Circuit Court for Cecil County
Case No. 07-I-14-000060

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0472

September Term, 2016

IN RE: K.A.

Arthur,
Reed,
Beachley,

JJ.

Opinion by Reed, J.

Filed: December 7, 2016

This appeal arises from a decision of the Circuit Court for Cecil County, sitting as a juvenile court, to change the permanency plan for K.A.,[1] from a plan of reunification with her father to a primary plan of adoption by a non-relative. Appellant, Mr. A., who is K.A.'s father, filed a timely notice of appeal of the juvenile court's order,[2] presenting three questions for our review:

1. Did the court err by finding the Department made reasonable efforts toward the permanency plan of reunification?

2. Did the court err by changing K.A.'s permanency plan?

3. Did the court err by excluding the father and his attorney from the child interview without considering the father's due process rights or articulating a reason for the exclusion?

For the following reasons, we answer each question in the negative, and accordingly, affirm the juvenile court's order.[3]

FACTUAL AND PROCEDURAL BACKGROUND

K.A. was born on June 20, 2003. Throughout her life she has been in the custody of several people. Upon her mother's incarceration, K.A. was placed in the custody of her maternal grandmother. On July 23, 2010, when the grandmother could no longer care for

[1] In furtherance of the privacy interests of Md. Rule 8-121(b), the juvenile will be referred to by her initials only in the caption of this appeal and in the opinion.

[2] K.A.'s mother, Ms. M., is not a party to this appeal.

[3] An order changing a permanency plan for a child adjudicated to be a Child in Need of Assistance is an appealable interlocutory order pursuant to Md. Code (1974, 2013 Repl. Vol.), § 12-303(3)(x) of the Courts & Judicial Proceedings Article ("CJP"), which allows an appeal from an interlocutory order depriving a parent of the care and custody of his child, or changing the terms of such an order. *See In re: Ashley E.*, 158 Md. App. 144, 160 (2004), *aff'd,* 387 Md. 260 (2005). Therefore, this appeal is correctly before us.

K.A., she placed her with a family friend, H.B. At that time, H.B. was in a relationship with M.C. When that relationship ended, K.A. remained in the custody of M.C. M.C. was awarded legal guardianship and remained responsible for K.A. until June 2014.

In June 2014, the Cecil County Department of Social Services (the "Department") received a child protective services referral regarding a physical altercation between K.A. and M.C. M.D. and C.D., friends of M.C.'s who have known K.A. since she was six years old, agreed to care for K.A.[4] On September 16, 2014, after K.A. had lived with the D.s for several weeks,[5] M.D. contacted the Department and advised that he and his wife could no longer care for K.A., then age eleven, because she had significant behavioral issues.[6] K.A. also advised M.D. and C.D. that she did not want to live with them. The Department contacted M.C. who said she no longer wanted to care for K.A. or be legally responsible for her.

The Department held a Family Involvement Meeting on September 23, 2014 to discuss K.A.'s safety and well-being. No family attended, but M.D. and C.D. were present. While they expressed a desire to remain a support system for K.A., the D.s decided that it would be best for K.A. to be in the custody of the Department. At this time, the Department had been unable to determine the whereabouts of either of K.A.'s parents.

[4] Prior to 2014, K.A. spent every Wednesday and some weekends at M.D. and C.D.'s home.

[5] The record does not indicate K.A.'s whereabouts from the date of the altercation to September 16, 2014.

[6] M.D. indicated that K.A. had been lying, acting out, and completely shutting down.

On September 24, 2014, the Department placed K.A. at St. Vincent's Villa Diagnostic Center for a comprehensive evaluation of her mental health needs. At the September 25, 2014 shelter care hearing, the juvenile court authorized K.A.'s continued placement with the Department. M.C. appeared at the hearing to advise the court that she no longer wanted to be involved in K.A.'s life and the court excused her further participation.

On October 15, 2014, the juvenile court held an adjudicatory and disposition hearing. Counsel for Mr. A. requested a continuance, explaining that she had recently learned that Mr. A. was incarcerated in Pennsylvania and had not had an opportunity to speak with him yet. The court denied the request and determined K.A. to be a Child in Need of Assistance ("CINA").[7] The court found that K.A.'s parents failed to provide a stable home for her and were therefore unable or unwilling to provide K.A. with proper care. The court ordered that K.A. remain in the custody of the Department until further review.[8]

Mr. A. timely appealed the CINA decision on November 14, 2014, arguing that he was denied the right to participate in the hearing in a "meaningful way," despite his

[7] "'Child in need of assistance' means a child who requires court intervention because: (1) [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." CJP § 3–801(f).

[8] K.A. remained at St. Vincent's Villa until February 18, 2015. She was diagnosed with Oppositional Defiant Disorder and continued therapy was recommended. She returned to M.D. and C.D.'s home, who had taken foster parent training classes and became licensed foster parents.

incarceration.[9] This Court agreed and remanded the case for a new hearing. Mr. A. entered into a service agreement with the Department on February 28, 2015, before the new hearing was held, in an effort to be reunified with K.A. upon his release.[10] The service agreement provided that Mr. A. would participate in drug and alcohol counseling, complete a mental health evaluation, comply with parole and probation when released, and establish and maintain safe and stable housing. The Department provided Mr. A. with updates on the case through periodic letters.[11]

The new CINA hearing occurred on May 20, 2015, and Mr. A. participated by telephone. He testified that he wanted to reestablish a connection with K.A. and agreed to the previously entered into service agreement, explaining that he would need an order from the court in order to receive services in the Pennsylvania correctional facility.[12] Again, the court found that K.A. was CINA and noted that Mr. A. "certainly appear[ed] to be ready to make valiant efforts toward getting ready for his release and being able to be a parent again."

The permanency planning hearing was set for December 16, 2015. At Mr. A.'s request, the hearing was postponed. Nonetheless, the court conducted an age appropriate

[9] *See In re Adoption/Guardianship No. 6Z98001*, 131 Md. App. 187 (2000).

[10] Mr. A. was scheduled to be released, and was released, from George Hill Correctional Facility on July 29, 2016.

[11] Letters were sent to Mr. A. on a monthly basis from November 2014 to March 2015.

[12] The order was granted on June 1, 2015.

consultation with K.A. pursuant to CJP §3-823. Neither Mr. A. nor his counsel were present for the consultation. The court authorized K.A.'s counsel to place details of the conversation with K.A. on the record. Counsel stated:

> K.A. met with Judge Murray today for her consult. K.A. told Judge Murray that she played all-star softball this year. She's also playing on a travel team for softball. She was a pitcher. K.A. enjoys playing softball. K.A. went to New York with her foster family. They went to Central Park. They also went to a Broadway show, Matilda. K.A. enjoyed the three-day trip. K.A. is in the seventh grade at [middle school]. She does well in school. She does struggle in math. She stays in school on Tuesdays to receive extra help. Her foster parents are looking for a math tutor.

K.A. also confirmed that she wanted to be adopted by her foster parents. She said, "It's better than being with my real parents because they really don't know how to take care of me, I guess." She further explained that because her parents had been in jail "so many times" it was unlikely that they would be able to care for her now "because they haven't changed yet."

Afterwards, Mr. A.'s counsel stated for the record that she believed the child interview was inappropriate because she was excluded. She moved that K.A. be produced as a witness at the rescheduled hearing so that she could present additional questions to be asked. The court denied the motion, stating it "ha[d] seen no authority for" granting such a motion.

Change in the Permanency Plan – April 2016

The permanency planning hearing was held on April 6, 2016. The Department argued that the permanency plan should be changed to adoption by a non-relative and stressed that Mr. A. had not been in contact with K.A. for the past seven years. The Department also stated that adoption was a "strong possibility" and that K.A. was doing well with M.D. and C.D. Counsel for K.A. agreed with the Department and provided further that it would take "some period of time" before Mr. A. was ready to care for K.A., which was not in her best interest.

Mr. A. called the Department's social worker, Catherine Burke, as a witness. Although she was the social worker in this case for approximately eleven months, Ms. Burke testified that she was unaware of the Service Agreement Mr. A. signed in February of 2015. She testified further that she had been in contact with Mr. A. and drafted another service agreement, but that he would not provide any information or speak to her without his attorney being present. Ms. Burke stated that she did not offer Mr. A. any services other than periodic updates on K.A. On cross-examination, Ms. Burke testified that she spoke with Mr. A.'s attorney about visiting Mr. A. together, but nothing has happened as a result of that conversation.

Mr. A. also testified at the hearing, participating by telephone. He testified that he planned on residing in Delaware upon his release and that Delaware's Department of Social Services was helping him identify employers who hire felons, as well as helping him secure his birth certificate and social security card. He also confirmed that the last correspondence he received from the Department was in December of 2015, approximately four months

prior to the hearing. Mr. A. stated that it would take him approximately six months from the date of his release to have "a stable residence and a stable job and enough money to provide" for K.A.

After considering all evidence, the court ruled as follows:

> ***
> I am troubled that a Service Agreement was never signed. R.A. indicates he did not want to talk to the Department without his lawyer being present. I find that disingenuous on his part if he truly wanted to participate in a Service Agreement, which really from what I see only said stay in touch with us and tell us where you are. I find that to be inappropriate on his part and did not help his cause any as far as reunification. Had there been more contact and had he agreed to talk and even to do so by correspondence – it was copied to his lawyer – that would have – you could have been a little further along in at least conversation with his daughter.
>
> ***
> The court finds that K.A. does – is in a placement that is in her best interest right now. The court also notes that by my calculations there's an eighteen-month period of time where things are in limbo. The court notes that K.A. at her age does not deserve another eighteen months of uncertainty. That what is in her best interest is to go forward now with a place where she is comfortable, happy, stable, and has many more prospects for success in life than she does in a state of uncertainty for another eighteen months. Knowing a few things about middle school age children I find that this is certainly an appropriate time for her to have stability, and as Mr. Wright said, the eighteen months of uncertainty – it would be detrimental for her to have those eighteen months of uncertainty, and it certainly outweighs any parental role of the father, especially when he hasn't had a parental role for six years.
>
> Finally, counsel and father complained that he could have made significant progress, but he refused to cooperate by indicating that he was not going to sign the service agreement, that his correspondence has been limited. Certainly that was something that could have been circumvented, then he could

> have participated. This is not like a Miranda situation where anything he says is going to jeopardize him. It's a situation where he needs to do the best he can from where he is to work with the department, and he did not do so. The court's not certain why it was okay to talk to the Delaware DSS and not the Cecil County DSS; but finds that Mr. A. has not done really anything to move forward to reunification. The fault lies with him.

On April 7, 2016, the court changed K.A.'s permanency plan from reunification to adoption by a non-relative as the primary plan and custody and guardianship to a relative as the secondary plan. This appeal followed.

DISCUSSION

A. Parties' Contentions

Mr. A. first contends that the juvenile court erred in finding that the Department made reasonable efforts toward the plan of reunification. In support of his argument, Mr. A. relies on CJP §3-816.1, which requires the juvenile court to determine whether the Department has made reasonable efforts to finalize the permanency plan in effect and to meet the child's needs. Mr. A. suggests that the Department's efforts to finalize the reunification plan were "non-existent." He asserts that the Department did not offer him any services designed to reunify him with K.A., such as counseling that might improve their relationship, and therefore did not meet its obligation. Instead of focusing its efforts on reunification, Mr. A. argues that the Department "ensure[d] that [K.A.] achieved permanency with a non-relative."

As a result of this underlying finding, appellant argues that the juvenile court abused its discretion when it changed K.A.'s permanency plan to adoption by a non-relative and "abandoned reunification efforts with the father." Mr. A. believes it was error for the lower court to focus on the length of time Mr. A. and K.A. were separated instead of considering whether repairing the father-daughter relationship was appropriate. Mr. A. argues that "unless there are compelling circumstances to the contrary, the plan should be to work toward reunification, as it is presumed that it is in the best interest of a child to be returned to his or her natural parent." *In re Yve S.*, 373 Md. 551, 582 (2003). The evidence presented at trial, according to Mr. A., did not support a finding that eliminating reunification was in K.A.'s best interest.

Mr. A. also argues that the juvenile court erred by excluding him and his attorney from the child interview. He relies on Md. Rule 11-110(b), which states that a hearing "may be conducted out of the presence of all persons except those whose presence is necessary or desirable." Mr. A. similarly cites *In re Maria P.*, 393 Md. 661 (2006), where the court held that the minor child's mother was prejudiced and her due process rights were violated when she was excluded from the child's interview.

The Department responds that the juvenile court appropriately exercised its discretion in changing K.A.'s permanency plan to adoption by a non-relative because it is in K.A.'s best interests and the Department's efforts were reasonable. The Department emphasizes that Mr. A. has not had a parental role in K.A.'s life for the past six or seven years and that residing with M.D. and C.D. provides K.A. with stability. The Department also addresses each of the statutory factors set forth in Md. Code (1984, 2012 Repl. Vol.),

§5-525(f)(1) of the Family Law Article ("FL") to support its position that the change to K.A.'s permanency plan promoted her best interests.

Local departments are required to make reasonable efforts to reunify children with their parents, but, the Department argues, they "need not expend futile efforts on plainly recalcitrant parents." *In re James G.*, 178 Md. 543, 601 (2008). According to the Department, its ability to offer services to Mr. A. was limited due to his incarceration in Pennsylvania and his refusal to speak to the social worker without his attorney.

Regarding K.A.'s interview, the Department contends that Mr. A. did not preserve his objections to the consultation, and even if preserved, the court provided an accurate summary of that consultation. The Department admits that the consultation summary should have been provided by the court, not K.A.'s counsel, but notes that Mr. A. did not object to that either. Furthermore, the Department reminds us that the right to participate in the proceedings is not an absolute right. *In re Maria P.*, 393 Md. at 673.

K.A.'s counsel submits that the juvenile court did not err or abuse its discretion, and properly found that it was in K.A.'s best interests to change the permanency plan to adoption by a non-relative.

B. Standard of Review

When reviewing child placement determinations, Maryland courts utilize three different standards simultaneously:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. [Secondly,] if it appears that the [juvenile court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the

> appellate court views the ultimate conclusion of the [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion.

In re Shirley B., 419 Md. 1, 18 (2011) (alterations in original) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

"A trial court's exercise of discretion in changing a permanency plan 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 the court deems minimally acceptable." *In re Andre J.*, 223 Md. App. 305, 323 (2015) (citation and internal quotation marks omitted).

C. Analysis

At issue first is whether the juvenile court was clearly erroneous in its finding of fact that the Department made reasonable efforts toward the permanency plan of reunification. We find no error.

A juvenile court must conduct a hearing to determine the permanency plan for a child within eleven months of a child's commitment to the Department's care. *See* CJP § 3-823(b). As the Court of Appeals has explained:

> The permanency plan is an integral part of the statutory scheme designed to expedite the movement of Maryland's children from foster care to a permanent living, and hopefully, family arrangement . . . Services to be provided by the local social service department and commitments that must be made by the parents and children are determined by the permanency plan.

In re Damon M., 362 Md. 429, 436 (2001).

Possible permanency plans are listed in CJP § 3-823(e). In descending order of priority and according to the child's best interests, the options are: 1) reunification with the parent or guardian; 2) placement with a relative; 3) adoption by a nonrelative; 4) custody and guardianship by a nonrelative; or 5) another planned permanent living arrangement.

Periodic hearings to review the permanency plan are required, at which the juvenile court must, *inter alia*, determine whether reasonable efforts have been made to finalize the permanency plan, and change the permanency plan if it would be in the best interest of the child to do so. CJP §3-823(h)(2)(ii) and (vi). A juvenile court examines reasonable efforts on a case-by-case basis. *See In re Shirley B.*, 419 Md. at 26. In this case, the juvenile court found that the Department made reasonable efforts at four hearings.[13]

Specifically, the juvenile court found that the Department made the following efforts to achieve the permanency plan of reunification:

1. Attempting to locate K.A.'s mother;
2. Attempting to locate, and ultimately locating, K.A.'s father;
3. Holding a Family Involvement Meeting;
4. Providing a Service Agreement for Mr. A.;
5. Updating Mr. A. through monthly letters;
6. Attempting to contact Ms. M. by sending letters to her last known address when it was discovered;

[13] April 15, 2015, May 20, 2015, September 16, 2015, and April 6, 2016.

7. Giving a birthday letter written by Mr. A. to K.A. and asking on two occasions if she wished to write back or speak to him at all;
8. Providing a second Service Agreement simply stating that he was in contact with the Department; and
9. Attempting to schedule a face-to-face meeting with Mr. A. and his counsel after he notified the Department that he would not speak otherwise.

Mr. A. contends, however, that these actions do not constitute reasonable efforts. He notes that the Department's service agreements obligated him to complete services but did not obligate the Department to provide referrals for them. Mr. A. also argues that the Department did not offer him parenting classes, therapy, or family counseling which would have helped repair his relationship with K.A. We disagree with Mr. A.

The Department's efforts to achieve reunification are not required to be perfect. *See James G.*, 178 Md. App. 543, 601 (2008) ("[T]he Department's efforts need not be perfect to be reasonable."). Rather, reasonable efforts must be considered on a "case-by-case basis." *In re Shirley B.*, 419 Md. 1, 25 (2011). Furthermore, local departments "need not expend futile efforts on plainly recalcitrant parents." *James G.*, 178 Md. at 601. Here, the Department's ability to offer services to Mr. A. was limited due to his incarceration and sudden unwillingness to work with the Department. Initially, Mr. A. was cooperating with the Department and seemed to have a serious interest in bettering himself so that he could regain a parental role in K.A.'s life. At some point, however, things changed. Mr. A. did not want to sign the service agreement and would not speak with the social worker without his attorney being present. Mr. A.'s actions significantly limited the Department's ability

to move forward with the reunification plan. The Department even reached out to Mr. A.'s counsel to plan a visit with Mr. A., but that attempt did not produce results. It cannot be said that the Department fell short in its efforts. Based on the record here, the court's finding that the Department made reasonable efforts at reunification was not clearly erroneous.

We next turn to the juvenile court's finding that it was in the best interests of K.A. to change the permanency plan to adoption. In determining the child's permanency plan, "the 'best interests of the child' are the primary consideration." *In re Shirley B.*, 191 Md. App. 678, 707 (2010); *In re Damon M.*, 362 Md. 429, 436, 765 A.2d 624 (2001) (The permanency plan "may not be changed without the court first determining that it is in the child's best interest to do so . . ."). Pursuant to CJP § 3-823(e)(2), the court must consider the following factors in deciding what is in the best interests of the child:

> (i) the child's ability to be safe and healthy in the home of the child's parent;
>
> (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
>
> (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;
>
> (iv) the length of time the child has resided with the current caregiver;

> (v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and
>
> (vi) the potential harm to the child by remaining in State custody for an excessive period of time.

FL §5-525(f)(1). The juvenile court addressed each of these factors in its decision.

At the time of the hearing, Mr. A. was nearing the end of a three-year incarceration period in Pennsylvania. He testified that it would take him about six months to become stable and properly care for K.A. This Court has held that there is "a right – and indeed a duty – to look at the track record, the past, of [the parents] in order to predict what [their] future treatment of the child may be." *In re Dustin T.*, 93 Md. App. 726, 735 (1992). Mr. A. has spent most of his adult life, ages 20 to 37, in and out of prison. He has not provided a home for K.A. or had a relationship with her in at least the last six years. His track record does not suggest that he can provide a home for K.A. to be safe and healthy (the first factor).

Additionally, K.A. has no attachment to Mr. A. She does not believe her father is in a position to care for her properly. K.A. is also adamant that she is not interested in contacting Mr. A. in any way. On the other hand, K.A. has been living with M.D. and C.D. consistently since February 2015 and spent time with them weekly prior to 2014. During her consultation, K.A. expressed an interest in and preference to being adopted by her foster parents. It is clear that K.A.'s attachment to her current caregivers outweighs her non-existent attachment to Mr. A. (the second and third factors).

Moreover, K.A. has been in foster care for almost two years now (the fourth factor), and would suffer harm if the Department moved her from her current placement (the fifth factor). K.A. has made great progress with M.D. and C.D. She has been in individual and family therapy on a monthly basis and the D.s have reported that her behavior has improved. K.A.'s educational needs are also being met. She is doing well in school and getting tutoring in the subjects where she needs help. Most importantly, K.A.'s current placement has provided her with stability, something that has been lacking in her life. Moving her from the D.s' home would cause emotional harm and potentially educational and developmental harm. Similarly, K.A. would continue to suffer harm if she were to remain in the Department's custody (the sixth factor). The juvenile court noted in its decision that if forced to wait for Mr. A. to be released from prison and become stable, K.A. would suffer detrimental effects. K.A.'s newfound stability would be sacrificed while she waited in uncertainty.

Accordingly, the court found that it was in K.A.'s best interest to change her permanency plan to adoption by a non-relative. The trial court "'is in the unique position to marshal the applicable facts, assess the situation and determine the correct means of fulfilling a child's best interests.'" *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 386 Md. 666, 696 (2002) (quoting *In re Mark M.*, 365 Md. 687, 707 (2001)). We find that it was not an abuse of discretion for the juvenile court to change K.A.'s permanency plan.

Finally, Mr. A. contends that it was a violation of his due process rights for the lower court to exclude him and his counsel from the child interview without articulating a reason

for the exclusion. Mr. A. argues that he or his counsel should have been present during the interview or, at least, able to observe it via recording and possibly submit follow-up questions. Although we take issue with the juvenile court's exclusion in this case, we find the error to be harmless. We explain.

"It is well-established that a parent's interest in raising a child is a fundamental right." *In re Yve S.*, 373 Md. 551, 566-58, 819 A.2d 1030, 1039-40 (2003) (quoting *In re Mark M.*, 365 Md. 687, 705, 782 A.2d 332, 342-43 (2001)). That right, however, is not absolute and is subject to the best interests of the child standard. *Id*. at 568-69. Mr. A. has a clear liberty interest in the care and custody of his child. When "a state seeks to change the parent-child relationship, 'the due process clause is implicated.'" *In re Maria P.*, 393 Md. 661, 676, 904 A.2d 432, 441 (2006) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 25, 674 A.2d 1, 12-13 (1996). In *Wagner*, this Court provided a detailed framework for the consideration of due process in connection with parental rights. Most notably, we held:

> Once it is determined that an interest is entitled to due process protection, the pertinent inquiry then becomes what process is due, a determination that requires consideration and accommodation of both government and private interests; a balancing of the various interests at stake. Plainly stated, due process is not to be evaluated in a vacuum. Its purpose is to assure basic fairness of procedure and, if departure from procedure results in unfairness, it may be said to deny due process; if no unfairness results, there is no denial of due process.

Wagner, at 11-12 (footnote omitted) (citations omitted). Thus, due process protection is guaranteed to Mr. A. in this context.

Accordingly, having determined that Mr. A.'s interest is entitled to due process protection, we next focus our analysis on what process is due by balancing the consideration and accommodation of both the Department's and Mr. A.'s interests at stake. *See Id*. The Court of Appeals' decision in *In re Maria P.* is instructive. There, the Court of Appeals held that the juvenile court abused its discretion in excluding a mother from the hearing during her child's testimony without conducting any inquiry as to the reasons for the exclusion, which was a violation of the mother's due process rights.[14] *In re Maria P.*, at 679. The Department specifically requested to exclude the mother from the courtroom during the testimony, which the juvenile court granted, stating:

> The heart of the allegations here is this young lady has been raped and that the allegation of the County is that her mother has not responded appropriately, and therefore, there may be some influence on this girl of tender years, age 12, with her mother in the courtroom and I think it would be in the best interest of the child if she not be subjected to any type of influence that may cause her to shade her testimony.

Id. at 670-71. The Court of Appeals determined that this explanation was insufficient to protect the mother's due process rights and held:

> There is no indication on the record that the hearing judge considered Petitioner's due process rights. No testimony was placed on the record, and no inquiries were made of the Department as to the specific reasons for Petitioner's exclusion during Gabby's testimony. In this situation, we are unable to discern the judge's exercise of discretion if he or she does not state, or there does not exist, on the record, the factual basis for his or her decision.

[14] The mother's counsel, the child's counsel, certain social workers, and court personnel were present during the interview.

Id. at 676-77. Therefore, it was a violation of the mother's due process rights for the juvenile court to exclude her from the testimony without making factual findings on the record about the reason for the exclusion, even when the judge explained that he thought the mother's presence might influence the child's testimony.

In the case *sub judice*, there was no motion to exclude Mr. A. or his counsel. In fact, the record suggests that it is the default procedure to conduct child interviews with all parties and counsel present except for parents and their counsel. Mr. A.'s counsel was only permitted into the courtroom after the conclusion of the interview. When she objected to the interview because of the exclusion, the court opined that it had seen no authority for allowing a parent's counsel to be present. The colloquy continued as follows:

> [Mr. A.'s counsel]: The point of saying that, your Honor, if I use participate it is because everyone is permitted to observe the conference with the child with the exception of parents' counselor or the parent, and that is a significant objection that we have with regards to the way these are conducted. I think I've suggested to the court in the past that if the court felt uncomfortable with parents' counsel being in the courtroom and observing, and perhaps answer a question that the court may have, that the court be – allow me and every other parents' attorney or parents' counsel to observe it remotely . . . that we be permitted to be in another room to at least observe what is going on in the courtroom. Heretofore the court has denied that request.
>
> THE COURT: And denies it again today.

This is problematic. While juvenile courts have the discretion to conduct a hearing outside of the presence of all persons except those whose presence is necessary or

desirable,[15] such blanket exclusions are inappropriate. As stated above, "if departure from procedure results in unfairness, it may be said to deny due process." *Wagner*, 109 Md. App. at 11-12. In order to avoid this potential problem, we require juvenile courts to make a factual finding on the record when exercising its discretion to exclude parties from child interviews. In this case, no unfairness resulted and therefore Mr. A.'s due process rights were not violated.

"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, 854 A.2d 893, 905 (2004). Mr. A. was not prejudiced when his attorney was excluded from the interview. K.A.'s testimony during the interview was largely cumulative, providing no new, critical information. In her consultation, K.A. discussed facts already contained in the record: playing softball, her troubles with math and science, travelling to New York City, and her desire to be adopted. To be fair, K.A. did testify as to her parents' inability to care for her due to their numerous

[15] Maryland Rule 11-110(b), states:

> Place of Hearing. A hearing may be conducted in open court, in chambers, or elsewhere where appropriate facilities are available. *The hearing may be adjourned from time to time and, except as otherwise required by Code, Courts Article § 3-812, may be conducted out of the presence of all persons except those whose presence is necessary or desirable*. If the court finds that it is in the best interest of a child who is the subject of the proceeding, the presence of the child may be temporarily excluded except when the child is alleged to have committed a delinquent act.

incarcerations. Although expressed in a new way, the information itself is not controverted or new. The record contains Mr. A.'s own testimony that he had been incarcerated at different times throughout his entire adult life.

If Mr. A.'s counsel would have been present or permitted to observe the interview, it is likely that the outcome of the case would not have been affected at all. Therefore, Mr. A. was not prejudiced by the exclusion and the error was harmless.

Very briefly, we also hold that although Mr. A. is correct that the court reporter, and not the child's attorney, is supposed to "make known immediately to the parties and counsel the contents of the interview," Mr. A.'s counsel did not object to K.A.'s counsel summarizing the consultation. Therefore, the argument is not preserved for appeal. Md. Rule 8-131(a); *Shapiro v. Shapiro*, 54 Md. App. 477, 480, 458 A.2d 1257, 1259 (1983) (citing *Marshall v. Stefanides*, 17 Md. App. 364, 369, 302 A.2d 682, 685 (1973) ("In all cases [where a judge interviews a child out of the presence of the parties], unless waived by the parties, the interview must be recorded by a court reporter and immediately following the interview its content shall be made known to counsel and the parties by means of the court reporter's reading of the record to them.").

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