Circuit Court for Charles County
Case No. C-08-JV-18-000186

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0317

September Term, 2019

IN RE: M.A.

Fader, C.J.,
Wright,
Wells,

JJ.

Opinion by Wright, J.

Filed: October 21, 2019

On October 30, 2018, the Charles County Department of Social Services (the "Department"), appellee, filed a Petition for Guardianship with the Right to Consent to Adoption or Long-Term Care Short of Adoption, in the Circuit Court for Charles County sitting as a juvenile court. The Department sought to terminate the parental rights of M.A.'s father, C.R. ("Mr. R"), appellant, and mother ("Ms. A"). The hearings on the merits of the petition took place on March 1, 2019, and April 5, 2019. On April 5, 2019, Ms. A negotiated post-adoption contact with M.A. and M.A.'s foster care resource and consented to the Department's petition. When the hearing resumed, on April 5, 2019, the circuit court granted the Department's petition and terminated the parental rights of both parents. The court based its decision to grant guardianship on Mr. R's unfitness and the existence of exceptional circumstances that made continuation of the parental relationship detrimental to M.A.'s best interest. Mr. R does not challenge either of the circuit court's findings. Instead, he challenges only the court's exercise of its discretion to deny a continuance of the second day of the guardianship proceedings when, after Mr. R failed to appear in person, he was permitted to participate by telephone. Mr. R filed a timely appeal.

QUESTION PRESENTED

> Did the juvenile court deny Mr. R due process by refusing the continue the hearing when he could not attend in person and by failing to ensure Mr. R was present telephonically throughout the hearing?

We answer the question in the negative and, therefore, affirm the judgment of the circuit court.

PROCEDURAL AND FACTUAL BACKGROUND

Mr. R and Ms. A had three other children together: K.R., N.R., and I.R.[1] The Department became involved with the family in September 2016, when Ms. A tested positive for phencyclidine ("PCP"). The Department received a report that the children had been left alone with no food, that they could not get into their home when they returned from school, and that they had to break in to enter the home. When Ms. A arrived home, she appeared under the influence of substances and had been driving with two of her children in her car. Mr. R was not able to care for the children because he also tested positive for PCP, and he refused to take another test.

Kyle Austin ("Ms. Austin") was the Department worker for the family, working together with Lolita Gleaton ("Ms. Gleaton"). Mr. R met Ms. Austin for the first time in November 2016 to discuss the "barriers" to his reunification with the children. Ms. Austin testified that Mr. R's "main barrier" to reunification was that he had tested positive for PCP. Mr. R was completing urinalysis at the Department at that time. The Department wanted Mr. R to submit to further testing due to his positive drug test at the shelter care hearing, but he refused. The Department considered a refusal to take a test a "clinical positive," which meant that the Department believed the person was still using

[1] Ms. A has ten children, including M.A. Mr. R has twelve children, including M.A. None of Mr. R's children live with him full time. The circuit court took judicial notice of the records in M.A.'s CINA, No. C-08-JV-17-000154, and of his siblings and half-siblings. K.R., N.R., I.R., and M.A. are Ms. A's children with Mr. R. I.R. and N.R. have been adopted.

illegal substances. Ms. Austin made referrals for Mr. R to attend parenting classes at a parenting program and to participate in a psychological evaluation.

Ms. Gleaton, a former Department social worker, testified as an expert in the fields of social work, child abuse and neglect, risk and harm assessment, and permanency planning decision-making. Ms. Gleaton became M.A.'s caseworker in December 2015 and worked with Mr. R and his family until she left in April 2018. She also managed M.A.'s eight older siblings and half-siblings. As indicated above, Ms. Gleaton worked as part of a two-person team with Ms. Austin.

Mr. R was arrested for armed robbery in December 2016 and was transported to King George, Virginia. He was incarcerated from December 11, 2016 to December 13, 2017. M.A. was born on April 12, 2017, while Mr. R was incarcerated. M.A. was born drug-exposed. The Department had previously intervened in the family's life regarding M.A.'s siblings. The Department identified Ms. W, Mr. R's sister, as a potential kinship placement for M.A. Ms. W had previously been a foster care resource for another child of Mr. R's and had been approved by Pennsylvania as a placement through the Interstate Compact on Placement of the Child ("ICPC"). Ms. A signed a safety plan on May 24, 2017. Ms. W and Ms. A took M.A. to Pittsburgh, where Ms. W would attempt to gain custody of M.A. Ms. A ultimately disagreed with the plan, and M.A. returned to Maryland on October 6, 2017. As a result, Mr. R also requested that the Department consider his cousins, the H. family, as a kinship resource. The Department worked with

the H. family to complete the process of becoming a resource, but the family members did not complete the process.

Ms. A tested positive for PCP on October 27, 2017. Ms. A claimed that she tested positive because she was making marijuana "dippers" laced with PCP, not because she was actively using the drug. The Department allowed Ms. A to contact a friend in an attempt to have M.A. placed with her, but that person had an extensive history with the Department and was not a suitable resource. The Department removed M.A. from Ms. A in December 2017.

The Department also found Ms. W an unsuitable placement for M.A. because she misrepresented how many children she had living with her. Ms. W's ICPC application was initially approved, but the Department transmitted the correct information to Pennsylvania's agency, and Ms. W's ICPC approval was subsequently rescinded. Ms. A voluntarily placed M.A. with Mr. R's sister who lived in Pennsylvania, but six months later Ms. A disrupted the placement by taking custody of M.A. while under a court order to obtain substance abuse treatment and a mental health evaluation. When she failed to obtain either, the circuit court declared M.A. to be CINA[2] on December 15, 2017.

[2] Md. Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 30801(f) defines "child in need of assistance" as "a child who requires court intervention because: (a) [t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) [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."

After his release from prison, Mr. R waited a month before he made contact with the Department in order to schedule his first visit with M.A. Due to evidence of Mr. R's continued substance abuse, M.A. could not be placed with Mr. R because he presented an unacceptable risk to M.A.'s safety. Accordingly, the Department placed M.A. with Ms. D. M.A., at the time of the hearing, had been with Ms. D since he was eight months old.

Mr. R only began visiting with M.A. at the end of January 2018. He had a standing appointment time to visit on Sundays but he had to call first. Between January 2018 and September 9, 2018, Mr. R visited with M.A. between twenty and twenty-five times. The visits included time with Mr. R's other children. Mr. R failed to visit with M.A. after September 9, 2018.

In order to reunify with M.A., the Department wanted Mr. R to complete an intake, attend family recovery court, complete parenting classes and to follow all recommendations, participate in domestic violence intervention, provide random urine screens, complete a psychological evaluation and to visit with M.A., and complete genetic marker testing.

Mr. R did participate in family recovery court services and was discharged in October 2018. However, he did not attend substance abuse treatment and tested positive for alcohol use. In September 2018, he had also tested positive for PCP and marijuana. Prior to September 2018, Mr. R had tested negative for illicit substances, but he had not provided consistently negative results for ninety days in order to start unsupervised

visitation with M.A. Mr. R did not re-engage with family recovery court services following his discharge.

Mr. R did complete a psychological evaluation on February 12, 2018. The evaluator made recommendations that Mr. R engage in individual therapy for at least six months, attend anger management, and a batterer's program, due to domestic violence issues with Ms. A. Mr. R briefly attended therapy at Avenues for Healing but declined to participate in anger management sessions.

Mr. R has a history of violent criminal activity, alcohol related traffic violations, and domestic violence with Ms. A. Mr. R and Ms. A have engaged in violent behavior in front of the children. Although Mr. R acknowledged this past history, he did not take responsibility as the aggressor. Mr. R persistently refused to participate in a batterer prevention program to which he was referred by the Department.

Mr. R attended a parenting program through NOVO parenting[3] and completed the program on June 11, 2018. The program encouraged him to complete "booster sessions" to supplement the program, so that the evaluator from NOVO could observe him with M.A. The Department did not consider Mr. R to have completed the parenting program because he did not attend these sessions. Mr. R testified that he believed the booster

[3] NOVO parenting program is an intensive in-home parenting program for at-risk families referred from Social Services, whose children are in danger of being removed from the home.

sessions were voluntary, and that he had difficulty engaging with services due to his work schedule. Mr. R was employed at that time at Alexandria Auto Clinic.

Mr. R had stable housing during 2018, and the Department verified his living situation. Mr. R. testified that he visited M.A. frequently for at least two months. In his opinion, the visits went "fine" and he thought that he and M.A. had bonded. Ms. Austin, to the contrary, testified that M.A. had no lasting ties to Mr. R and that in terminating his parental rights there was "not much to take away." Although Mr. R did not attend visits with M.A. between September 2018 and the hearing, he did call Ms. D to get updates about M.A.

There was testimony that M.A. was a happy child who was doing well in his stable, pre-adoptive foster home. M.A. attended day care and did not need or receive early learning services. M.A. enjoyed activities such as learning, reading, and playing. Ms. D brought M.A. into regular contact with his siblings and supervised parent visitation. Testimony indicated that M.A. called Ms. D "Momma," that M.A. turned to her for emotional support, and that Ms. D wanted to adopt M.A.

Ms. Austin testified at that time, that despite numerous supportive services and the expectations of the Department, Mr. R remained unable or unwilling to produce consistent, negative urinalyses, and failed to demonstrate his sobriety; consequently, his visitation with M.A. remained supervised. Ms. Austin opined that M.A.'s emotional bond and commitment was with Ms. D and that, to a reasonable degree of professional certainty, terminating Mr. R's parental rights to M.A. would be in M.A.'s best interests.

Request for Continuance and Telephone Hearing

On February 21, 2019, Mr. R's attorney requested a continuance of the March 1, 2019 proceedings due to Mr. R's "recent" car accident. Mr. R alleged that he had "limited [his] mobility" and needed "to recuperate." The circuit court denied the motion.

The hearing on the merits of the Department's guardianship petition began as scheduled on March 1, 2019. The parents both arrived late but were present for the proceedings that day. When the hearing resumed on April 5, 2019, Ms. A had agreed to post-adoption contact with M.A.'s foster care resource and consented to the guardianship petition.

Although Mr. R received notice, he failed to appear for the second day of the hearing. Counsel for Mr. R informed the court that he would be arriving at the courthouse at 12:00 p.m. After waiting until 12:40 p.m., the court noted that Mr. R was forty minutes past his predicted noon arrival time. Counsel for Mr. R then renewed her request for a continuance. The court denied the motion to continue the case.

After a brief recess, the court asked Mr. R's attorney to "get him up on the telephone so that he can participate by phone until he is able to get here." The court reconvened 17 minutes later at 12:57 p.m., when Mr. R confirmed that he could hear the proceedings in the courtroom as he drove to the courthouse, and would, as instructed by his attorney, call her or her office if he could not hear the proceedings. There was no objection to having Mr. R participate by speakerphone.

At some point during Ms. Austin's testimony, Mr. R's attorney realized that Mr. R had stopped listening to the hearing. Mr. R had either lost the connection to the courtroom speakerphone or had turned off the sound on his telephone. Mr. R did not call his attorney to inform her of the lapse as he had agreed. His attorney called him back to reconnect him to the proceedings, and when he answered, he claimed not to have heard the prior 30 minutes of testimony by Ms. Austin. After another disconnect, the court noted that the problem was not with the court system hanging up.

Once the connection was restarted, Mr. R again agreed to put his phone on mute while he listened to the proceedings. There was another disconnect when Ms. Austin testified about M.A.'s strong bond with Ms. D; Ms. Austin explained that Mr. R "has a tendency to turn it [his phone] off if he doesn't want to talk to you." When Mr. R's attorney called him back Mr. R's phone went to voice mail. His attorney left Mr. R a message indicating that the hearing would continue, and that he should call her to conference back into the hearing.

The court again took a recess before Mr. R's case was to resume. Mr. R spoke with his attorney privately for 20 minutes, and when the court reconvened, Mr. R decided to testify at the hearing. The court noted that Mr. R was still driving to the courthouse and that one hour and forty minutes earlier he had stated that he was one hour and thirty minutes away.

When M.A.'s counsel cross-examined Mr. R at approximately 3:45 p.m. and asked Mr. R where he was, Mr. R stated he was on I-495, which was what he had said at 11:30

a.m. Asked where he had been, Mr. R stated he was seeing a foot doctor in Pennsylvania "to get surgery on my foot." He explained, "[m]y foot is broken. My foot has been diagnosed down there. So I go all the[] way out of town to see a bone doctor."

The court then questioned Mr. R and asked him where he had been at 9:00 a.m. that morning. Mr. R stated that he had been on his way to the courthouse. The court asked him where he was coming from. He stated he was driving from Pittsburgh, Pennsylvania. The court asked him when he was there, and he stated he was there "yesterday," *i.e.*, April 4, 2019. When the court asked him when he had left Pittsburgh to come to the hearing, Mr. R said he had left at 6:00 a.m. on April 5, 2019. Mr. R never reached the courthouse to attend the hearing.

Findings of the Juvenile Court

Based on the documentary and testimonial evidence, the juvenile court made findings under each of the factors in Md. Code (1984, 2012 Repl. Vol.), Family Law Article ("FL") § 5-323(d). The court also made a credibility finding that Mr. R's telephonic testimony was evasive, inconsistent, not credible, and, at times, incoherent. The circuit court gave primary consideration to M.A.'s health and safety and found by clear and convincing evidence that Mr. R had abandoned M.A. The evidence was overwhelming that he is unfit to be a parent to M.A.

Specifically, the juvenile court found that Mr. R has twelve children and that none were in his custody. During his two and one-half years of involvement with the Department, Mr. R had failed to demonstrate any ability to maintain stability for himself

or his twelve children. He had an extensive history of substance abuse that remained untreated and presented an ongoing safety risk to M.A. Mr. R had failed to make M.A. a priority, and he had made no effort to change his circumstances to obtain unsupervised visitation, let alone "unification" with M.A. The court found it would be unrealistic to expect Mr. R. -- who by his own choice had not seen M.A. for seven months prior to the guardianship hearing -- to make any efforts to improve the situation to the degree that he would be a good placement option for M.A. There were no additional services likely to bring about a lasting parental adjustment so that M.A. could be placed with Mr. R within an ascertainable period of time. The court found Mr. R would never be able to have custody of M.A.

The juvenile court also found that exceptional circumstances existed that made continuation of the relationship detrimental to M.A.'s best interests. Mr. R had failed to take advantage of opportunities to develop a relationship with M.A. and had failed to benefit from the services provided to him. By failing to visit M.A. for seven months before the guardianship proceedings, Mr. R had abandoned M.A., with the result that he had no relationship or attachment to Mr. R.

Based on the above, the juvenile court found there would be no negative effects on M.A. in terminating parental rights and that doing so would be only positive for M.A. Moreover, the court concluded that maintaining the parent-child relationship between M.A. and Mr. R would be detrimental to M.A. In conclusion, the court found that terminating parental rights best served M.A.'s interests and would free M.A. to be

adopted by Ms. D, who was ready, willing, and able to provide him permanence in a "forever home."

Standard of Review

An appellate court applies the clearly erroneous standard to review a juvenile court's factual findings. *In re Shirley B.*, 419 Md. 1, 18 (2011). Where there "is a purely legal issue involving interpretation of the Maryland Code and the Maryland Rules of Procedure, [the court] review[s] the juvenile court's decision under a *de novo* standard." *In re Malichi W.*, 209 Md. App. 84, 89 (2012) (citation omitted).

The granting or withholding of a continuance is discretionary with the circuit court and the judge's action in this respect, unless arbitrary, will not be reviewed on appeal. *Attorney Grievance Comm'n of Md. v. Steinberg*, 395 Md. 337, 361 (2006) (quoting *Crus Along Boat's, Inc. v. Langley*, 255 Md. 139, 142 (1969)); s*ee Touzeau v. Deffinbaught*, 394 Md. 654, 669-70 (2006).

Regarding the abuse of discretion standard, "we will only disturb a court's ruling if it does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective." *In re Adoption of Jayden G.*, 433 Md. 50, 87 (2013) (internal quotations and citation omitted). "Questions within the discretion of the trial court are 'much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred.'" *In re Caya*

B., 153 Md. App. 63, 74 (2003) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312-13 (1997) (internal quotation omitted).

In cases where a person has failed to appear to establish an abuse of discretion, there must be a showing that the party that failed to appear had been diligent in its efforts to attend the court proceedings. *See Touzeau*, 394 Md. at 679.

Continuance and Due Process

Mr. R argues that the juvenile court denied him due process and abused its discretion by refusing to continue the hearing when he could not attend in person and failed to ensure he was present telephonically throughout the hearing. Specifically, he argues that the court did not monitor his presence or confirm whether he was participating in the hearing.

The Department responds that the court acted within its discretion when it denied Mr. R's request for a continuance on the second day of the guardianship proceedings and permitted him to participate by telephone after finding that his excuses for failing to appear lacked credibility. We agree with the Department.

On March 1, 2019, the juvenile court advised the parties on the record that the second day of the proceedings would begin at 9:00 a.m. on April 5, 2019. Mr. R, therefore, had ample notice of the date and time of the proceedings but did not inform the court he had an appointment in Pittsburgh on the day before the hearing. After hearing his explanation, the court found his excuses for not attending the hearing lacked credibility. *See In re O.P.*, 240 Md. App. 518, 576 (2019), *cert. granted*, No. 76, Sept.

Term, 2019, 2019 WL 3770220 (Md. July 12, 2019) ("Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the factfinder.") (quotations omitted). Moreover, Mr. R's explanation was lacking as he chose to leave Pittsburgh at 6:00 a.m. on the day of the hearing to return to Maryland instead of leaving the day before. Therefore, Mr. R failed to demonstrate that he had made reasonable and diligent efforts to attend the April 5, 2019 hearing. In fact, he did not exercise "due diligence." *See Touzeau*, 394 Md. at 675 ("[T]his case lacks the element . . . of . . . due diligence."). A person who wants to gain custody of a child is expected to show some initiative. *See In re Adoption/Guardianship No. 94339058/CAD*, 120 Md. App. 88, 105 (1998).

Further, Mr. R did not object to his participating by speakerphone after the juvenile court denied his request for a continuance. Consequently, the issue of the adequacy of his participation has not been preserved for appellate review. *See In re Billy W.*, 384 Md. 405, 446 (2005) (refusing to address in a permanency plan appeal, an issue that had not been "preserved by sufficient objection at the trial court level"). Assuming arguendo that objection to participating is preserved for review, we move to the merits of his argument.

In it' brief, the Department put it well when it quoted, "[d]ue process is . . . a flexible concept that calls for such procedural protection as a particular situation may demand." *In re Maria P.*, 393 Md. at 674. It demands no more than "reasonable procedural protections, appropriate to the fair determination of the particular issues

presented in a given case." *Id.* at 675. A party's right to be present and to participate in a trial in a civil proceeding is rooted in "the common law of Maryland, and the due process clause[s]" of the Federal and Maryland constitutions. *Id.*, 393 Md. at 672. While a party to a civil proceeding ordinarily may not be excluded from the trial of his case, his right of presence "is not absolute." *Green*, 366 Md. at 618-19; *accord In re Maria P.*, 393 Md. at 677-78. The Court of Appeals has "made clear, as have most other courts in the nation, . . . that there are circumstances in which a civil case may proceed without the attendance of a party and, indeed, with the party excluded." *Maria P.*, 393 Md. at 672.

"Procedural due process mandates that a person be accorded an opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 193-94 (quoting *Matthews v. Elridge*, 424 U.S. 319, 333 (1976)) (internal quotation marks omitted). The *Matthews* factors determine what process is due. Those factors include:

> First, the private interest that will be affected by an official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id., 424 U.S. at 335.

As to the request for a postponement, Mr. R failed to appear for the hearing and agreed to participate in the proceedings by speakerphone with the assistance of counsel. The court was not required to interrupt the proceedings to allow Mr. R, who had waived his physical appearance by his unexcused absence, to continue the trial, particularly when

he agreed to participate by speakerphone. *See In re Lavar D.*, 198 Md. 526, 597 (2009) ("The conduct of the trial 'must of necessity rest largely in the control and discretion of the presiding judge,' and an appellate court should not interfere with that judgment unless there has been error or clear abuse of discretion." (*Id.* omitted)).

In guardianship proceedings, this Court has held that due process does not require the physical presence of the parent, or even that the parent have the right to participate remotely via speakerphone or the like but only that the parent, on request, be afforded the opportunity to participate in the guardianship trial in some meaningful way. *In re Adoption/Guardianship No. 6Z98001*, 131 Md. App. at 190. We rejected a father's claims that the juvenile court's actions in denying his motions to dismiss and for continuance based on his absence from the proceedings, either in person or by speakerphone, deprived him of due process. *Id.* at 191-97. In the context of a guardianship proceeding, a parent does not have the same rights of presence as that guaranteed a criminal defendant under the Sixth Amendment, which "as a general principle . . . is inapposite in this context." *Id.* at 191-92.

In the guardianship context, both the private and governmental interests are compelling. *In re Adoption/Guardianship No. 6Z98001*, 131 Md. App. at 198 (citing *In re Adoption/Guardianship No. 93321055*, 344 Md. 458, 491-92 (1997)). The private interest is one of the most basic of rights: "the parent's fundamental right to raise his or her children." *In re Adoption No. 93321055*, 344 Md. at 491. The governmental interest—securing permanent homes for children placed into its custody because of an

inability or unwillingness of their parents to care for them properly—also is "strong and vital." *Id.* The pivotal issue, then, "is the risk of error created by the challenged procedure." *In re Adoption/Guardianship No. 6Z98001*, 131 Md. App. at 198; s*ee In re Adoption No. 93321055*, 344 Md. at 491-92.

In this case, Mr. R had failed to appear after receiving notice. The court deemed the reasons he gave for his absence to not be credible. He failed to object to participating by telephone and failed to remain on the call by his own volition. The court's decision to continue with the second day of hearing with telephone participation by Mr. R had a reasonable relationship to the objective of seeking some permanency in the life of M.A. The juvenile court acted well within its discretion when it refused to permit Mr. R to delay efforts to secure permanence in M.A.'s life. The juvenile court neither acted in an arbitrary manner nor denied Mr. R due process.

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