Circuit Court for St. Mary's County
Case No. C-18-JV-18-39

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2310

September Term, 2018

IN RE: R.W.

Fader, C.J.,
Reed,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: February 27, 2019

*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.

In this termination of parental rights case, appellant/mother did not appear in the Circuit Court for St. Mary's County for the merits hearing scheduled for September 10, 2018 at 9:00 a.m. Her counsel requested a two-hour continuance, which the court denied. The court proceeded to try the case and thereafter ordered termination of appellant's parental rights.

In her timely appeal, appellant poses a two-part question for our review:

1. Did the trial court abuse its discretion in denying Appellant's counsel's request for a two-hour continuance and in trying this termination of parental rights ("T.P.R.") case in the mother's absence?

For the reasons discussed below, we affirm the judgment of the circuit court.

BACKGROUND

Appellant,[1] has had a long-standing relationship with the St. Mary's County Department of Social Services (DSS) and the courts as a result of her history of substance abuse and mental health diagnoses in relation to her ability to care for her children.

At the time of the instant TPR hearing, appellant had given birth to seven children: R.W., who is the subject of this appeal; two other children, who had been adopted through DSS following involuntary TPR proceedings; four of whom had been placed with various family members of appellant; and an infant who was born approximately one week prior to the hearing.

[1] In keeping with this Court's policy of protecting privacy in cases involving children, we identify appellant as "appellant" or as "Mother," and identify her minor child by the initials "R.W."

The minor child who is the subject of this appeal, R.W., was born to appellant on March 23, 2017. Her paternity was not known. Within three days of her birth, a report was filed with DSS, alleging, *inter alia*, that appellant lacked adequate child care needs and supplies, and that appellant had tested positive for marijuana on two occasions during pregnancy. As a result, DSS removed R.W. to shelter care and ultimately found a suitable long-term placement for her with appellant's cousin, who later indicated a desire to adopt R.W. R.W. was adjudicated a Child in Need of Assistance (CINA),[2] and based on appellant's history, a no contact or visitation order was imposed. Although under no obligation to do so, DSS offered appellant reunification services and various types of financial aid in order to help her establish a relationship with R.W. Appellant's initial compliance with reunification services prompted DSS to engage in service agreements with appellant that would allow her to facilitate visitation with R.W. Despite the DSS efforts, appellant ultimately failed to comply with the terms and conditions of the service agreements by refusing to take weekly drug tests and failing to maintain drug and mental health treatment. As a result, visitation was terminated. DSS then filed a petition for guardianship of R.W. to initiate TPR proceedings, which appellant contested.

A TPR hearing was originally scheduled for July 23, 2018, but was continued in order to afford DSS additional time to effectuate alternative service by publication on R.W.'s father, the identity of whom appellant could never provide.

[2] A "child in need of assistance" is "a child who requires court intervention because … [t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." Md. Code (1974, 2013 Repl. Vol., 2018 Supp.), § 3-801(f)(2) of the Courts and Judicial Proceedings Article.

At the outset of the rescheduled hearing in September appellant's counsel appeared, informing the court that appellant had left a message with counsel's office, indicating that appellant had missed the bus and would not be in court until eleven a.m. The following ensued:

> THE COURT: [DSS counsel], are you ready?
>
> [DSS COUNSEL]: Well, your Honor, I am. But I spoke with [Mother's counsel], … and she has some information about her circumstances.
>
> [MOTHER'S COUNSEL]: [Mother] left a message with our office a short time ago indicating that she had missed the bus this morning and will not be able to be here until 11 a.m.
>
> THE COURT: Well, Court starts at nine, so we'll start at nine. If you don't mind, let me just take care of that. That shouldn't take very long. We have two cases on the docket? That doesn't seem right.
>
> * * *
>
> THE COURT: Okay. Okay. So anybody else here involved in this?
>
> (No audible response.)
>
> THE COURT: And is there a father situation?
>
> [DSS COUNSEL]: Dad, your Honor, is unknown. [Mother] was unable to identify (inaudible over coughing) by publication, which we accomplished.
>
> THE COURT: Good. Okay. So all right. So we are prepared to go forward.
>
> I understand your representation, [Mother's counsel], that your client has missed the bus and will be here in a couple of hours.
>
> But the Court is well aware of her long history and that it is not unusual for her to be unreliable in appearing and in participating and in being part of the process.
>
> So we are going to proceed. Court is at nine o'clock.

> [MOTHER'S COUNSEL]: If, for the record, your Honor, I may make a preliminary motion to pass the case until eleven.
>
> THE COURT: Okay. And that is denied.

Thereafter, the case proceeded to a merits trial. DSS offered a single witness, R.W.'s foster care and adoption supervisor, who testified as to appellant's history with DSS, the course of the CINA proceedings, appellant's efforts, and R.W.'s progress in her foster placement. Appellant's counsel briefly cross-examined the witness, but did not offer any witnesses, and concluded her case by reiterating appellant's objection to the termination of her parental rights. The court then granted the petition for guardianship of R.W., terminating appellant's parental rights, and stated its statutory findings of fact for the record.

DISCUSSION

Appellant contends that the trial court "committed two interrelated errors[:]" first, that "it abused its discretion in denying the requested two-hour continuance[,]" and, second, that "it erred in trying the case in [her] absence in the absence of any investigation into the reasons for [her] failure to timely appear." Appellant does not challenge the evidence offered by DSS, the court's factual findings, or the court's decision granting the termination of her parental rights. Thus, our review is limited to the procedural challenges presented.

Denial of Postponement

Appellant argues that "[t]he combination of the importance of the case, the fundamental rights of the mother, including the right to present, and the extreme brevity of

the requested delay, compel the conclusion that the denial of the continuance was a clear abuse of discretion." This, she avers, is because "[t]he stakes in the litigation were enormously high – the transformation of [R.W.] from [her] child to a legal stranger."

Appellant briefly cites to *In re Maria P.*, 393 Md. 661, 677-78 (2006), for the proposition that "the Court of Appeals has held in the CINA context, where the stakes are lower than a T.P.R. case, that these due process rights include a right to be present and to participate in a trial absent some strong justification for exclusion." In that case, at the Department's request, the mother was removed from the courtroom and excluded from the hearing while the child testified.

She also refers us to *Thanos v. Mitchell*, 220 Md. 389 (1959), explaining in a parenthetical that: "Abuse of discretion in denying continuance where a mentally ill plaintiff could not attend court on a specified day, but affidavits of physicians stated without contradiction that she would be able to attend within a reasonable time."

In response, DSS contends that "[t]he court acted soundly, not arbitrarily, when it proceeded with R.W.'s guardianship hearing." Further, that "[appellant's] lack of credibility in explaining her failure to 'be a part of the process' permeated this case, and her argument that the court should have attempted to 'ascertain the facts underlying [her] failure to appear' at the guardianship proceedings, therefore is unavailing." (Citation omitted). Additionally, DSS argues that "[appellant] also has failed to demonstrate that she has been prejudiced by the court's refusal to continue the case[,]" because she "was represented by counsel at the guardianship hearing, merely left a message with her attorney that she had missed a bus and would appear in court at 11:00 a.m." (Citations omitted).

Counsel for R.W. joins DSS's assertion that the court acted within its discretion because the "determination to deny the continuance was based on the judge's view of Mother's credibility[,]" and because of that, it "did not expect Mother to show up in the two hours requested in her continuance."

Continuances

Maryland Rule 2-508(a), governing continuances and postponements in civil matters, provides that: "On motion of any party or on its own initiative, the court may continue or postpone a trial or other proceeding as justice may require." In *Touzeau v. Deffinbaugh*, 394 Md. 654 (2006), the Court of Appeals explained the intent of the Rule and our standard of review:

> We have not specified what the phrase "as justice may require" means, but have said that the decision to grant a continuance lies within the sound discretion of the trial judge. Absent an abuse of that discretion we historically have not disturbed the decision to deny a motion for continuance. We have defined abuse of discretion as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Touzeau, 394 Md. at 669 (internal citations and quotations omitted). More simply, "an abuse of discretion exists 'where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles.'" *In re Andre J.*, 223 Md. App. 305, 323 (2015) (quoting *In re Yve S.*, 373 Md. 551, 583 (2003)). As such, a court's exercise of that discretion will be reversed if the court's decision is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Id.* (quoting *In re Adoption of Cadence B.*, 417 Md. 146, 155–56 (2010)).

After denying appellant's motion to pass the case "until 11:00", the court conducted the merits hearing and thereafter, as part of its on-the-record findings of fact and ruling, observed:

> [Mother] - - and again, I am familiar, because the other cases have come before me as well, as well as some of [her] criminal cases. That she does go through short period of sobriety and even maybe starts some sort of treatment and stays clean for a period of time.
>
> But it doesn't last, and she ends up relapsing; she ends up just terminating any treatment she is involved in. She ends up getting in trouble with the law again. And this has been her pattern for many years through now seven children. She fails to maintain contact with her children, which she has done with [R.W.].
>
> * * *
>
> So when [Mother] says she is on her way, it doesn't have much credibility with the Court. When she asks the Court to wait two hours to start the hearing so that she can be here, I wouldn't even expect her to be here in two hours, frankly. And she has been so totally noncompliant, and the children suffer as a result of that….

While the requested two-hour postponement may have been a "*de minimus* inconvenience," as appellant asserts, the court exercised its discretion in assessing whether to grant the delay. The court recognized appellant's history with the court as well as her extensive history with her other children in other CINA and TPR cases, and weighed the credibility of the representation offered by her counsel, concluding that a postponement would have been futile. We cannot say that the court's decision was so far "beyond the fringe" of what we would deem minimally acceptable to be an abuse of discretion.

Proceeding *in Absentia*

As a continuation of her principal argument, appellant asserts that the court abused its discretion when "the trial court decided to proceed in [her] absence without performing

any investigation, assuming that she was at fault based upon her prior conduct." She insists further that "there are at least as many innocent explanations as culpable ones, and under applicable law, the court was required to determine that [she] was at fault before proceeding in her absence." (Citation omitted). For support, appellant relies on *Pinkney v. State*, 350 Md. 201 (1998), wherein the Court of Appeals addressed certain factors the trial court must consider before proceeding *in absentia* in a criminal matter.

However, as the as this Court recognized in *In re Adoption/Guardianship No. 6Z980001,* 131 Md. App. 187, 192 (2000), as a termination of parental rights is a civil proceeding, a Sixth Amendment due process right of a criminal defendant to be present at trial, is inapposite. Moreover, appellant does not assert a violation of her procedural due process rights in this appeal – she asserts only an abuse of the trial court's discretion in its denial of her motion to continue.

In *In re McNeil*, 21 Md. App. 484 (1974), this Court was presented with the question of whether the juvenile court abused its discretion in denying the mother's continuance and proceeding in her absence. In that case, the proceedings were initiated by the mother who had filed a petition seeking to have her minor children committed to the DSS because she was unable to care for them. 21 Md. App. at 486. When her circumstances changed within approximately six months, she filed a petition for review of the commitment. *Id*. Following a hearing, the juvenile magistrate recommended revocation of the commitment and return of the children to the mother, to which DSS took exception. *Id*. Thereafter, a merits hearing was scheduled in the circuit court. *Id*.

On the day of the merits hearing, the mother had notified chambers and her counsel that one of the children was sick and that she would not be able to appear. *Id*. at 486-88. The court denied her counsel's various requests for a continuance and proceeded with the trial on the merits in her absence, ultimately dismissing her petition. *Id*. at 487-93.

On appeal, we vacated the denial of the petition, finding that it was "one of those exceptional instances where refusal to grant a continuance was so arbitrary as to constitute a denial of due process." 21 Md. App. at 499. In so finding, we disagreed with the court's decision to "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 ascertaining whether she had been guilty of a pattern of unconcern[,]" and noted that it was the mother who had filed the original petition for commitment and that she "had acted in a responsible manner" throughout the proceedings. *Id*. at 498. Further, mother's counsel had proffered to the court the evidence that the mother would have offered, had she been able to attend. *Id*.

The facts before us are distinguishable and the court's finding of "a pattern of unconcern[,]" was apparent from the record. Moreover, appellant's counsel made no argument in support of a postponement, or proffer to the court what helpful testimony appellant would provide. Nor, did counsel request a lesser remedy – a recess in order that counsel might phone appellant to verify her status and confirm that she would be attending the hearing that morning.

Notably, we are unable to learn, either from the record or the parties' briefs, whether appellant did in fact appear in court at 11:00 a.m., as she had represented in her message to her counsel's office. As we have recognized:

> 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 that context, prejudice means that it is likely that the outcome of the case was negatively affected by the court's error.

In re Ashley E., 158 Md. App. 144, 164 (2004) (emphasis in original) (internal citations omitted).

In *In re Maria P.*, *supra*, the Court of Appeals held that the court abused its discretion by failing to make a factual finding as to the merits of the Department's claim that the mother would influence the daughter's testimony before excluding her from the courtroom during the daughter's testimony. *Id.* at 679. In reaching that conclusion the Court explained that, "[t]he determination of whether the exclusion of a party constitutes sufficient prejudice, either presumed or actual, to warrant a new trial depends, to some extent, on the circumstances." *Id.* at 678 (citing *Green v. N. Arundel Hosp. Ass'n, Inc.*, 366 Md. 597, 620 (2001)). The Court stated further that "the focus of our analysis should not just hinge upon the exclusion of a party from the proceedings, but 'why the exclusion was prejudicial.'" *Id.* (quoting *Green*, 366 Md. at 620-21). Before us, appellant offers no explanation of potential actual prejudice.

On this record, we cannot conclude that the denial of the requested continuance was an abuse of discretion requiring reversal.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.