

Circuit Court for Cecil County
07-I-15-000015-16

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 452

September Term, 2017

IN RE: ADOPTION/GUARDIANSHIP OF
D.M. AND G.S.

Nazarian,
Reed,
Beachley,

JJ.

Opinion by Reed, J.

Filed: March 12, 2018

*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.

Appellant’s (Ms. S’s) parental rights to her two children were terminated at a Guardianship Hearing and granted to the Cecil County Department of Social Services (“CCDSS” or “the Department”). By the hearing date, no objection to the termination of Ms. S’s parental rights had been filed. At the Guardianship Hearing, Ms. S’s counsel first entered her appearance and raised issues regarding Ms. S’s potential mental disabilities for the first time. Counsel for Ms. S also sought a postponement to allow her to speak with Ms. S to explore filing an objection to the termination of Ms. S’s parental rights. However, as the deadline for filing had since passed, the court denied Ms. S’s counsel’s request and granted guardianship with the right to consent to adoption of Ms. S’s two children to the Department. It is from this court decree that Ms. S appeals.

Ms. S presents the following questions which we have consolidated and rephrased:

1. Did CCDSS fail to disclose Appellant’s mental health diagnoses in its petition?
2. Did Appellant receive ineffective assistance of counsel?
 - a. Did counsel fail to timely raise the issue of Appellant’s disability and fail to file a notice of objection?
 - b. Did counsel fail to ensure that mediation was conducted before the Guardianship proceeding?
 - c. Did counsel fail to raise the issue of improper service on Appellant?

For the following reasons we affirm in part and vacate in part.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant, K.S. (“Ms. S”), is the natural mother of D.M. (“D”) and G.S. (“G”). G was born substance exposed. Ms. S had used drugs for several years and had grown addicted to opiates and narcotic pain medications. In January of 2014, Ms. S’s two children, D, then age three, and G, then two months old, were removed from her home because of her drug use. The juvenile court deemed the children CINA but closed their cases by granting custody to Ms. S’s mother. The children returned to Ms. S’s mother’s home, where Ms. S had also been residing. On December 19, 2014, the Cecil County Department of Social Services (“CCDSS” or “the Department”) learned that Ms. S’s mother often left four-year old D unsupervised in the street, that there were several physical altercations in the home, that police often responded to the home because of these altercations, and that both Ms. S and her mother were abusing substances. A safety improvement plan was initiated between the Department and Ms. S’s mother, but after the plan’s failure, the children were removed from the home on April 3, 2015. A Shelter Care Hearing was held on April 15, 2015 and emergency shelter was granted as to both children. After an Adjudicatory and Disposition Hearing held on May 20, 2015, the children were again found to be CINA and committed to the Department to be placed.

Per Ms. S’s service agreement with a Foster Care Natural Parent Worker, executed May 29, 2015, Ms. S agreed to complete drug and alcohol assessments, engage in parenting classes, complete a psychological evaluation, and establish legitimate income to support herself and her family. Although having tested positive for a few drug tests during the first

months of the agreement, Ms. S had negative drug screens for August and September, completed her parenting course, and her psychological evaluation. Additionally, an October 21, 2015 CCDSS Progress Review Report¹² stated that Ms. S was extremely consistent with visits with the children and her behaviors appropriate.

Another review was held on April 6, 2016. The report stated that “[Ms. S] has remained mostly consistent with her visitation...however the appropriateness of the visits varies greatly...Since the last review hearing [Ms. S] appeared under the influence in approximately (4) or (5) of her scheduled visits.” She has also appeared at her visits unable to keep her eyes open, lethargic, with slurred speech and once nodded out completely, unable to be awakened. The report also noted that Ms. S was arrested on March 19, 2016, and charged with one count robbery, two counts of theft less than \$1,000, one count theft less than \$100, and one count for possession-not marijuana. The Department learned that the stolen items belonged to Ms. S’s mother. Based on the April 6th review, the Department recommended that the children remain CINA, that Ms. S work towards reunification with the children, and that the permanency plan remain reunification.

¹ Progress Review Hearing Reports were conducted on May 6, 2015, October 21, 2015, April 6, 2016, July 6, 2016, October 18, 2016, and April 18, 2017.

² On June 12, 2015, D and G were moved to a second foster home, due to the previous home’s inability to keep the children long term. The October report stated that both children were doing well in their foster care placement.

The Plan Changes

An October 18, 2016 review hearing and report maintained that the children remain CINA but changed the recommendation, stating that “the Permanency Plan be changed from Reunification to a Primary Plan of Adoption by a Non-Relative and a Secondary Plan of Reunification.” The plan also recommended that a court-ordered mediation be arranged to help facilitate communication about a post-adoption agreement. All parties were to participate in the mediation, however mediation never occurred because of scheduling conflicts and because Ms. S never filed an objection to the termination of parental rights (TPR).

The CCDSS filed its Guardianship Petition on October 31, 2016, and a Show Cause Order was issued on November 9, 2016. Ms. S’s then-counsel was served with both on December 6, 2016 and was notified that the Guardianship Hearing date was scheduled for April 14, 2017. Ms. S was served on December 22, 2016.³ Ms. S appeared for the Guardianship Hearing without counsel. Ms. S’s counsel arrived after receiving a phone call to appear. Counsel then asked to enter her appearance and requested a postponement of the TPR hearing. She stated that she had been negotiating a post-adoption agreement on Ms. S’s behalf, that she and Ms. S had prior discussions about an objection to the TPR, and that she wanted to further discuss with Ms. S why she had not filed an objection. Counsel stated that Ms. S was confused and emotional and therefore wanted to explore whether a basis

³ The parties dispute whether Ms. S was appropriately served.

existed for not timely filing an objection. The court denied counsel’s request for postponement, made no finding of a disability, and found that Ms. S consented to the termination of her parental rights when she failed to object. Consequently, CCDSS was granted guardianship rights with the right to consent to adoption for D and G. It is from this order that Ms. S appeals.

Discussion

I. Ms. S’s mental health diagnoses

A. Parties’ Contentions

Ms. S argues that the CCDSS failed to disclose her mental health diagnoses in its Petition for Guardianship. She asserts that the Department’s failure to disclose these material facts “severely impacted” the appointment of her counsel, thereby directly impacting the outcome of the case at trial. Ms. S supports her argument using Md. Rule 9-103, which states that a Petition for Guardianship must include “facts known to each petitioner *that may indicate* that a party has a disability that makes the party incapable of consenting or participating effectively in the proceedings, or, if no such facts are known to the petitioner, a statement to that effect.” (Emphasis added.) Ms. S continued that the Department’s statement that they were unaware of any facts that would indicate that she had a disability that would render her incapable of participating in her proceeding was untrue. Ms. S asserts that her psychological evaluation, conducted in July 2015, and submitted into evidence by the Department, states that Ms. S has major depressive disorder recurrent, a specific learning disorder, an extremely low ability to comprehend written

material, and severe acute mental illness. Ms. S further states that although the Department may have disagreed that her disability might indicate her incapability to effectively participate in the trial, it was still required to disclose Ms. S’s disability. She continues that because the Department failed to do so, she was deprived of a Disability Determination Hearing and therefore denied her right to counsel which violated her due process rights. Ms. S asks this Court to find that the right to effective assistance of counsel, recognized in *In Re Adoption/Guardianship of Chaden M.*, 422 Md. 498, 510 (2011), attaches at the time an allegation of potential disability should have been made, such as when evidence in the court’s CINA file reveals that information. We disagree, and state our reasons below.

The Department argues that neither Ms. S’s mental health diagnoses nor her ability to comprehend written material at the fourth-grade level indicate lack of capacity to consent to a termination of parental rights or effectively participate in TPR proceedings. The Department asserts that Ms. S’s opinion that the Department is required to disclose mental health diagnoses for every parent in every TPR petition would result in every parent being entitled to a disability determination hearing based on the outcome of a psychological evaluation. The Department further asserts that Md. Rule 9-103 does not require that one’s mental health diagnosis or their learning disability be disclosed, and that regardless of which, the facts known to the Department did not support an indication that Ms. S lacked capacity to consent. The Department contends that evaluations of Ms. S revealed that “her recent memory was good and she exhibited no evidence of abnormal thought content or perception.” The Department last argues that Ms. S’s counsel did not raise the issue of

whether Ms. S was entitled to a hearing to determine whether she had a disability that rendered her incapable of consenting to the TPR or one that would affect her participation in the proceedings and therefore, cannot argue the issue on appeal. It is this last contention that is problematic and causes us to remand this case for further proceedings because of the ineffective assistance of counsel.

B. Standard of Review

In CINA cases, factual findings by the juvenile court are reviewed for clear error. An erroneous legal determination by the juvenile court will require further proceedings in the trial court unless the error is deemed to be harmless. The final conclusion of the juvenile court, when based on proper factual findings and correct legal principles, will stand unless the decision is a clear abuse of discretion.

In re Ashley S., 431 Md. 678, 704 (2003) (internal citations omitted).

C. Analysis

This Court rejects Ms. S’s argument that she was deprived of a Disability Determination Hearing due to the Department’s failure to disclose her disability in the petition. “Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.” *Jones v. State*, 379 Md. 704, 712 (1994). The record indicates that Ms. S’s counsel failed to raise or make a request for a Disability Determination Hearing in the juvenile court. Accordingly, this Court properly declines to address this argument.

If the Court had addressed this argument, we would point out that the contents of a petition for adoption are governed under Md. Rule 9-103(b). The specific provision at issue in this case is 9-103(b)(1)(K), which states:

(1) *Contents.* A petition for adoption shall be signed and verified by each petitioner and shall contain the following information:

(K) Facts known to each petitioner that may indicate that a party has a disability that makes the party incapable of consenting or participating effectively in the proceedings, or, if no such facts are known to the petitioner, a statement to that effect.

Ms. S asserts that per 9-103, the information in her psychological evaluation required the CCDSS to disclose her mental health diagnoses in the Guardianship Petition, but that the Department failed to do so. We disagree with Ms. S and find that the Department adhered to Md. Rule 9-103. Md. Rule 9-103(b)(1)(K) specifically references a disability that makes a party incapable of consenting or incapable of effectively participating in proceedings. Although Ms. S's psychological evaluation states that she had symptoms of major depressive disorder, acute mental illness, and post-traumatic stress disorder, the evaluation did not formally diagnose Ms. S with these disabilities, nor are the facts of Ms. S's case indicative of a person who is incapable of consenting or participating in proceedings. However, assuming that all parties have relied on the evaluation, it also states that at her status exam, Ms. S did not display evidence of a thought disorder, that her registration was intact, that her recent memory was good, that her attention and concentration appeared grossly intact, and that there was no evidence of abnormality of thought content or

perception. Additionally, Ms. S had never received treatment for any of these disorders. The record, as well as counsel’s assertions at oral argument, establish that Ms. S consented to the change in the permanency plan from reunification to adoption. Ms. S also agreed to engage in mediation with the Department, which all parties concede was discussed, although mediation never took place. This Court does not intend to minimize the importance of mental health issues, however, the existence of a mental health issue does not necessarily make one incapable of consenting or effectively participating in a court proceeding—especially in a person who has demonstrated her ability to consent. Accordingly, we disagree with Ms. S’s assertion that the Department was required to disclose her alleged disability in the Guardianship Petition.

This Court also finds no justification for extending the Court of Appeals’ decision in *In Re Adoption/Guardianship of Chaden M.*, 422 Md. 498 (2011), as requested by Ms. S, to find that the right of effective assistance of counsel attaches when an allegation of potential disability should have been made, rather than when the allegation is actually made. In *In Re Adoption/Guardianship of Chaden M.*, the Court of Appeals engaged in plain meaning statutory interpretation of 9-105 to find that the plain language of the statute confers a right to an attorney where there is an allegation that a parent may be disabled. The Court continued with a plain meaning statutory interpretation of MD. CODE ANN., FAM. LAW 5-307 (2008), finding that the code provides for representation of a disabled parent in guardianship proceedings, unless that parent is already entitled to representation under C.P. § 16-204. “In interpreting a statute, [the Court’s] goal is always to ascertain and

effectuate the intent of the Legislature. In attempting to discern that intent, courts look first to the plain language of the statute, giving it its natural and ordinary meaning. If the language is clear and unambiguous, our search for legislative intent ends and we apply the language as written and in a commonsense manner.” *Cosby v. Department of Human Resources*, 425 Md. 629, 644 (2012) (Internal citations and quotations omitted). Accordingly, this Court declines to look beyond the plain meaning of these unambiguous statutes to give them a meaning the legislature did not intend to give. Additionally, this Court cannot modify a decision from the Court of Appeals.

II.a. Ineffective Assistance of Counsel

A. Parties’ Contentions

Ms. S argues that her counsel failed to notify the court of CCDSS’s failure to disclose information about her disability in its petition. She also argues that her counsel failed to request a disability determination hearing on her behalf or enter her appearance in the Guardianship proceeding, and states that a disability determination is of “utmost importance.” Ms. S cites *In Re Adoption/Guardianship No. TPR970011*, 122 Md. App. 462 (1998) to contend that the legislature intended for a CINA attorney, once served or notified, to provide effective assistance of counsel to a client with a disability. Ms. S asserts that the record is devoid of any detailed information regarding her counsel’s actions to communicate with her about her disability or her desire/need for representation after receiving the Department’s Guardianship Petition. Ms. S further asserts that her counsel raised the issue of her disability for the first time at the Guardianship Hearing on April 14,

2017. There, counsel stated her basis for why the court should permit her untimely objection. Ms. S contends that although counsel mentioned that “it takes substantially longer than that to process it with my client, under the best of conditions,” counsel never mentioned Ms. S’s psychological evaluation. Ms. S asserts that by her counsel’s own admission, counsel failed to speak with her prior to the hearing about her disability, and therefore, counsel violated the Maryland rules of professional responsibility. Ms. S continues her argument by stating that a parent’s due process right is violated when she is deemed to have consented to the permanent severance of her relationship with her children due to the non-disclosure of her potential disability.”

Ms. S asserts that her counsel was aware that she sought a permanency plan of “open adoption” and thus, because the aim of counsel’s representation was to ensure continued contact between Ms. S and her children, counsel was required to carry out her representation to achieve that goal. Ms. S also asserts that although CINA and Guardianship proceedings are separate, it was reasonable for her to believe that her CINA counsel would continue representing her in the Guardianship proceedings because the two proceedings involved the same parties, facts, evidence, witnesses, and usually the same attorneys. Ms. S argues that her CINA counsel failed to enter her appearance before attending the Guardianship hearing and had no legitimate explanation for failing to file the notice of objection. Ms. S further contends that the trial court was “biased in favor of Appellant’s counsel because [the judge] had known her in excess of twenty-five years” and

therefore should have recused herself for presuming without evidence, that Ms. S’s counsel had performed her ethical duty.

Lastly, Ms. S argues that her ineffective assistance of counsel claim satisfies the *Strickland* test. Appellant argues that this two prong test, requiring deficient performance and prejudice to the client, have both been met. As it pertains to deficient performance, Ms. S asserts that her counsel: failed to disclose her mental health diagnoses to the court; counsel failed to request a Disability Determination Hearing after being served with the Guardianship Petition; counsel failed to file a notice of objection to the Guardianship proceeding; and counsel failed to ensure that mediation was included in the CINA order. Ms. S continues that all of these deficiencies prejudiced her in that she was denied due process and counsel at critical stages of the proceeding, she was denied the opportunity for a fair and impartial hearing to determine whether she had a disability; and she was denied the opportunity to negotiate and enter a contract to guarantee contact with her children.

The Department asserts that a parent’s failure to timely file an objection to a Guardianship petition serves as a deemed consent to the TPR and forecloses the parent’s right to defend per Md. Code Ann., Fam. Law § 5-320(a)(1)(iii)(C). The Department contends that this filing deadline is absolute and that the court has no discretion to accept a late-filed objection. The Department however cites *In re Adoption/Guardianship of Chaden M.*, 422 Md. 498, 514-15 (2011) where the Court of Appeals found that a mother suffered prejudice as a result of her attorney’s failure to file a timely objection. The Department asserts that unfortunately, the juvenile trial court took no testimony to

determine what transpired between Ms. S and her counsel and therefore, an evidentiary hearing would have been appropriate. The Department concedes that if Ms. S’s counsel’s failure to file an objection was due to ineffective assistance of counsel, Ms. S was prejudiced and therefore should be permitted to file a belated objection.

B. Standard of Review

To prove deficient performance, the defendant must identify acts or omissions of counsel that were not the result of reasonable professional judgment. The standard by which counsel's performance is assessed is an objective one, and the assessment is made by comparison to prevailing professional norms. Judicial scrutiny of counsel's performance is highly deferential, and there is a strong (but rebuttable) presumption that counsel rendered reasonable assistance and made all significant decisions in the exercise of reasonable professional judgment. As we indicated in *Redman*, 363 Md. at 310, 768 A.2d at 662, “the inquiry has two foci: first, a performance evaluation under prevailing professional norms; and second, an inquiry into whether the defendant suffered prejudice as a result of deficient performance.” In assessing the reasonableness of counsel's performance, the reviewing court should keep in mind that counsel's primary function is to effectuate the adversarial testing process in the particular case. Nonetheless, a single, serious error can support a claim of ineffective assistance of counsel.

In re Parris W., 363 Md. 717, 256-26 (2001).

C. Analysis

Both Ms. S and the Department cite *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court of the United States’ decision establishing the test for determining whether a party’s counsel was ineffective. There, the Court held that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the

proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686.

Ms. S asserts that her counsel in the Guardianship proceedings was ineffective because she failed to object, on Ms. S’s behalf, within the allotted time period, and was prejudiced as a result. Ms. S also contends that her counsel failed to disclose her mental health diagnoses to the court, failed to request a Disability Determination Hearing after being served with the Guardianship Petition, and failed to ensure that mediation was included in the CINA order. Ordinarily, when a parent fails to file an objection to a petition for Guardianship within the 30 day time limit, that parent is considered to have consented to the petition. This deadline is absolute. *See In re Adoption of Chaden M.*, 422 Md. 498, 512 (2011) “A parent who fails to file a timely notice of objection is deemed to have consented by operation of law.” F.L. § 5–320(a)(1)(iii)(C). That failure forecloses the parent’s ability to contest the petition. [T]he statutory scheme of regarding the failure to file a timely objection as an irrevocable deemed consent to the petition does not facially offend any due process right of the parent.” (Internal citations omitted). Although the deadline to object is absolute, the Court of Appeals made an exception in *In re Adoption/Guardianship of Chaden M.*, 422 Md. 498, 514-15 (2011), where it allowed a parent to make a belated objection because of her counsel’s failure to file a timely objection on her behalf, resulting in prejudice towards the mother. The Department in this case has conceded that if Ms. S’s counsel’s failure to file an objection was the fault of ineffective assistance of counsel, Ms. S was prejudiced and therefore should be permitted to file a

belated objection. As such, there is no issue and we remand for the limited purpose of allowing the court to determine whether Ms. S's failure to object was caused by ineffective assistance of counsel and whether Ms. S should be allowed to file a belated objection to the petition for Guardianship and to engage in mediation.

II.b. Mediation

A. Parties' Contentions

Ms. S asserts that her counsel failed to ensure that the parties participated in mediation, as agreed to during the uncontested permanency plan review hearing on October 18, 2016. She continues that the court orally ordered that all parties engage in mediation to discuss Ms. S's desire for open adoption, but that mediation mandate was not put in the court's written order. Ms. S contends that her counsel violated the rules of professional responsibility when she failed to properly review the court's written order to ensure that it memorialized the mediation clause. Accordingly, Ms. S asserts that because mediation never took place, she was deprived of the opportunity to negotiate a post-adoption agreement that would allow her continued contact with her children.

B. Analysis

In light of the Department's counsel's agreement to allow the circuit court to consider ineffective assistance of counsel, we remand for the purpose of allowing the court to consider as well whether Ms. S should be permitted to engage in the mediation process. If so, counsel should be given a reasonable period of time to notify the court of what action Ms. S wishes to take.

II.c. Service

A. Parties' Contentions

Ms. S argues that during the Guardianship Proceeding, her counsel failed to argue that she was improperly served. Ms. S contends that the affidavit of service was completed by Shannen Gentry, an employee of CCDSS and one of the Foster Care Natural Parent Workers assigned to her. Ms. S asserts that these roles make Ms. Gentry a party to this action and thus limited her ability to appreciate the importance of the documents she was receiving or that she was being served. She concludes that had her counsel argued improper service, the clock limiting the time to file the notice of objection would have not yet begun to run.

The Department argues that Ms. Gentry was permitted to serve Ms. S because though an employee of CCDSS, an employee of a party is not prevented from serving process per *Palmisano v. Baltimore County Welfare Bd.*, 249 Md. 94, 102 (1968).

Analysis

On this point, we agree with the Department. In *Palmisano*, natural parents sought to regain their child after signing a 'Release of Parental Rights,' turning the child over to the Baltimore County Welfare Board for adoption. The social worker involved in the case was an employee of the Baltimore County Welfare Board and informed the parents that if the child became adopted, their parenthood would be irrevocably terminated. The parties moved forward with the 'Release of Parental Rights.' A show cause order was later issued and served on the mother and the social worker. The mother filed no objection.

Accordingly, the Baltimore County Welfare Board sent a consent to adoption to the Harford County Welfare Board, where the child’s foster parents sought to adopt the child. The natural mother sought to regain the child and the social worker expressed the mother’s wishes to the Harford County Welfare Board. After petitioning the Harford County Circuit Court, the foster parents were assigned as the child’s adoptive parents by way of final adoption decree. On appeal, the natural parents asserted irregularities to the show cause order, one of them being that it was delivered to them by the social worker, who the parents contend was an interested party. The Court of Appeals concluded that the social worker “was an employee of the Baltimore County Welfare Board and not herself a party to the hearing.” The Court stated “that a party to a suit may not be appointed to serve process. However, the Court has never held an employee of a party to be under such a disability.”

In line with the Court of Appeals’ reasoning in *Palmisano*, we find that Ms. S was properly served.

**JUDGMENT OF THE CIRCUIT
COURT FOR CECIL COUNTY
AFFIRMED IN PART, VACATED
IN PART AND REMANDED FOR
PROCEEDINGS CONSISTENT
WITH THIS OPINION. COSTS
TO BE PAID IN PART BY
APPELLANT AND IN PART BY
APPELLEE.**