UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0315

September Term, 2015

IN RE: DESTINY C.

Kehoe,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: October 14, 2015

Kenneth C., appellant, the father of Destiny C., appeals from a judgment of the Circuit Court for Cecil County, sitting as the juvenile court, granting sole legal and physical custody and guardianship of Destiny C. to Kelly C., Destiny's paternal aunt, and terminating the court's jurisdiction. Appellant presented one question for our review, which we separated into two questions, reordered and rephrased:[1]

> 1. Did the circuit court abuse its discretion or err in denying the father's motion for a continuance when appellee Department of Social Services changed the proposed permanency plan one week prior to the hearing?
>
> 2. Did the circuit court abuse its discretion or err in denying the father's motion for a continuance when the notice of the hearing served on the father contained the incorrect hearing date?

We answer the first question in the affirmative,[2] and shall reverse.

[1] The question, as posed by appellant, is:

> "Did the circuit court err in denying the father's motion for a continuance, where the notice of the hearing served on the father contained the incorrect hearing date, and the Department of Social Services changed the proposed permanency plan one week prior to the hearing?"

[2] In light of our holding on the court's failure to grant a continuance because appellant did not have notice of the change in plan in accord with the statute, we need not address his lack of hearing notice argument.

I.

Because appellant's questions presented focus on narrow procedural issues, we will dispense with a full recitation of the underlying facts.

Destiny C. was born on February 27, 2006. On January 10, 2014, the Department of Social Services (DSS) took emergency custody of Destiny, removing her from appellant's home, which appellant shared with his wife (Destiny's stepmother), Amy C. On February 19, 2014, the juvenile court declared Destiny to be a Child In Need of Assistance ("CINA") and committed her to the custody of DSS. On March 28, 2014, the court placed Destiny with her aunt.

The court held a progress review hearing on September 3, 2014, which appellant attended. During the hearing, through counsel, appellant agreed that he was not able to take care of Destiny at that time and did not at that time object to Destiny's placement with her aunt. The court found that the natural mother had contacted DSS indicating that she was not in a position to be a resource for the child at that time and that the mother supported placement with the aunt. The court order of September 3, 2014 included that the court "ORDERED, that the child's **PRIMARY** permanency plan is hereby changed/continued to be as follows: *Return to the natural parents*."

On March 11, 2015, DSS workers Miller and Clouser, and supervisor Russell, signed a revised Permanency Plan Hearing Report. The revised report recommended "[t]hat custody

and guardianship of Destiny [C.] be granted to paternal aunt, . . . and that the Circuit Court for Cecil County terminate its jurisdiction in the matter of Destiny [C.]"

On March 18, 2015, the court held a second progress review hearing. The father was not present for the hearing. The circuit court first recorded DSS filing the revised report on March 18, 2015. DSS presented a proposed order reflecting the revised permanency plan placing Destiny with her aunt and terminating the court's jurisdiction. Appellant's counsel, speaking in her client's absence, objected to the revised proposed permanency plan, stating as follows:

> "Your Honor, I received a revised report from the department, I believe it was about a week ago, after the original report had been filed with the court. I have had some contact with Mr. C, albeit, not within the last couple of weeks. *There was a change in the recommendation*. Consequently, I do not believe Mr. C knows that that is the recommendation for that to happen in court today, so I would ask the court to consider continuing this matter for a period of two weeks so that we can attempt to locate Mr. C, and talk to him about the recommendations made by the department. Initially Mr. C opposed the plan of placement for Destiny where she is now, although she is doing very well. So because my client is not here and did not know that that was what was supposed to happen today, I would ask for the court to consider continuing this so that I could at least try to contact him, and I would just ask for two weeks, your Honor; and when we were last in court my understanding was we were coming back for a review hearing. I in no way ever anticipated that there was going to be a request to close the case today; consequently neither did Mr. C. Thank you."

The court denied the continuance, reasoning as follow:

> "[The Court] find[s] that it's in Destiny's best interest that this matter be terminated, that she have some stability and some peace, and that she know from today forward that that's the situation. Her aunt is in the courtroom, I believe. Is that you? And given Destiny's demeanor now and earlier today, she's a delightful young lady. It was a pleasure meeting her and talking to her. I think Destiny deserves some stability and some finality. And this court will sign the termination order."

The juvenile court granted custody and guardianship to Destiny's aunt and terminated jurisdiction.

This timely appeal followed.

II.

Appellant argues that he did not receive a copy of the DSS permanency plan for Destiny at least 10 days before the permanency plan hearing as required by § 3-823 of the Courts and Judicial Proceedings Article. Appellant's counsel objected to the proceedings during the March 18, 2015 progress review hearing, arguing that she had only received the " . . . revised report from the department, I believe it was about a week ago . . . ." Appellant argues that the court abused its discretion or erred in denying appellant's counsel's request that the court continue the matter for two weeks.

Destiny argues that the court properly considered the circumstances before it and the court's denial of appellant's counsel's request to continue was not an abuse of discretion.

Appellee DSS argues that the juvenile court acted within its discretion in denying the postponement request, the basis for which was DSS submitting a revised permanency plan to appellant about one week before the hearing.

III.

We address appellant's statutory argument: The circuit court abused its discretion or erred in denying appellant's motion for a continuance, the basis for which was DSS submitting a revised permanency plan about one week before the hearing. We agree with appellant.

In reviewing the decision of the circuit court, sitting as a juvenile court, we apply three different levels of review. *In re Shirley B.*, 419 Md. 1, 18, 18 A.3d 40, 50 (2011). First, we review the juvenile court's factual findings to determine whether they are clearly erroneous. *Id.* Second, we determine *de novo* whether the juvenile court erred as a matter of law, in which case further proceedings will be necessary unless we determine that the error is harmless. *Id.* Finally, we review the juvenile court's ultimate conclusion for an abuse of discretion. *Id.* We review the juvenile court's decision to deny a motion for a continuance for an abuse of discretion. *Touzeau v. Deffinbaugh*, 394 Md. 654, 669, 907 A.2d 807, 816 (2006).

Section 3-823 of the Courts and Judicial Proceedings Article provides as follows:

> "(d) *Distribution of permanency plan*. — At least 10 days before the permanency planning hearing, the local department shall provide all parties and the court with a copy of the local department's permanency plan for the child."

The mandatory language of § 3-823 establishes a statutory requirement that an agency "develop and implement a permanency plan that is in the best interests of the child . . . and to provide all parties and the court with a copy of the plan at least 10 days before any scheduled disposition, permanency planning, or review hearing." *In re Faith H.*, 409 Md. 625, 644, 976 A.2d 336, 347 (2009). DSS changed its permanency plan prior to the hearing, and filed the revised plan with the court on the day of the hearing. There is no indication that appellant or his counsel received a copy of the permanency plan in accordance with the statute.

Before turning to when DSS provided the revised plan to appellant, it bears noting that the statute mandates DSS provide a copy of the revised plan to a second entity—the court. The record before us reflects that the first recorded entry in the circuit court of the revised permanency plan was on the day of the hearing on March 18, 2015. The docket entries do not reflect otherwise.

DSS could not have provided appellant with the executed revised permanency plan it submitted to the court on March 18, 2015 in accord with the statute. DSS workers Miller and Clouser, and Supervisor Russell, signed the Permanency Plan Hearing Report including

the revised permanency plan on March 11, 2015, which DSS presented to the circuit court on March 18, 2015. Even if DSS sent the plan to appellant on March 11, 2015, 7 days before the hearing, the 10 day statutory requirement was not satisfied. Moreover, the record, including the detailed chronology of events included in the March 18, 2015 Permanency Plan Hearing Report, include no notation of DSS providing the revised permanency plan to appellant at any time before March 18, 2015.

Counsel for appellant related to the court at the March 18, 2015 hearing that she did receive the revised permanency plan, but not until "about a week" before the hearing. The report was not timely provided even if counsel received the report on March 11, 2015, the day DSS officials signed the plan—exactly one week before the permanency planning hearing. Appellant's counsel articulated the prejudice of the untimely delivery to appellant as follows:

> "I have had some contact with Mr. C, albeit, not within the last couple of weeks. There was a change in the recommendation to custody and guardianship going to the aunt with the case being closed. That was not the original recommendation. Consequently, I do not believe Mr. C knows that that is the recommendation for that to happen in court today, so I would ask the court to consider continuing this matter for a period of two weeks so that we can attempt to locate Mr. C, and talk to him about the recommendations made by the department."

The court considered appellant's request, denied the continuance request, granted custody and guardianship to Destiny's aunt and terminated jurisdiction.

The juvenile court abused its discretion in denying the continuance because the permanency plan had been changed and appellant was not notified properly pursuant to § 3-823(d) of the Courts and Judicial Proceedings Article. Appellant did not receive a copy of DSS's revised proposed permanency plan at least 10 days before the hearing.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE CECIL COUNTY DEPARTMENT OF SOCIAL SERVICES.