Circuit Court for Anne Arundel County
Case Nos. C-02-JV-16-520 and C-02-JV-18-668

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

No. 2847
September Term, 2018

No. 372
September Term, 2020

IN RE: G.O.

Arthur,
Beachley,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: December 4, 2020

*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 these consolidated appeals from the Circuit Court for Anne Arundel County, sitting as a juvenile court, Ms. O., the mother of G.O., asks this Court to return this case to the circuit court for further proceedings. We shall decline to do so and affirm the circuit court's order granting guardianship of G.O. to the Anne Arundel County Department of Social Services with the right to consent to his adoption by a non-relative.

Procedural History

The Department's involvement with Ms. O. and G.O. began in 2016, when G.O. was almost two years old (22 months) and was placed in shelter care because Ms. O. had been arrested on a felony warrant.[1] G.O. was found to be a CINA as a result. We fast-forward to 2018, when the issues presented in this appeal became certain. Between the initial shelter care in September 2016 and November 19, 2018, when the court ordered a change in the previously-ordered permanency plan, Ms. O. and G.O. had been continuously involved with the juvenile court and the Department. During that period, and through the present, G.O. has been in foster care except for a ten-week trial home reunification with Ms. O. from June of 2017 until August of 2017, which ended when Ms. O. was again arrested.

Ms. O. appealed from the court's interlocutory change of permanency plan to adoption by a non-relative, which was docketed as *In re: G.O.*, No. 2847, Sept. Term, 2018. Shortly thereafter, the Department filed a Petition for Guardianship of G.O., seeking the

[1] Ms. O., at that time, had a history with the Department involving her two other children who had been voluntarily placed in care in 2012. G.O.'s father initially objected to the Department's petition, but later withdrew the objection and consented. Thus, he is not a party to these appeals.

right to consent to G.O.'s adoption and the termination of Ms. O.'s parental rights. The Department then filed an unopposed motion to stay the permanency plan appeal, which this Court granted, pending the outcome of the guardianship proceedings.

The merits trial on the Department's TPR petition was scheduled for June 18, 2019, but, when Ms. O. failed to appear, was postponed until the following day. The following day, despite having been personally notified by the court, Ms. O. again failed to appear. The court denied a request from counsel for further delay, and the trial went forward, with Ms. O.'s counsel participating in her absence. One year later, the juvenile court entered an order granting the Department's petition for guardianship and termination of Ms. O.'s parental rights on June 22, 2020. Ms. O. filed a timely appeal, which was docketed as *In re: G.O.*, No. 372, September Term, 2020. Thereafter, this Court lifted the stay in No. 2847/18 and ordered consolidation of the two pending appeals. Oral argument on the consolidated appeals was heard on November 10, 2020.

DISCUSSION

Questions Presented

<u>Permanency Plan Appeal</u>

1. Did the court commit error when it approved the permanency plan of adoption with a nonrelative for G.O. when Ms. O. had made significant strides towards reunification and the department had no concrete plan for G.O.'s future?

2. Did the court abuse its discretion when it inserted itself into the proceedings by questioning Ms. O. about medical marijuana and taking judicial notice of an order that she was to abstain from all illegal substance use thereby denying Ms. O. due process?

Guardianship Appeal

1. Did the trial court's failure to issue its order, findings of fact, and conclusions of law in a timely manner violate Ms. O.'s right to due process?

Standard of Review

Maryland courts have long recognized that:

> Parents have a fundamental right to raise their children and make decisions about their custody and care. As we explained in [*In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 495 (2007)], there is "a presumption of law and fact—that it is in the best interest of children to remain in the care and custody of their parents." These principles are not absolute—they are tempered by the State's interest in protecting children. The "transcendent" standard in TPR proceedings has always been the child's best interests.

In re Adoption/Guardianship of H.W., 460 Md. 201, 215–16 (2018) (internal citations omitted).

With respect to a court's decision to terminate a parent's parental rights, we apply three interrelated standards of review:

> The juvenile court's factual findings are left undisturbed unless they are clearly erroneous. We review legal questions without deference, and if the lower court erred, further proceedings are ordinarily required unless the error is harmless. The lower court's "ultimate conclusion," if it is "founded upon sound legal principles and based upon factual findings that are not clearly erroneous," will be "disturbed only if there has been a clear abuse of discretion."

460 Md. at 214 (internal citations omitted). Because Ms. O. raises only a due process challenge to the court's delay in entering the guardianship order, we need not engage in an extended review of the court's findings of fact or legal conclusions. We will review only the application of the statutory timing provisions, without deference.

The Department's Motion to Dismiss

We first consider the Department's Motion to Dismiss Ms. O.'s appeal from the juvenile court's permanency plan order of November 19, 2018,[2] in No. 2847/18, asserting that Ms. O. had acquiesced in the plan of plan of adoption of G.O. Moreover, the Department contends that, "In light of her acquiescence to the plan of adoption, Ms. O. has waived her right to pursue this appeal."

In asserting Ms. O.'s acquiescence, the Department relies on the juvenile court's permanency plan review order of December 9, 2019, based on the Magistrate's findings and recommendations of November 21, 2019. The court's order, entered on a printed form, included a box checked by the court that provided:

> The parties confirmed that they had reached an agreement. The parties agreed to the recommendations made by the Department of Social Services as contained in a court report, which was entered into evidence and is incorporated herein by reference.

The recommendations referred to were that the permanency plan continue to be adoption.

In her reply brief, Ms. O. casts doubt on the veracity of the checked box, stating:

> The court checked a box on its form only that indicated that only Ms. O.'s counsel was present [at the hearing]. Given that Ms. O. as a party was not even present for this hearing, it is unlikely that any party agreements regarding the department's recommendations, which must be attributed to her attorney, would include that she agreed to G.O.'s adoption. In June 2019, Ms. O.'s attorney made a clear record at the termination of parental rights trial that she had inconsistent communication with her client and had not spoken to her client, Ms. O., prior to the termination hearing. It is speculative

[2] Throughout the record and appellate filings, the date of the court's change in permanency plan order appears, variously, as November 13, 2018, which was the date of the permanency plan hearing, and November 19, 2018, which was the date that the court executed the order. The date of the order's execution is the controlling date that we will reference in this opinion.

> to include an agreement by Ms. O through her attorney to a permanency plan of adoption under these circumstances, despite the court's wording in its order….

(Internal citations omitted).

For reasons to be subsequently addressed, we shall deny the Department's motion.[3] In any event, in view of our affirmance of the judgment granting guardianship to the Department, the motion to dismiss becomes moot.

I. Delay in Entering the TPR Order

At the outset, we point out that Ms. O. asserts no challenge to the court's factual findings or the sufficiency of the evidence to support the Juvenile Court's order granting the Department's petition for guardianship with the right to consent to G.O.'s adoption. Moreover, she has raised no procedural challenges. Her only challenge to the TPR order is the court's delay in entering it, contending that, as a result, she has been denied due process.

In that regard, we recall that the TPR trial was scheduled before the court for June 18, 2019, in the afternoon. Ms. O. did not appear on that date. Her counsel, in response to the court's inquiry, told the court that Ms. O. had been advised of the trial date by email, to which she had responded, indicating her awareness of the trial date and time. Counsel also advised the court that Ms. O. did not appear for a previously scheduled mediation and had not been responding to counsel's phone calls, with only intermittent responses to counsel's emails.

[3] An earlier Motion to Dismiss was filed, which this Court denied upon consolidation of the two appeals.

At that point, the court placed a telephone call to Ms. O., which was on speaker for the record, inquiring of her absence. Considering Ms. O.'s response, essentially disputing her counsel, that she was not aware of the scheduled hearing, the court ordered the matter continued until the next day and personally advised Ms. O. of the new date and time. When the case was called on June 19, Ms. O. was again not present, and her counsel represented to the court that Ms. O. was again unresponsive to her (counsel's) phone call, but had responded to counsel's email, acknowledging that she had spoken to the court and was aware of the date and time of the postponed trial. The court denied any further postponement and held the one-day trial in Ms. O.'s absence, with her counsel present and advocating on her behalf. Following the trial, the court held the matter *sub curia*.

On December 16, 2019, with the court's guardianship order still outstanding, Ms. O.'s counsel filed a line with correspondence to the court, requesting the entry of the guardianship order. The court entered its Findings of Fact, Conclusions of Law and Guardianship Order on June 8, 2020, which was amended on June 22, 2020, to correct the trial date. No explanation for the court's delay is found in the record.

Ms. O. argues that the court's delay in issuing its findings of fact and guardianship order violated her due process rights. She relies on Family Law Article § 5-319(a), explaining that "the juvenile court must decide a guardianship petition within 180 days after the department filed the petition *and* within 45 days of the trial." Ms. O. contends that "[t]he court's manifest untimeliness in issuing its order and findings of fact and conclusions of law calls into question a crucial aspect of termination of parental rights judgments: whether termination of Ms. O's rights is in the best interest of [G.O]." Further,

she posits that "[a] year later, the court did not have a current basis on which to terminate Ms. O.'s parental rights."

In response to Ms. O.'s delay arguments, G.O.'s counsel avers that "[appellant's] right to due process was met by the procedures set in place by the guidelines of the guardianship statute." Counsel explained that G.O. "was also harmed by the court's delay in issuing its findings[,] [h]owever, to grant the request of the Appellant would only exacerbate that harm for [G.O]."

With respect to Ms. O.'s challenge, questioning whether the court's decision was "still" reflective of G.O.'s best interest, G.O.'s counsel contends that is a "false argument" and that the delay "in fact gave Ms. O. an opportunity to make progress and changes on the issues before the [TPR] court …." when she "had the opportunity to participate in those reviews (permanency review hearings)."

As we have noted, a permanency review hearing was held on November 19, 2019, resulting in a continuation of the permanency plan of adoption. Also, the court found that "the parties confirmed that they had reached an agreement[,] … [and] agreed to the recommendations made by the Department of Social Services as contained in a court report, which was entered into evidence and is incorporated herein by reference."

The Department argues that appellant "raises her deprivation of due process for the first time on appeal[,]" having failed to ask the court "to reopen the matter while it was pending in order to consider additional evidence or any change in circumstances." Indeed, the only contact initiated by Ms. O.'s counsel, was a letter, addressed to the court, but delivered only to the Clerk of Court, six months after the merits trial, asking the court to

enter an order. The record does not disclose whether the letter was ever seen by the court. The Department further contends that "[a]bsent a showing of changed circumstances impacting G.O.'s best interests, the juvenile court committed no error because a delay in issuing a decision, standing alone, does not constitute reversible error." Finally, the Department asserts that appellant's "failure to raise the issue in the juvenile court has resulted in the lack of a record demonstrating error."

Responding to her due process arguments, the Department contends that "[t]he juvenile court's decision comported with due process requirements and properly terminated [appellant's] parental rights, providing G.O. with the opportunity to have a permanent, stable home and protecting his best interests, health, and safety."

Maryland Code (1984, 2012 Repl. Vol.), § 5-319(a) of the Family Law Article (FL) provides the maximum time limits for courts in ruling on a guardianship petition:

> (a) Subject to subsection (b) of this section, a juvenile court shall rule on a guardianship petition:
> (1) within 180 days after the petition is filed; and
> (2) within 45 days after the earlier of:
> (i) receipt of all of the consents required under this Part II of this subtitle; or
> (ii) trial on the merits.

On its face, the statute appears to establish mandatory time requirements to be enforced by the trial court. However, those requirements were found to be less so when analyzed by this Court in *In re Abiagail C.*, 138 Md. App. 570 (2001) (under an earlier version of the statute), and which was affirmed more recently by the Court of Appeals in *In re Adoption of Jayden G.*, 433 Md. 50 (2013). In *Abiagail C.*, this Court undertook a thorough analysis of the statutory construction of FL § 5-319 and its legislative history.

From the supporting documents of the cross-filed bills for the proposed legislation we discussed the reasons necessitating such a statute and its intended purpose:

> The Department of Human Resources asked the General Assembly to enact HB 295, "establishing [a] time frame [ ] for the courts to hear these cases ... [to] assist the courts in assigning a higher priority to these cases and thus enable earlier implementation of adoption plans for children." A committee report on HB 295 prepared in conjunction with an identical cross-filed Senate Bill (SB 656) stated that testimony before the Senate was that the bills were "intended to reduce the length of time involved in implementing adoption plans for foster children." Senate Jud. Proc. Comm. Report, House Bill 295 (1991).

138 Md. App. at 585.

In discerning the legislative intent underlying the statute's imposed time frames, we concluded that the goals of the statute were two-fold: first, to give courts the authority to prioritize scheduling of child protection cases over other cases; and, second, to reinforce the best interests of foster children by providing an opportunity to expedite permanent adoption plans and thereby reducing their time in the foster care system. *Id*. at 585–86.

With the established goals in mind, this Court explained that the timing provisions of what is now FL § 5-319(a) are directory rather than mandatory:

> A mandatory construction of FL § [5–319(a)] requiring the circuit court to dismiss a guardianship petition that has not been ruled on in 180 days cannot possibly serve that purpose. The consequence of dismissal would not be that the child would be returned to the natural parent by default, as the appellant seems to assume, or that the child would remain adrift in foster care. Rather, the consequence plainly would be that the petition would be refiled and the 180–day period would run anew. Thus, only further delay would be accomplished. We will not interpret a statute meant to assist the circuit court in more promptly deciding guardianship/adoption cases so as to delay the dispositions of those very cases.

138 Md. App. at 586 (internal citations omitted).

In *Jayden G.*, *supra*, the Court of Appeals applied this Court's *Abiagail C.* reasoning and concluded that "[w]ithout a doubt, the 180–day provision is not mandatory on the court." 433 Md. at 81. The Court explained that the fact that the statute's provision "encourages courts to rule on TPR petitions in an expedient manner, … does not mean that this goal takes on a life of its own, leaving juvenile courts no choice but to rule on TPR petitions within 180 days or else risk dismissal, as the mother argued in *Abiagail C.*, or reversal[.]" *Id.*

In the context of protections afforded in TPR cases, "cases make plain that process is due a parent who faces the permanent loss of his or her parental ties to the child at a TPR proceeding, but certainly not the degree of process due a criminal defendant, probationer, or alleged juvenile delinquent who faces the loss of personal liberty." *In re Blessen H.*, 163 Md. App. 1, 17 (2005). The Court of Appeals has explained that, with respect to due process rights in TPR cases, there are

> three basic principles: (1) parents have a fundamental liberty interest in the care, custody, and management of their children, (2) when the State moves to abrogate that interest, it must provide the parents with fundamentally fair procedures, and (3) the process due to parents in that circumstance turns on a balancing of the three factors specified in *Mathews v. Eldridge*, 424 U.S. 319 (1976), *i.e.*, the private interests affected by the proceeding, the risk of error created by the State's chosen procedure, and the countervailing governmental interest supporting the use of the challenged procedure.
>
> The first and third *Mathews* factors are obviously important ones in a termination of parental rights action. The private interest is the parent's fundamental right to raise his or her children, and there are few, if any, rights more basic than that one. The governmental interest in securing permanent homes for children placed into its custody because of an inability or unwillingness of their parents to care for them properly is also strong and vital, however. These are vulnerable and defenseless children, usually at critical stages of their development and having only the government and its

> agents to turn to for physical and emotional sustenance. Once it appears that reunification with their parents is not possible or in their best interest, the government has not only a special interest, but an urgent duty, to obtain a nurturing and permanent placement for them, so they do not continue to drift alone and unattached.

In re Adoption/Guardianship No. 93321055/CAD, 344 Md. 458, 491–92 (1997) (footnote omitted).

Applying the established standard, we conclude that Ms. O. has been afforded a panoply of the rights that constitute due process. Those include the right to receive notice of, and the opportunity to object to, the TPR petition, the opportunity to participate in mediation in advance of trial (for which she failed to appear), the right to participate in the merits trial (for which she again failed to appear), and the right to effective assistance of counsel (which she only briefly attempts to cast doubt on in her reply brief). To be sure, "TPR proceedings are initiated as a last resort and only after efforts to reunify the parent and child, who likely has previously been adjudicated a CINA, have failed[,]" and "only when the '*prima facie* presumption that a child's welfare will be best served in the care and custody of its parents' is overcome by a 'show[ing] that the natural parent is unfit to have custody, or exceptional circumstances make parental custody detrimental to the best interests of the child.'" *In re Blessen H.*, 163 Md. App. at 18 (quoting *In re Yve S.*, 373 Md. 551, 572 (2003)).

Indeed, TPR proceedings require consideration under a higher standard of proof than CINA proceedings. *Id.* at 16 (explaining that "due process demands that TPR proceedings, … can only result in the termination of a parent's rights on a 'clear and convincing' standard of proof, rather than the lesser 'preponderance of the evidence'

standard that attends CINA adjudications"). Ms. O. has had ample opportunity to be heard and to assert her parental rights throughout both the permanency plan proceedings and the TPR proceedings. Moreover, and finally, Ms. O. does not provide us with legal authority to support her argument that the court's delay in filing the TPR order amounts to a deprivation of her due process rights.

Notwithstanding the court's inexplicable failure to comply with the FL § 5-319(a) time provisions, such does not impact Ms. O.'s due process rights. The language of FL § 5-319(a), and the caselaw interpreting that language, makes clear that the statute is directory and not mandatory. While we find no violation of Ms. O.'s rights to due process on the record before us, we cannot say that under more egregious circumstances where harm is shown to the interests of either a parent or child, or both, we would rule similarly.

II. Change in Permanency Plan

Because we hold that Ms. O. has not been denied due process and affirm the court's grant of the Department's petition for guardianship with the right to consent to adoption of G.O., the earlier order of the court changing the permanency plan, and the appeal therefrom, becomes moot and does not require our discussion. *See In re Adoption of Quintline B. & Shellariece B.*, 219 Md. App. 187, 205 (2014) (explaining that when a parent's rights have been terminated while there is a pending appeal for a change in permanency plan, "this case is among those where 'permitted action by the trial court ... render[ed] a case moot'" (quoting *In re Adoption of Jayden G.*, 433 Md. at 74)).

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.