (D. NH 2012) (A court's request that one follow state's rules and procedures to achieve accommodation held not to be an ADA violation).

Even in the event of error, the ADA provides no remedy of reversal. In support of her argument that reversal is justified based upon an ADA violation, appellant directs us to *In re Custody of La'Asia S.*, 739 N.Y.S.2d 898 (2002). However, the *La'Asia* court rejected the attempt by hearing impaired parents to overturn a TPR ruling, given that "nothing in the ADA suggests that denial of TPR is an appropriate remedy for an ADA violation." *Id.* at 909 (citation omitted). Similarly, when the Court of Appeals considered the effect of an alleged ADA violation in *Green v. North Anne Arundel Hospital,* 366 Md. 597, 615 (2001), *cert.. denied,* 535 U.S. 1055 (2002), it ruled that reversal of a civil court decision was not an appropriate remedy for an alleged ADA violation. Even if the juvenile court violated the ADA, reversal and remand of the case *sub judice* would not be the proper holding.

The Court of Appeals' ruling in *Green* follows the logic of out-of-state cases which have considered, but refused to alter a TPR decision based upon an alleged ADA violation. Most frequently cited is *In the Interest of Doe,* 60 P.3d 285, 291 (Haw. 2002), which held that allegations of an ADA violation do not provide a basis upon which to reverse a TPR ruling because any purported violation may be remedied only in a separate proceeding brought under the provisions of the ADA. Most out-of-state courts addressing the issue have

held "the ADA does not directly apply to termination proceedings, either because the ADA creates a separate right of action or because termination proceedings are not among the public 'services, programs, or activities' described in 42 U.S.C. § 12132." *In re J.B.K.,* 95 P.3d 699, 702 (Mont. 2004); *S.G. v. Barbour Cnty. Dept. of Human Resources,* 148 So.3d 439, 447 (Ala. 2013) (rejecting TPR challenge based upon ADA violation); *In re S.G.S.,* 130 S.W.3d 223, 230 (Tex. 2004) (rejecting affirmative TPR defense out of ADA violation, and listing several similar outcomes of other state courts).

Alternatively, Maryland provides a procedure, available to all, regarding telephone testimony, which appellant alleges the court violated by failing to follow. Maryland Rule 2-513 provides the following basic requirements:

> (c) **Time for filing motion.** Unless for good cause shown the court allows the motion to be filed later, a motion to take the testimony of a witness by telephone shall be filed at least 30 days before the trial or hearing at which the testimony is to be offered.
>
> (d) **Contents of motion.** The motion shall state the witness's name and, unless excused by the court:
> (1) the address and telephone number of the witness;
> (2) the subject matter of the witness's expected testimony;
> (3) the reasons why testimony taken by telephone should be allowed, including any circumstances listed in section (e) of this Rule;
> (4) the location from which the witness will testify;
> (5) whether there will be any other individual present in the room with the witness while the witness is testifying and, if so, the reason for the individual's presence and the individual's name, if known; and
> (6) whether transmission of the witness's testimony will be from a wired handset, a wireless handset connected to the landline, or a speaker phone.

> (e) **Good cause.** A court may find that there is good cause to allow the testimony of a witness to be taken by telephone if:
> (1) the witness is otherwise unavailable to appear because of age, infirmity, or illness;
> (2) personal appearance of the witness cannot be secured by subpoena or other reasonable means;
> (3) a personal appearance would be an undue hardship to the witness; or
> (4) there are any other circumstances that constitute good cause for allowing the testimony of the witness to be taken by telephone.

As conceded by appellant, she failed to file a formal motion in accordance with Rule 2-513. Although counsel did informally request that appellant be permitted to testify by telephone, this request was not made 30 days prior to the date of the proceeding, as required by Rule 2-513(c), nor did it fulfill any of the requirements set forth in Rule 2-513(d) and (e).

Appellant contends that the principles of Rule 2-513 were ignored, although the rulings of the court reflect an attempt to accommodate appellant, in accordance with the Rule. Both the respondent children and the Department objected to appellant's telephone testimony, so it was necessary for appellant to provide good cause to justify her request. Based upon her history of absence from court, together with the BCDSS witness's testimony regarding appellant's intention to not participate in the TPR trial under any circumstances, the court's request for some evidence of appellant's inability to personally appear in court was not an abuse of discretion. Telephone testimony is available to everyone, but everyone is equally required to follow certain rules and procedures in order to enable a fair hearing for all parties. *See, e.g., Attorney Grievance v. Agbaje,* 438 Md. 695, 720 (2014) (plain language of Rule governing telephone testimony must be followed by all).

Although appellant complains that she was not permitted to testify, she is unable to make a proffer of any probative testimony that she would have provided, and has failed to demonstrate any claim or evidence of prejudice. Reversible error based upon exclusion of evidence requires both proffer of evidence and prejudice based upon such denial. Md. Rule 5-103(a). Given that there has been no proffered evidence or claim of prejudice, there can be no reversal based upon any violation of this Rule. "It is well settled in Maryland that a judgment in a civil case will not be reversed in the absence of a showing of error and prejudice to the appealing party." *In re Ashley E.,* 158 Md. App. 144, 164 (2004). Appellant failed to demonstrate any likelihood "that the outcome of the case was negatively affected by the court's error." *Id.* As a result, any alleged error would be harmless.

II. Appellant's lack of legal counsel during closing argument.

Appellant's second argument is that because she was denied counsel at closing argument, the actions of both the Office of Public Defender ("OPD") and the court denied her the opportunity to participate during a critical stage of the legal proceeding.

Closing arguments were initially scheduled to take place on October 14, 2014. Four days prior to this date, appellant discharged her long-time trial counsel, Karl-Henri Gauvin, filing an attorney grievance complaint against him. At the October 14th hearing, Attorney Gauvin moved to withdraw his appearance, which the court granted. The OPD assigned new counsel for appellant, Linda Koban, but appellant discharged Attorney Koban after learning of a potential conflict based upon counsel's previous service as Master in one of appellant's

former cases. On November 5, 2014, the day of her withdrawal, Attorney Koban provided appellant with formal notice that closing arguments were currently scheduled for November 20, 2014, and that "[i]f another attorney cannot be found by the Public Defender's Office you will have fifteen days to find your own attorney or you can choose to proceed on your own."

The OPD again obtained new counsel to represent appellant, Susan Magaziner. However, appellant immediately indicated her unwillingness to accept this attorney, and rejected counsel even before her appearance could be entered on the record. In an e-mail dated November 19, 2014, appellant ordered new counsel to "strike yourself off the record today now, ..."[5] Attorney Magaziner did as requested, moving to withdraw from the record, but because the attorney's appearance had not yet been entered, the court denied this motion as unnecessary.

In accordance with Md. Rule 2-132, on November 24, 2014, the court sent appellant a certified letter notifying her of the following:

> It appears from the record . . . that you are not presently represented by counsel.
>
> You are hereby notified that your failure to have new counsel enter his or her appearance in this case within fifteen (15) days after service upon you

[5]Counsel's motion to withdraw included a copy of appellant's message directing her to withdraw as counsel of record, which had also been sent to the Attorney Grievance Commission and OPD's chief attorney. Any and all private communication had been deleted by counsel.

> of this notice shall not be grounds for postponing any further proceedings concerning the case. You are warned that without counsel to protect your interests in the case, you will have to represent yourself in this matter."

Closing arguments in this matter took place on December 16, 2014. Appellant did not personally appear, and no counsel appeared in court to represent her.

Appellant argues that she was denied the opportunity to participate in a critical stage of the legal proceeding because both the OPD and the court failed to provide her with legal counsel. After discharging her third OPD attorney in this proceeding, and being warned that, without counsel she would have to represent herself, when no attorney then appeared at closing argument on her behalf, she argues that the OPD "failed to meets its statutory duty," thereby prejudicing her by its failure. However, when asked to define the prejudice, she can only point to her personal right to testify at the hearing itself. No prejudice with respect to the best interests of the children has ever been claimed. According to appellant, the court also erred by neglecting to provide her with proper notice that she was without counsel after the discharge of the third OPD attorney.

Joy and Malachi maintain that the court committed no error because it provided appellant with timely notice to obtain an attorney or proceed on her own, and by failing to appear at closing argument, appellant waived her right to participate. They emphasize that appellant's rights must be balanced against those of Joy and Malachi, for whom a stable life with a family of permanence is long overdue. The Department maintains that the court

properly proceeded to hear closing arguments after appellant, through her own actions, waived any right she had to counsel.

In criminal cases, where there is a Sixth Amendment right to counsel, courts "have consistently held that the right to counsel does not give an accused the unfettered right to discharge current counsel and demand different counsel shortly before or at trial." *Fowlkes v. State,* 311 Md. 586, 605 (1988). "Although the right to counsel generally embodies a right to retain counsel of one's choice," one may not manipulate this right so as to frustrate the orderly administration of justice. *Id.* For indigent defendants, the right to counsel "is not a right to representation by any particular attorney." *Id. See also, Wheat v. United States,* 486 U.S. 153, 159 (1988) ("the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers"). Thus, there comes a point at which "the appointment of substitute counsel is simply not an option available to the defendant[,]" and her continuous refusal to proceed with current counsel becomes a constitutional waiver of the right to counsel. *Id.* at 606.

Appellant's right to legal representation is one provided by statute pursuant to Md. Criminal Procedure (C.P.) Code Ann. § 16-204(b) (2008, 2014 Supp.). This law provides that individuals in certain civil family law cases, including parents in TPR cases, shall be provided representation at "all stages of [the] proceeding." C.P. § 16-204(b)(2). However, just as criminal defendants may waive their right to legal counsel, civil family law parties

may also waive their right to legal counsel. In appellant's TPR trial, she was represented by legal counsel throughout the trial, including at all times during which testimony and other evidence entered the record. However, shortly before the scheduled closing argument, she discharged her counsel, as well as substitute counsel appointed by OPD, causing closing argument to be postponed an additional two months. Appellant's actions constitute waiver of her right to legal counsel at closing argument.

As set forth in *In re Emileigh F.,* 353 Md. 30, 36 (1999), CINA litigants have a right to make closing argument. However, unlike the trial judge in *Emileigh,* who denied petitioner the right to make any arguments while at closing, in the case before us, appellant was never prevented from arguing or otherwise participating in closing argument proceedings. To the contrary, not only did OPD repeatedly appoint counsel for her, but appellant rejected these attorneys, and both counsel and the court sent her appropriate notice that she could represent herself at closing argument. Given that appellant not only waived her right to counsel, but waived her right to personally appear at closing argument, together with the fact that she does not dispute the court's ruling based upon the overwhelming evidence in support of the court's ruling, we affirm the ruling of the juvenile court.

JUDGMENT AFFIRMED;
COSTS TO BE PAID BY APPELLANT.