Circuit Court for Baltimore County
Case No. 03-Z-17-000062 TPR UNA

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2351

September Term, 2018

IN RE: ADOPTION/GUARDIANSHIP
OF D. C.

Fader, C. J.,
Kehoe,
Beachley,

JJ.

Opinion by Kehoe, J.

Filed: April 22, 2019

This is an appeal from a judgment of the Circuit Court for Baltimore County, the Honorable Kathleen Gallogly Cox presiding, that granted the petition of the Baltimore County Department of Social Services to terminate the parental rights of Ms. C and Mr. J in their daughter, D. C. ("D."). Ms. C. presents three issues on appeal, which we have reworded:

> 1. Did the trial court err when it denied Ms. C.'s request to postpone the trial so that she could obtain private counsel?
> 2. Did Ms. C.'s counsel provide effective assistance at trial?
> 3. Did the trial court err in basing its findings upon hearsay evidence admitted only as the foundation for expert opinions?

We conclude that the trial court did not err in denying Ms. C.'s request for a continuance. Ms. C. has not demonstrated to us that her trial counsel was ineffective. There was substantial evidence in the record to support the court's findings, and that evidence was properly before the court.

Background

We summarize the evidence adduced at trial in the light most favorable to the Department as the prevailing party.

D.'s Birth and Early Childhood

In December of 2014, and after being exposed to a controlled dangerous substance in utero, D. was born in Anne Arundel County. Immediately after her birth, Sherri A., Ms. C.'s oldest sister, transported Ms. C. and D. to the maternal grandmother's house in

Cooksville, Maryland. Ms. C. and D. lived there for three months. During this time, Mr. J. helped care for D. three or four days per week with occasional overnight visits.

In the months following D.'s birth, the Departments of Social Services for both Howard and Anne Arundel Counties attempted to visit and provide aid to Ms. C. due to D.'s substance exposure. Howard County's outreach was unsuccessful. An Anne Arundel County caseworker did meet with Ms. C. a few times, but after the caseworker was later unable to locate Ms. C., the case was closed.

Ms. C. and D. left the Cooksville home when D. was three or four months old. At about the same time, Mr. J. questioned Ms. C. as to whether he was actually D.'s biological father, and Ms. C. stopped communicating with him. Sherri A. occasionally spoke to Ms. C. by telephone, but Ms. C. then changed her telephone number and did not provide Sherri A. with the new number. During this period, Mr. J. was also unaware of Ms. C. and D.'s whereabouts.

At around the same time as she moved from Cooksville, Ms. C. contacted one of Mr. J.'s sisters, Deborah J. ("Aunt Deborah"). Ms. C. informed Aunt Deborah that she and D. had no place to live. Aunt Deborah offered to allow Ms. C. and D. to stay with her in her home in Bowie. Ms. C. accepted the offer.

Ms. C. and D. had been living at Aunt Deborah's house for about four months when Aunt Deborah asked Ms. C. to leave. Ms. C. refused. Aunt Deborah testified that Ms. C. broke windows in the house and falsely claimed to the police that she was renting Aunt

Deborah's home and that Aunt Deborah broke into the residence and threatened her and D. Ultimately, Aunt Deborah was forced to leave her home for three days and to hire an attorney to assist her. It took Aunt Deborah more than a year to rectify the whole situation through court appearances. The record does not tell us where Ms. C. and D. lived after they left Aunt Deborah's house.

Ms. C.'s Arrest and Incarceration

On March 21, 2016, Ms. C. was arrested for shoplifting. When she was arrested, Ms. C. and D. were in Ms. C.'s automobile. Arresting officers reported that they found 30 bags of crack cocaine in the vehicle.[1] Following the arrest, Ms. C. was transported to a hospital emergency room. While she was at the hospital, Ms. C. was interviewed by Jocelyn Puller, a caseworker with the Baltimore County Department of Social Services (the "Department"). Ms. Puller perceived Ms. C. as "disoriented and verbally aggressive," which suggested to Ms. Puller that Ms. C. suffered from "an untreated mental illness or substance use." Ms. C. informed Ms. Puller that she was having a diabetic reaction. On March 21, 2016, law enforcement officers transferred Ms. C. from the hospital to the Baltimore County Detention Center because Ms. C. was the subject of open warrants for theft and assault. The record is clear that Ms. C. was incarcerated continuously from the date of her arrest through the trial in the termination of parental rights action, and the record

[1] It is unclear whether the police followed up with drug charges.

indicates that she would remain incarcerated until April of 2019. However, the record does not identify her precise convictions.

The Department filed an emergency shelter care petition on April 11, 2016, which was granted on the same day. On April 20, 2016, the juvenile court found D. to be a CINA, awarded the Department custody of D., and found Ms. C. "unable/unwilling to provide proper care and attention [to D.] due to [Ms. C.'s] drug addiction[] and resulting negative consequences involving endangerment of [D.]." The court ordered Ms. C. to participate in several services after her release from detention, including a substance abuse assessment due to her prior cocaine use.

Ms. C.'s Visitation History with D.

The Department's social worker with primary responsibility for D. was Amy Heikkinen. During the first week of April of 2016, Ms. Heikkinen met with Ms. C. at the Baltimore County Detention Center and arranged for D. to visit Ms. C. on two occasions. At the Detention Center, Ms. C. had to interact with D., who was about 18 months old, through a glass partition. During the first visit, although D. was willing to engage with Ms. C., she was also apprehensive. During the second visit, Heikkinen observed D. "clearly exhibiting a lot of distress," pointing toward the door, being upset, and wanting to leave. Although Ms. C. attempted to engage D. through the glass partition, D. went to the exit door and cried.

In the latter half of 2016, Ms. C. was transferred from the Detention Center to the Maryland Correctional Institution for Women at Jessup. The Jessup prison had a visitation room with toys and permitted direct physical contact between Ms. C. and D. In March 2017, at Ms. C.'s request, Heikkinen explored the possibility of setting up regular contacts between Ms. C. and D. through Skype, but the Institution's regulations did not permit it. As of the November 14, 2017 guardianship trial, Heikkinen had taken D. for four visits with Ms. C. at the Jessup facility. Heikkinen testified that Ms. C. "really tries to engage" D. but "sometimes initiates more contact than D. was comfortable with" and that D. was also wary and would run back to Heikkinen. Although D. had become more comfortable during later visits, the relationship between Ms. C. and D. did not significantly improve.

The Department's Efforts to Place D. with a Family Member

Shortly after D. entered foster care, Heikkinen contacted various members of Ms. C.'s family—Tanelle A., Troy A., and Sherri A.—to explore the possibilities of these family members providing care to D. All three were unable or unwilling to be placement options for D. At trial, Heikkinen testified that Tanelle A. expressed no interest in being a placement option, and that Troy A. was not willing to be a placement option, due to a history of conflict between him and Ms. C..

Heikkinen stated that after some initial contact with Sherri A., she no longer received communications from her. Specifically, Heikkinen testified that she reached out to Sherri A., who told her that she had to undergo surgery in July 2016 and would follow up with

Heikkinen when and if she wanted to become involved with D in the future. At the trial, Sherri A. testified that, although she was willing to be a resource to Mr. J., including being a supervisor for visitation between Ms. C., Mr. J., and D., she had been unable to care for D. after D.'s birth because of a death in her family and financial issues. Heikkinen then asked Ms. C. to suggest other persons who might be interested in caring for D. Ms. C. gave Heikkinen the names of several members of a church that D. had once attended. Heikkinen left two voicemail messages, but received no responses. At Ms. C.'s request, Heikkinen also spoke with Pastor Romancy Blackwood about providing care for D. Ms. C. identified Pastor Blackwood as a clergy member whom she had known for many years. However, Pastor Blackwood advised the Department that she was unable to care for D.

Heikkinen also reached out to members of Mr. J.'s family. Two of Mr. J.'s sisters, Brenda P. ("Aunt Brenda") and Deborah J. ("Aunt Deborah"), expressed some interest in caring for D. The Department scheduled visits between them and D. starting on July 5, 2016. There was one visit with Aunt Brenda, but Heikkinen did not hear from her again.

Heikkinen arranged several visitations between D. and Aunt Deborah that occurred during the summer of 2016. Heikkinen testified that the visits between D. and Aunt Deborah appeared to go well but that, in the fall of 2016, Aunt Deborah told Heikkinen that she no longer desired to be a placement option.

In the TPR action, Aunt Deborah testified that she had known D.'s foster mother for more than ten years and communicates with her regularly. Aunt Deborah felt that D. was doing very well in the foster mother's care.

Finally, Heikkinen also contacted Brittany J., D.'s adult paternal half-sister and Mr. J.'s daughter. At the guardianship proceeding, Ms. J testified that she was unable to care for D. Specifically, Ms. J. elaborated that when she spoke with Heikkinen, she told Heikkinen that while she would like to have D., she could not receive her at the time because she was living with her mother and did not have her own residence.

D.'s Health History

Heikkinen testified that she had reviewed D.'s medical records. According to her, those records indicated that D. had only one visit to a pediatrician during the 14 months while she was in Ms. C.'s care. D. was evaluated by a pediatrician within five days of being placed in foster care. The physician noted that D.'s eardrums were "full of scar tissue," that she had active infections in both ears, that she could not hear properly, and that she had not received all recommended immunizations. D. continued to have ear infections after entering foster care until July of 2016, when she had tubes placed in her ears. Additionally, D. suffered from a speech delay when she entered foster care. With treatment, her hearing improved as did her verbal skills. D.'s speech delay was likely related to her hearing loss.

D.'s Acclimation to Foster Care

Since March of 2016 at the age of 14 months, D. had been in the foster care system. In her two-parent, pre-adoptive home, D. is very happy and secure with her foster family. Allison Mitchell, LCSW-C, an expert in adoptions and social work, was assigned by the Department in May of 2017 to be D.'s adoption social worker. She observed D.'s interactions with her foster family. Mitchell described D. as being "very attached to the family. She refers to them as [']mommy['] and [']daddy[']. She looks to them for affection, comfort, and to meet her basic needs." While in her foster placement, D. attended preschool and had progressed with her speech therapy to the point that she no longer needed special education services. Mitchell testified that D. has no behavioral issues and does well socially.

Ms. C.'s Prior History with the Department of Social Services

In 2008, Ms. C. was a respondent in a TPR action involving her son from a prior relationship, The juvenile court terminated the parental rights of both parents and the juvenile court found them to be unfit to raise M.S. because they "refuse[d] to recognize health and emotional challenges in this child and obdurately refuse[d] assistance for him[.]" A panel of this Court affirmed the judgments by means of an unreported opinion, *In Re: M. S.*, No. 164, Sept. Term 2005 (filed June 25, 2009). Like D., M. S. was born prematurely and was medically fragile. The opinion described Ms. C.'s "pattern of hostility toward medical and social caregivers . . . and failure to provide proper care and supervision,"

particularly medical care. The trial court in the instant case received a copy of this Court's unreported opinion into evidence.

The Juvenile Court's Ruling in the Current Action

After the conclusion of the evidentiary portion of the trial in the TPR action, the trial court filed a memorandum opinion setting out written findings regarding Ms. C., Mr. J., and D. As to Ms. C., the court found:

> [Ms. C.] has been incarcerated and unable to care for [D.] since March 2016, and is not projected to be released until May 2019, at which time [D.] will be approximately four and a half years old.
>
> Although [Ms. C.] is incarcerated, she has attempted to maintain contact with the Department and with her child. The practical reality, though, is that contact was traumatic for [D.] in the confines of the jail, and has therefore been limited. [D.] has very limited ties to her mother. By contrast, she is extremely tied with her foster family and with the other children within her foster home. She has adjusted well to her home, preschool, and community and is a happy, well-adjusted child.
>
> There is nothing additional [Ms. C.] is able to do to adjust her circumstances to permit [D.] to return to her care at an earlier date.
>
> [D.] was born drug exposed. [Ms. C.] was uncooperative with services offered through both Anne Arundel and Harford Counties. No evidence has been presented to demonstrate that she obtained drug treatment services on her own.
>
> [Ms. C.] neglected [D.]'s medical needs as an infant. She had only one well-baby visit. [Ms. C.] ignored repeated ear infections, resulting in ruptured ear drums, scar tissue and hearing loss to [D.] Those conditions would have been extremely painful, yet she sought no care for [D.]
>
> [Ms. C.] previously had parental rights terminated for her son [M.S.], based upon chronic failure and/or inability to recognize and meet his profound medical needs.
>
> The Department made reasonable efforts to explore relative or other appropriate placement for [D.], including potential placement resources suggested by [Ms. C.]. None of the individuals identified by [Ms. C.], or by

> [Mr. J.], were willing to care for [D.] At least some of the potential placement resources refused to care for [D.] because they were unwilling to have to interact with [Ms. C.] upon her release from incarceration.

The court found by clear and convincing evidence that Ms. C. was "unfit to care for D. and that exceptional circumstances also exist that make the continuation for her parental relationship detrimental to the child."

As to Mr. J., the court found:

> Before [D.] came into care, [Mr. J.] was not involved in [D.]'s life. While the question of paternity may be a partial explanation for his behavior, he had some limited involvement with [D.] as an infant. When his relationship with [Ms. C.] ended, he took no steps to resolve the paternity issue or to continue to be involved in [D.]'s life.
>
> [D.] entered care in March 2016. [Mr. J.] wasn't located until May 2016, and the first communication he received from the Department was sent in July 2016. [Mr. J.] was uncertain of paternity, and that was not confirmed until January 2017.
>
> Upon release from jail in February 2016, the Department arranged for [Mr. J.] to visit [D.]. [Mr. J.] canceled that visit, apparently due to transportation difficulties. [Mr. J.] was not proactive in trying to re-schedule that visit. However the Department also did nothing proactively to follow up with [Mr. J.] to facilitate visits or to establish a schedule for visits.
>
> The Department never offered or entered into any service agreement with [Mr. J.]. Its sole outreach to [Mr. J.] was to offer to set up a visit.
>
> The Department promptly explored relative placements suggested by [Mr. J.]. [Aunt Deborah] was a promising prospective resource. She visited several times with [D.], and those visits were progressing well. [Aunt Deborah] ceased visiting with [D.] based upon concerns she developed from conversations with the foster mother that [Aunt Deborah] might be required to interact with [Ms. C.] after [her] release if [D.] came into her care. The Department never discussed this decision with [Aunt Deborah] or took action to determine whether she could still be a relative resource. No family decision meeting was ever scheduled.

> [Mr. J.] did not follow up with or regularly communicate with the Department. However, he did respond to their initial written inquiry. He arranged to meet when the Department sought to serve him with the TPR Petition. He attended the mediation session that was scheduled for the TPR, and he followed up by scheduling a visit with [D.] in October 2017, and with another visit in late November or early December 2017.
>
> There is no evidence that [Mr. J.] ever abused or neglected [D.] or any other child.
>
> [Mr. J.] has eight biological children and five step-children. He appears to have been an active and involved parent in the lives of his other children.
>
> [D.] has no emotional ties or feelings with respect to [Mr. J.]. He is, in almost all respects, a stranger to her. As previously stated, [D.] is immersed in the life of her foster family, has strong emotional bonds there, and is happy, well-adjusted, and in a loving environment.

Based on these findings, the trial court concluded:

> The statutory analysis for [Mr. J.] is complicated. [Mr. J.] is not responsible for any act of abuse or neglect that brought [D.] into care. His whereabouts were unknown for the first several months of the CINA proceedings, and when he was finally located, he was incarcerated for an additional six months, so he was not in a position to have an active role in the CINA process. . . . Paternity wasn't even confirmed until January 31, 2017.
>
> * * *
>
> [V]irtually no efforts were made [by the Department] to offer services to [Mr. J.]. Certainly [Mr. J.] could, and should have done more to engage with the Department. But even when he did contact the worker and asked when a visit would be set, the response seemed to be to ask [Mr. J.] when he wanted to visit.
>
> The decision to pursue the TPR seems to have been based upon the belief that reunification with [Ms. C.] was not a viable plan based upon her prior history, the medical concerns for [D.] when she came into care, and the projected length of her incarceration. There also appears to have been an assumption that [Mr. J.] would not be a resource. . . . [T]he Department really did not offer him any services or set up a discernible plan for the steps he needed to take if re-unification was really going to be viable.

* * *

> [Mr. J.]'s potential as a parent also needs to be considered in light of his involvement with his other children. The evidence suggests that he was an active and involved parent with many other children. While he may not have had primary custody, his daughters and his sisters confirmed that he was a positive parent in their lives, and that he has support of extended family to assist him.
>
> A statutory factor courts must consider is, "whether additional services would likely bring about lasting parental adjustment so the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement. . . ." FL § 5-323(d)(2)(iv). This required consideration suggests that in instances where a parent might presently be unable to parent, but where the potential exists for the provision of additional services leading to an adjustment that would allow for reunification with the parent, reasonable time should be allowed for those services to be provided and potential adjustments to occur.
>
> * * *
>
> Based on these findings, this court finds that the Department has not provided clear and convincing evidence that exceptional circumstances exist such that termination of [Mr. J.]'s parental rights are in [D.]'s best interest at this time. . . .
>
> * * *
>
> The termination petition is held in abeyance for six months. [Mr. J.] will be given a period to demonstrate a sincere, consistent effort to engage with the Department and show progress towards parenting [D.]. A follow up hearing will be scheduled to receive additional evidence concerning progress and ongoing efforts. This Court will then issue a final decision on the pending request for termination of parental rights.

Ultimately, however, these additional re-unification efforts were unsuccessful, and Mr. J. consented in the record to the relief sought by the Department. The trial court granted the petition and entered a guardianship order, which terminated both parents' parental rights.

The Standard of Review

The Court of Appeals recently summarized the appropriate appellate standards of review in termination of parental rights cases:

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

In re Adoption/Guardianship of H.W., 460 Md. 201, 214 (2018) (citations and quotation marks omitted).

A discretionary ruling by a trial court will not be reversed by an appellate court simply because appellate judges believe that they "would not have made the same ruling." Instead, an appellate court will overturn a discretionary ruling by a trial court only when the decision in question is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In Re: O.P.*, ___ Md. App. ____, No. 2877, 2019 WL 1417368 at *24 (filed March 29, 2019) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 313 (1977); and *In re Adoption/Guardianship of C.A. & D.A.*, 234 Md. App. 30, 45 (2017)).

The Standard for Termination of Parental Rights

The Court of Appeals has recently summarized the current complex state of the constitutional, statutory, and decisional law in termination of parental rights actions in *In re Adoption/Guardianship of H.W.*, 460 Md. at 215-20. In light of the contentions by the parties in this case, the following summary should be sufficient.

Parents have a fundamental, constitutionally-protected right to raise their children and to make decisions about their education, custody, and care. *See id.* at 216. As an ancilla to this principle, there is a factual and legal presumption that the best interest of a child is served when the child is in the care and custody of his or her parents. *See id.* However, these presumptions are rebuttable, and a parent's right is not absolute. The State, in its role as *parens patriae*, has a compelling interest in protecting the welfare and best interests of all children and, in particular, those children who have been abused or neglected by their parents. *Id.* at 215-20. Accordingly, a juvenile court can, in proper circumstances, terminate parental rights. A court's authority to do so is circumscribed, however. The General Assembly has limited the scope of judicial discretion by statute, specifically Family Law Article ("F.L.") § 5-323.[2] First and foremost, § 5-323(b) provides that a court may

[2] The statute states in relevant part:

> § 5-323. Grant of guardianship--Nonconsensual
>
> (a) In this section, "drug" means cocaine, heroin, methamphetamine, or a derivative of cocaine, heroin, or methamphetamine.

(b) If, after consideration of factors as required in this section, a juvenile court finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in a child's best interests, the juvenile court may grant guardianship of the child without consent otherwise required under this subtitle and over the child's objection.

* * *

(d) Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:

(1)(i) all services offered to the parent before the child's placement, whether offered by a local department, another agency, or a professional;

(ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and

(iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any;

(2) the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including:

(i) the extent to which the parent has maintained regular contact with:

1. the child;

2. the local department to which the child is committed; and

3. if feasible, the child's caregiver;

(ii) the parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so;

(iii) the existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time; and

(iv) whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interests to extend the time for a specified period;

(3) whether:

(i) the parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect;

(ii) 1. A. on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidenced by a positive toxicology test; or

B. upon the birth of the child, the child tested positive for a drug as evidenced by a positive toxicology test; and

2. the mother refused the level of drug treatment recommended by a qualified addictions specialist, as defined in § 5-1201 of this title, or by a physician or psychologist, as defined in the Health Occupations Article;

(iii) the parent subjected the child to:

1. chronic abuse;

2. chronic and life-threatening neglect;

* * *

(v) the parent has involuntarily lost parental rights to a sibling of the child; and

(4)(i) the child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly;

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

(iii) the child's feelings about severance of the parent-child relationship; and

terminate parental rights only upon a showing by clear and convincing evidence that the parent "is unfit to remain in a parental relationship" with the child or that there exist "exceptional circumstances . . . that make a continuation of the parental relationship detrimental to the best interests of the child." Second, § 5-323(d) sets out specific criteria to guide judicial decision-making in guardianship cases. Under certain circumstances, courts may also consider "such parental characteristics as age, stability, and the capacity and interest of a parent to provide for the emotional, social, moral, material, and educational needs of the child." *In re Adoption of Ta'Niya C.*, 417 Md. 90, 104 n.11 (2010)

(iv) the likely impact of terminating parental rights on the child's well-being.

(e)(1) A juvenile court shall consider the evidence under subsection (d)(3)(i) and (ii) of this section as to a continuing or serious act or condition and may waive a local department's obligations for services described in subsection (d)(1) of this section if, after appropriate evaluation of efforts made and services offered, the juvenile court finds by clear and convincing evidence that a waiver is in the child's best interests.

(2) A juvenile court may waive a local department's obligations for services described in subsection (d)(1) of this section if the juvenile court finds by clear and convincing evidence that one or more of the acts or circumstances listed in subsection (d)(3)(iii), (iv), or (v) of this section exists.

(3) If a juvenile court waives reunification efforts under § 3-812(d) of the Courts Article, the juvenile court may not consider any factor under subsection (d)(1) of this section.

(f) If a juvenile court finds that an act or circumstance listed in subsection (d)(3)(iii), (iv), or (v) of this section exists, the juvenile court shall make a specific finding, based on facts in the record, whether return of the child to a parent's custody poses an unacceptable risk to the child's future safety.

* * *

(citation omitted). Third, the focus of the court in a termination case is not whether it is in the child's best interest to be in the *custody* of his or her parents, but rather whether maintaining the *parental relationship* is in the child's best interest. *See In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 495, 499 (2007). Fourth, both § 5-323 and Maryland case law require a court in a termination case to make specific findings regarding the statutory criteria. Finally, as we will discuss in Part 1 of this opinion, a parent in a termination proceeding has a right to counsel and Maryland law provides that counsel will be afforded to those without the means to pay.

In all of this, however, and despite the great weight afforded to a parent's interests, the State's interest in protecting children is the "'transcendent standard' in TPR proceedings." *In Re H.W.*, 460 Md. at 216 (citing *In Re Ta'Niya C.*, 417 Md. at 112; *In Re Jayden G.*, 433 Md. 50, 67 (2013); *In Re Rashawn H.*, 402 Md. at 496).

In deciding what is in the best interest of a child, a "critical factor . . . is the desire for permanency in the child's life." *In Re Jayden G.*, 433 Md. at 82. Writing for the Court in *Jayden*, Judge Adkins expanded upon this concept:

> Permanency for children means having constant, loving parents, knowing that their home will always be their home; that their brothers and sisters will always be near; and that their neighborhoods and schools are familiar places.
>
> * * *
>
> Long periods of foster care are harmful to the children and prevent them from reaching their full potential. . . .
>
> * * *

> [An] emotional commitment [between a child and his or her natural or adoptive family] and a sense of permanency . . . are absolutely necessary to ensure a child's healthy psychological and physical development.
>
> Recognizing these needs, federal and state governments have undertaken steps to prevent childhoods spent in 'foster care drift'—the legal, emotional, and physical limbo of temporary housing with temporary care givers. Indeed, the overriding theme of both the federal and state legislation is that a child should have permanency in his or her life. The valid premise is that it is in a child's best interest to be placed in a permanent home and to spend as little time as possible in foster care.

433 Md. at 82-84 (brackets and ellipses added; citations, quotation marks, and footnote omitted).

With these principles in mind, we now turn to the issues raised in this appeal.

Analysis

1.

Ms. C.'s first argument is that the trial court erred when it denied her motion, made on the first day of trial, for a continuance to engage privately-retained counsel. Some additional information will be useful to place Ms. C.'s contentions in perspective.

The TPR trial was held over three days: November 14, 2017; December 19, 2017; and July 31, 2018. In both the CINA and TPR proceedings, Ms. C. was represented by a lawyer ("trial counsel") provided by the Office of the Public Defender. On the first day of the TPR trial, and before any witness was called, trial counsel informed the court that Ms. C. "would like to discharge me as counsel." What was said in the resulting colloquy between Ms. C.,

trial counsel, and the trial court is important for both the first and second issues in this appeal and so we set it out in detail:

> THE COURT: [Ms. C.], do you want to be heard on that?
>
> [MS. C.]: I'm in a position to [trial counsel] – I had written [trial counsel] a letter. You might not have received it yet. I have just been financially able financially to afford a family paid attorney. So I wanted some time so that I guess they can, you know, converge or meet and have time to look – review the case.
>
> THE COURT: Well, the matter is set for trial here today though. Do you have an attorney who is present who is going to take it over?
>
> [MS. C.]: No.
>
> THE COURT: Well, we are prepared to go forward to trial today. So you are asking to discharge counsel and are you asking to postpone the case?
>
> [MS. C.]: You postpone so that the new attorney can enter an appearance.
>
> THE COURT: What is the other parties' positions with regard to a request for postponement?
>
> [DEPARTMENT'S COUNSEL]: We are prepared. We have all of these witnesses here. We would object.
>
> [D'S COUNSEL]: I would also object.
>
> [MR. J.'S COUNSEL]: The respondent has no objection to the request for postponement.
>
> * * *
>
> THE COURT: If there was a request for postponement to be filed, it should have been filed in advance of the trial. This case was filed in April [2017]. It

is set for trial here today. It is already outside the timeframe[3] that these are supposed to be tried within I'm denying the request to postpone it today. So the case is going forward today.

All right? If you want [trial counsel] to continue to represent you, [trial counsel] is your attorney of record. If you are asking that [trial counsel] be discharged, that would mean that you would go forward without an attorney representing you.

[MS. C.]: Being incarcerated, Your Honor, it is very hard to obtain an attorney. I just became available financially through an inheritance. So I was not able to afford an attorney then. So there was no reason for me to enter an appearance or ask for a postponement until just when I received my inheritance.

THE COURT: All right. But you have an attorney who is present with you today who is prepared to go forward.

[MS. C.]: We are just not on the same page for representation on what I need, the needs that I'm trying to – what I'm fighting for. I don't think we are on the same page. I think we have – things have – she is not optimistic in the ways that I am and she is just – I mean, I'm not sure if she is able to – are you able to do what I asked?

[TRIAL COUNSEL]: My understanding is that [Ms. C.] said she has written me a letter and told me that I would be discharged, that she is now in a position financially to hire individual counsel. I have not received that letter but I will tell the Court that I was in court all day yesterday until 5 o'clock so I did not check my mail at my office. There very well may be a letter there. The last time I got mail at my office was last Thursday because Friday was a holiday.

THE COURT: The letter is not the issue. The issue is whether this case is ready to go forward today. Are you prepared to go forward on the case set for today?

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[3] A reference to F.L. §5-319(a), which provides that a court shall rule on a guardianship petition within 180 days after the petition is filed. The TPR action was filed on April 19, 2017; the first day of trial was November 14, 2017.

[TRIAL COUNSEL]: Am I prepared?

THE COURT: Yes.

[TRIAL COUNSEL]: I mean, I have my information together from what I have been able to gather from my client, however, she indicates that she believes that there are other persons that should have been here that would be able to present testimony. I can tell the Court that I have asked her those individuals' names prior. The only person I was given was the name of a minister who did appear at one hearing and that was the only person that did appear. Her sister did call me at one time. Her sister did call me to tell me that she thought [Ms. C.] needed to find another attorney. And so I think that [Ms. C.'s] writing to me now is a product of her sister not wanting me to represent her either. I told her that she has to make her request to the Court. And so that is why she is doing that.

When I talked to her sister, I indicated that only [Ms. C.] can fire me as counsel and she can certainly do that in writing and only the Court can assign another attorney to her or she can hire her own.

THE COURT: She can hire counsel. That is not the issue. The issue is whether this case should be postponed to give her time to hire private counsel when the issue was not raised in advance of trial. We are here on the trial date and other parties are prepared to go forward.

[TRIAL COUNSEL]: My only concern, Your Honor, is opening myself up if I'm representing someone who has clearly indicated she does not want me to be her attorney.

THE COURT: I think with what she indicated, she wanted to hire someone else. [Ms. C.], is there something – are there things that you think should have been done that haven't been done?

[MS. C.]: Yes.

THE COURT: What?

[MS. C.]: Subpoena witnesses. What hasn't been done –

THE COURT: What witnesses?

[MS. C.]: My sister, my family members that are able and available to have had [D.] all this time. The Department – I'm not saying they haven't – they failed, but to me they failed to find and talk to my family, return the calls. My daughter has been in care for like 16 months and I was incarcerated and didn't have numbers, wasn't able to have contact with anyone on the outside because we have a certain phone system that you have to have certain numbers programmed. And when I found my sister's new number, she called. She called and she spoke – she had surgery. She spoke with the workers but yet no one has interviewed her to be a placement for my daughter while incarcerated until March. I should be home in March. I have just been asking for family members. The pastor came to say that I believe she had another child in her care which was too old to be with my daughter. But I have had family and friends who have tried to get D but nothing has prevailed.

THE COURT: All right. Do you want to be heard on the postponement request, [D.'s counsel]?

[D.'S COUNSEL]: Yes, I do. This case is 18 months old. These witnesses have been interviewed as placement resources by the Department. There have been numerous CINA cases and CINA hearings where we have gone over this before.

[MS. C.]: No.

THE COURT: I don't find that this is a timely request to postpone. So the case will not be postponed today. So you have basically two options: You can go forward with [trial counsel] as your counsel or you can discharge [trial counsel] as counsel and proceed without counsel. But I would strongly urge you that you are much better served if you have an attorney assisting you who understands the rules of Court and understands the Court process.

[MS. C.]: I also understand it should be my right to have counsel in addition. So if that is the rule, that is the rule. It is appealable?

THE COURT: When the case is done, the outcome of the case is appealable by whatever side loses. What I'm denying is the request to postpone. It is up to you to keep [trial counsel] as your attorney.

> [MS. C.]: Yes, [trial counsel] is my attorney. I have no problem with [trial counsel]. I need a family attorney that specializes. This is my child.
>
> THE COURT: I understand.
>
> [MS. C.]: This is a special case. This is not a case of a child being abused, neglected. This is because I'm incarcerated.
>
> THE COURT: Okay.
>
> [MS. C.]: Her father is sitting here. Okay. Both of us are here. We have family. My child should not be in foster care. That is my issue. And I feel as though a family attorney would be more suitable. Nothing against [trial counsel], but I think we need more. She is awesome. Since they want to go to a TPR, something premeditated when I only have six months here.
>
> THE COURT: The request to postpone is denied.
>
> [MS. C.]: Thank you.
>
> THE COURT: All right. . . .

Ms. C. points to two decisions of the United States Supreme Court, *Santosky v. Kramer*, 455 U.S. 745 (1982), and *Lassiter v. Department of Social Services*, 452 U.S. 18 (198l), as standing for the propositions that: (1) her interest in maintaining a parental relationship with D. is a fundamental right; and (2) in appropriate cases, the State is required to furnish counsel to indigent parents in termination cases. We agree with Ms. C. up to this point. As we have discussed, it is settled law that an individual's right to have a parental relationship with his or her child is a fundamental one. Moreover, indigent parents

have a right to representation through the Office of the Public Defender in termination of parental rights cases. *See* Criminal Procedure Article § 16-204.[4]

From these premises, Ms. C. argues that she has a right to counsel of her choice, and that this right was violated when the trial court refused to postpone the TPR trial to allow her to retain private counsel. At the very least, asserts Ms. C., the trial court should have engaged in the colloquy required by Md. Rule 4-215 when a defendant in a criminal trial requests permission to discharge counsel. She argues that her incarceration inhibited her capacity to mount an effective defense to the guardianship petition, and contends that the trial court had a duty to make some attempt to verify that her trial counsel was acting according to her wishes. Additionally, Ms. C. points to this Court's analysis and holding

[4] Section 16-204 reads in pertinent part:

> (a) Representation of an indigent individual may be provided in accordance with this title by the Public Defender or, subject to the supervision of the Public Defender, by the deputy public defender, district public defenders, assistant public defenders, or panel attorneys.
>
> (b)(1) Indigent defendants or parties shall be provided representation under this title in:
>
> * * *
>
> (vi) a family law proceeding under Title 5, Subtitle 3, Part II or Part III of the Family Law Article, including:
>
> 1. for a parent, a hearing in connection with guardianship or adoption; [and]
>
> * * *
>
> 3. an appeal.
>
> * * *

in *In re Alijah Q.*, 195 Md. App. 491, 522 (2010), as supporting her contention that the colloquy between the court and Ms. C. was constitutionally inadequate.

These contentions are unpersuasive. The issue is not whether Ms. C. had the right to retain private counsel (she clearly did), but whether Ms. C. had the right to a postponement of the trial to give her an opportunity to do so. There was no requirement for the trial court to invoke the procedures required by Md. Rule 4-215. The teachings of *Alijah Q.* do not change this result.

Postponements are governed by Md. Rule 2-508, which states in pertinent part:

> (a) Generally. On motion of any party or on its own initiative, the court may continue or postpone a trial or other proceeding as justice may require.

Whether to grant a request for a continuance is a matter that lies "within the sound discretion of the trial judge." *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006). In *Touzeau*, the Court of Appeals considered whether a trial court abused its discretion by denying a motion made eleven days prior to trial for a continuance to permit an unrepresented party to retain counsel in a contested child custody action. *Id.* at 666.

In answering "no" to this question, the Court first identified three scenarios in which a trial court's denial of a request for a continuance will be treated as an abuse of discretion: (1) when the continuance is mandated by law; (2) when counsel is taken by surprise by an unforeseen event at trial, even though counsel has diligently prepared for trial; and (3) when an unforeseen event occurs that prejudices a party as long as counsel (or the party)

acted with diligence to mitigate the effects of the surprise. *Id.* at 669-70. Turning to the specifics of the case before it, the Court stated:

> Ms. Touzeau asserts that, even if she is deemed not to have presented those "exceptional situations" in which we found an abuse of discretion in the denial of a continuance, she had a right to be represented by counsel because the proceedings implicated the right to parent, a right that we recognized to be fundamental. We have said that the right to parent is fundamental even in custody disputes. The fundamental nature of the right to parent, however, does not necessarily implicate the range of due process protections statutorily afforded to parents in Child In Need of Assistance ("CINA") proceedings and involuntary termination of parental rights proceedings. Even in the two latter situations, we heretofore have declined to require the full panoply of constitutional due process protections to litigants, as afforded to defendants in criminal cases. . . .
>
> * * *
>
> In the case sub judice, Ms. Touzeau has failed to demonstrate that she experienced an unforeseen circumstance in the contested custody proceedings that she reasonably could not have anticipated and that she acted with due diligence to mitigate the consequences of not being represented by counsel at the hearing to modify custody.

Id. at 676-78 (citations omitted).

Returning to the case before us, Ms. C. does not assert that there was a Maryland statute or rule that required the trial court to grant a postponement in a TPR proceeding to enable a parent to obtain different counsel. Indeed, it is the public policy of this State to minimize the time that children spend in foster care. *See In Re Jayden G.*, 433 Md. at 82-84; Courts and Judicial Proceedings Article ("C.J.P.") § 3-823(h) (3) ("Every reasonable effort shall be made to effectuate a permanent placement for [a child in need of assistance] within 24 months after the date of initial placement."); F.L. § 5-319(a) ("[A] juvenile court shall rule

on a guardianship petition . . . within 180 days after the petitioner is filed."). Ms. C. had been represented by trial counsel since April of 2016, more than 19 months before the TPR trial began. At some point, Ms. C. became dissatisfied with trial counsel. Ms. C. made no efforts to obtain new counsel and instead waited *until the day of trial* to ask for a postponement so that she could obtain new counsel. Both the Department and counsel for D. objected to the postponement. When asked by the trial court to describe "things that you think should have been done that haven't been done," Ms. C. stated that trial counsel had failed to subpoena her sister and other family members who were available to care for D. while Ms. C. was incarcerated.[5] Trial counsel informed the court that Ms. C. had identified only one potential witness, a minister who had appeared at a CINA hearing. Like the Court of Appeals in *Touzeau,* we conclude that Ms. C. did not demonstrate that her desire for a different lawyer to represent her was "an unforeseen circumstance" that arose on the eve of trial.

We are fully aware of the importance of a parent's rights in his or her children. We are also cognizant of the restrictions imposed upon persons who are incarcerated. But parental rights must be balanced against the best interest of the child, and the practical difficulties

[5] In fact, the Department had contacted Ms. C.'s siblings. None of them were able to care for D. One of Mother's siblings, Sherri A., testified on the second day of trial.

facing Ms. C. were not insurmountable. We conclude that the trial court did not abuse its discretion in denying Ms. C.'s request for a postponement.

We are also unpersuaded by Ms. C.'s contention that the trial court was obligated to make the inquiries and advisements required by Md. Rule 4-215[6] for two reasons. First, Ms. C.'s parental rights are not afforded the same degree of constitutional protection as are the liberty interests that are in jeopardy in a criminal proceeding. *Touzeau*, 394 Md. at 676 ("Even in [TPR actions], we heretofore have declined to require the full panoply of constitutional due process protections to litigants, as afforded to defendants in criminal cases.") (citing *In Re Blessen H.*, 392 Md. 684, 705-08 (2006)). Second, the relevant

[6] The rule states in pertinent part:

> Rule 2-415 Waiver of Counsel.
>
> * * *
>
> (e) *Discharge of Counsel--Waiver*. If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

portion of Rule 2-415 applies to cases in which a defendant seeks to *discharge* counsel. After the trial court advised Ms. C. that it intended to deny her motion for a postponement, and that "you are much better served if you have an attorney assisting you who understands the rules of Court and understands the Court process," Ms. C. made no further effort to discharge trial counsel.

Finally, we are not persuaded that *In Re Alijah Q.*, 195 Md. App. 491 (2010), suggests a different result. In that case, this Court held that the trial court erred in striking the appearance of a lawyer representing a parent in a CINA proceeding without first "attempt[ing] to verify with Ms. Q. that she wanted to discharge her lawyer." *Id.* at 523. We reached this result by analyzing the legislative history of C.J.P. § 3-813,[7] Md. Rule 11-106,[8] and principles of agency law. 195 Md. App. at 510-19, 520-23. No one asserts that

[7] The statute reads in pertinent part:

> (a) Except as provided in subsections (b) and (c) of this section, a party is entitled to the assistance of counsel at every stage of any proceeding under this subtitle.
>
> * * *
>
> (c) The Office of the Public Defender may not represent a party in a CINA proceeding unless the party:
>
> (1) Is the parent or guardian of the alleged CINA;
>
> * * *

[8] Rule 11-106 reads in pertinent part:

> a. In All Proceedings--Appearance of Out-of-State Attorney. The respondent is entitled to be represented in all proceedings under this Title by counsel

either the statute or the rule applies to TPR actions, or that the law of agency is relevant to Ms. C.'s request for a postponement. However, this Court also noted that:

> retained by him, his parent, or appointed pursuant to the provisions of subsection b 2 and 3 of this Rule. . . .
>
> b. Waiver of Representation--Indigent Cases--Non-Indigent Cases.
>
> 1. Waiver Procedure. If, after the filing of a juvenile petition, a respondent or his parent indicates a desire or inclination to waive representation for himself, before permitting the waiver the court shall determine, after appropriate questioning in open court and on the record, that the party fully comprehends:
>
> (i) the nature of the allegations and the proceedings, and the range of allowable dispositions;
>
> (ii) that counsel may be of assistance in determining and presenting any defenses to the allegations of the juvenile petition, or other mitigating circumstances;
>
> (iii) that the right to counsel in a delinquency case, a child in need of supervision case, or a case in which an adult is charged with a violation of Section 3-831 of the Courts Article includes the right to the prompt assignment of an attorney, without charge to the party if he is financially unable to obtain private counsel;
>
> (iv) that even if the party intends not to contest the charge or proceeding, counsel may be of substantial assistance in developing and presenting material which could affect the disposition; and
>
> (v) that among the party's rights at any hearing are the right to call witnesses in his behalf, the right to confront and cross-examine witnesses, the right to obtain witnesses by compulsory process, and the right to require proof of any charges.
>
> * * *
>
> 3. Child in Need of Assistance Cases. A party in a child in need of assistance proceeding is entitled to the assistance of counsel as provided in Section 3-821 of the Courts Article.

> We are mindful that a statutory right, such as the one created by C. J. § 3–813 . . ., while deserving of protection, is not necessarily the equivalent of a constitutional right. Nevertheless, in order to effectuate and safeguard the statutory right to counsel in CINA cases, certain minimal protections must govern the waiver of counsel, even if the waiver need not satisfy Rule 11–106(b)(1) or constitutional standards of a voluntary, knowing, and intelligent waiver.
>
> * * *
>
> As we see it, in the absence of any affirmative indication by Ms. Q. that she assented to the discharge of her counsel, it was incumbent on the judge to make some attempt to verify that, moments before the hearing was to begin, Ms. Q. wanted to discharge her lawyer.
>
> We are mindful of *Blessen's* admonition that a personal, voluntary, knowing, and intelligent waiver colloquy is ordinarily required only in proceedings that involve fundamental rights or could result in confinement. Although the Sixth Amendment does not apply here, a CINA proceeding implicates a "fundamental" right. . . . [the] liberty interest in the care and custody of her child, and *when, as in a CINA proceeding, a state seeks to change the parent-child relationship, the due process clause is implicated.*

In Re Alijah Q., 195 Md. App. 491, 519-23 (2010) (footnote and citations omitted, emphasis in original).

The Due Process Clause is certainly implicated in TPR actions and *Alijah Q.* stands squarely for the proposition that the trial court would have erred if, for instance, the court had failed to engage in a dialogue with Ms. C. about her reasons for wishing to discharge trial counsel, or had discharged counsel without warning Ms. C. of the risks inherent in proceeding without counsel. But the trial court did permit Ms. C. to explain why she was dissatisfied with trial counsel and did advise Ms. C. that it would be prudent to proceed with counsel. The trial court did not violate Ms. C.'s due process rights when it denied her request for a postponement.

To conclude our analysis on this issue, a parent's right to counsel in a guardianship proceeding derives not from the Constitution, but rather from a state statute. *Compare Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 25-27, 30 (1981) (holding that there is no constitutional right to counsel in every termination of parental rights); *with* Crim. Proc. § 16-204 (requiring the Office of the Public Defender to provide counsel to eligible parents in TPR actions). Moreover, the right to counsel "is not a right to representation by any particular attorney." *Fowlkes v. State*, 311 Md. 586, 605 (1988) (citations omitted). The trial court did not abuse its discretion in declining to continue the case to permit Ms. C. to retain private counsel.

2.

Ms. C.'s second argument is that she received ineffective assistance of counsel from her trial attorney. She claims that trial counsel was aware that she wanted to fight to regain her child; but that she and trial counsel were "not on the same page." Ms. C. asserts that instead of formulating an approach consistent with her decisions, trial counsel devised and implemented what she terms "an effortless strategy of conceding that [Ms. C.] had no basis for contesting the TPR petition and advocating solely for the return of the child to her father." In her brief, Ms. C. expanded upon her contention:

> Despite awareness of [Ms. C's] express desires and the communication challenges presented by [Ms. C.'s] incarceration, trial counsel took no steps to resolve the fundamental disagreement between the two and the case proceeded according to counsel's objective and strategy. When Father agreed to consent to TPR along with a post-adoption contact arrangement with the foster parents, [Ms. C.'s] case fell apart.

> Counsel for [Ms. C.] also did not hold the Department accountable for meeting the state's heavy burden of proof in an involuntary TPR hearing. Aside from the brief testimony of the maternal aunt, counsel did not subpoena or produce any records or witnesses on [Ms. C.'s] behalf. . . . The record shows that counsel's case-in-chief consisted of brief and incomplete direct examination of [Ms. C.] and limited testimony from her sister about her willingness to supervise visitation if and when [D.] was placed with her father.
>
> * * *
>
> The record displays that the Department failed to produce direct evidence of the key components of [Ms. C.'s] alleged detrimental behavior and neglect of her daughter that formed the heart of its case and based its presentation on hearsay material only to be used to test expert opinions and not for the truth of the matters asserted. [Ms. C.'s] counsel somehow overlooked this blatant deficit.
>
> * * *
>
> [T]he failure to advocate the client's position, produce any positive evidence, explore potential placement resources, test the unsupported contentions of the Department, and challenge the value of the Department's social workers' hearsay testimony, cannot be considered to have been either a tactical decision or the exercise of reasonable professional judgment. . . . Counsel's actions clearly fell below an objective standard of reasonableness.
>
> [Ms. C.] suffered prejudice because there was a reasonable probability that the result would have been different if the case had been conducted in a competent manner.

Finally, Ms. C. asks us to reverse the trial court's judgment or, failing that, to remand the case to the trial court for an evidentiary hearing regarding the effectiveness of trial counsel's performance.

Ms. C.'s contentions concerning her trial counsel's performance are unpersuasive. Our explanation begins with *In Re Chaden M.*, 422 Md. 498, 515 (2011), which was an appeal

by April C.[9] from a judgment of the Circuit Court for Baltimore City terminating her parental rights in her son, Chaden M., because Ms. C. had failed to timely file an objection to the guardianship petition as required by Md. Rule 9-107.[10] 422 Md. at 515.[11] The record showed that Ms. C.'s counsel explained to the trial court that she failed to file a timely objection on behalf of her client because she (erroneously) believed that filing an entry of her appearance reserved Ms. C.'s rights to participate as a party in the TPR action. *Id.* at 505-06. The trial court concluded that counsel's failure to file an objection constituted an irrevocable waiver of Ms. C.'s right to participate in the TPR proceeding. *Id.* at 506.

Ms. C. appealed. This Court reversed. In reaching our result, we looked to the tests enunciated in *Strickland v. Washington*, 466 U. S. 668, 687–88 (1984), to evaluate

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[9] The "Ms. C." in *Chaden M.* is not the same person as the appellant in the present case.

[10] Rule 9-107 states in pertinent part:

> (a) In General. Any person having a right to participate in a proceeding for adoption or guardianship may file a notice of objection to the adoption or guardianship. The notice may include a statement of the reasons for the objection and a request for the appointment of an attorney.
>
> (b) Time for Filing Objection.
>
> (1) In General. Except as provided by subsections (b)(2) and (b)(3) of this Rule, any notice of objection to an adoption or guardianship shall be filed within 30 days after the show cause order is served.
>
> * * *

[11] Failure to timely file an objection is deemed to be a consent to the relief sought in the petition. F.L. § 5-320 ; *see also In re Adoption/Guardianship Nos. T00130003, T00130004*, 370 Md. 250, 263 (2002); *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 496 (1997)).

assertions of inadequate representation by counsel in criminal cases. *In Re Adoption/Guardianship of Chaden M.*, 189 Md. App. 411, 431–38 (2009). The Court of Appeals granted the Department of Social Services' petition for writ of certiorari and affirmed, "albeit by a different analysis." 422 Md. at 514.

In holding that the trial court erred, the Court of Appeals reasoned that the right to counsel, even if statutory in origin, was also the right to effective counsel, *id.* at 509; that it was clear from the record that Ms. C.'s attorney did not render effective legal assistance, *id.* at 513; that the attorney "recognized her error . . . in not filing a notice of objection, *id.* at 514; and, finally, that the lawyer's error prejudiced Ms. C. because Ms. C. was precluded from contesting the guardianship petition, with the "inevitable" outcome that the petition was granted, thus terminating Ms. C.'s parental rights, *id*. at 514–15. The Court concluded that:

> Given the prejudice inuring to April C. as the result of [the lawyer's] error, we hold that April C. received ineffective assistance of counsel and, consequently, was denied the right to counsel. . . . Under these circumstances, permission to file a belated notice of objection is the proper remedy.

Id. at 515.

Finally, the Court noted that it based its holding "on the clear and admitted failure of [Ms. C.'s attorney] . . . to have fulfilled a statutory duty to file a notice of objection[.] Therefore, there is no need to address, as did the Court of Special Appeals did, the applicability to this situation of the analysis of *Strickland v. Washington.*" *Id.* at n.14.

Unlike the lawyer in *Chaden M.*, Ms. C.'s trial counsel did not admit to the trial court that her representation of her client was deficient in any aspect. Ms. C.'s appellate counsel points to nothing in the trial transcript that suggests that the trial court addressed the adequacy of trial counsel's performance. Thus, in contrast to *Chaden M.*, there is nothing in the record of this case that clearly shows that trial counsel's performance was deficient. Therefore, we will assess Ms. C.'s contention against the judgment terminating her parental rights by applying the two-part test set out in *Strickland v. Washington*.[12] Writing for the Court in *State v. Syed*, ___ Md. ___, 2019 WL 1090800, No. 24 September Term, 2018

[12] Other than jurisdictional questions, this Court "[o]rdinarily . . . will not decide any . . . issue unless it plainly appears by the record to have been raised or decided by the trial court." Md. Rule 8-131(a). The same rule permits us to decide an issue "if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." *Id*. The efficacy of trial counsel's performance was neither raised to nor decided by the trial court, and it is difficult for us to see how addressing the issue would provide guidance to the trial court or avoid another appeal. Applying a similar principle, the Supreme Court of Arkansas held that it will not consider an appellate assertion that trial counsel in a TPR proceeding was deficient because the issue was not raised at trial. *Jones v. Arkansas Department of Human Services*, 361 Ark. 164, 190–91 (2005).

However, it appears that a clear majority of those appellate courts that have considered the issue have concluded that it is appropriate for the appellate court to address assertions of inadequate representation in TPR cases on direct appeal. *See* Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenges for Appellate Courts*, 6 JOURNAL OF APPELLATE PRACTICE AND PROCESS 179, 199–203 (2004). Generally, these courts applied the *Strickland v. Washington* analysis to the facts as developed in the cases before them. *Id.* at 214 n.180; s*ee also, In Re Adoption/Guardianship of Chaden M.* 189 Md. App. at 432–33 (collecting out-of-state cases).

(filed March 8, 2019), Judge Greene explained that a *Strickland* analysis involves a two-part analysis:

> Under the first prong, the defendant must show that his or her counsel performed deficiently. Next, the defendant must show that he or she has suffered prejudice because of the deficient performance. In the absence of satisfying both prongs of the test, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

2019 WL 1090800, at *5 (quotation marks, citations, and brackets omitted).

The standard used in determining whether a lawyer's performance in a particular case was deficient is an objective one. *Id.* Courts are "highly deferential" in their scrutiny of counsel's performance and "there is a strong 'but rebuttable' presumption that counsel rendered reasonable assistance." *Id.* (quoting *In Re Parris W.*, 363 Md. 717, 725 (2001)). Additionally, in order to prove deficient performance, a defendant "must also show that counsel's actions were not the result of trial strategy. A strategic trial decision is one that 'is founded upon adequate investigation and preparation.'" *Syed* at *5 (quoting *Coleman v. State*, 434 Md. 320, 338 (2013), and *State v. Borchardt*, 396 Md. 586, 604 (2007)). In *Strickland*, the Supreme Court explained the reason for the degree of deference and the presumption:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective

> at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

446 U. S. at 689 (citations and quotation marks omitted).

When we apply this standard to the facts of the case before us, we conclude that Ms. C. has failed to overcome the strong presumption that her trial counsel was constitutionally adequate.

First of all, as Ms. C. concedes in her brief, it is clear from the transcript that her trial counsel's strategy was to focus on the Department's case against Mr. J.. In our view, this trial strategy was a reasonable one under the circumstances presented in this case because, unless a court terminates the rights of both parents, it typically will not terminate the rights of either parent. *See* F.L. § 5-350(a) (A juvenile court may grant a guardianship petition only if "each of the child's living parents consents" or "parental rights have been terminated" in a TPR action filed in accordance with F.L. § 5-323 or a similar action filed in another jurisdiction.)[13]; *Carroll County v. Edelmann*, 320 Md. 150, 175 (1990) (stating

[13] The statute states in pertinent part:

> § 5-320. Authority to grant guardianship
> (a) A juvenile court may grant guardianship of a child only if:
> (1)(i) the child does not object;
> (ii) the local department:

that "the [guardianship] statute looks to the termination of the rights of *both* natural parents and the granting of custody of the child to a child placement agency for adoption.") (emphasis added)).[14]

Second, as Ms. C. does not concede in her brief, the Department's case against her was a strong one. The Department had evidence that showed that: D. was born drug-exposed; Ms. C. neglected the health of D., to D.'s long-term detriment; Ms. C. had substance abuse and addiction problems; Ms. C. was unable to maintain a stable residence after D.'s birth; Ms. C. frustrated efforts by the Department of Social Services to provide services to her

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1. filed the petition; or
2. did not object to another party filing the petition; and
(iii) 1. each of the child's living parents consents:
A. in writing;
B. knowingly and voluntarily, on the record before the juvenile court; or
C. by failure to file a timely notice of objection after being served with a show-cause order in accordance with this subtitle;
2. an administrative, executive, or judicial body of a state or other jurisdiction has granted a governmental unit or person other than a parent the power to consent to adoption, and the unit or person consents; or
3. parental rights have been terminated in compliance with the laws of a state or other jurisdiction, as described in § 5-305 of this subtitle; or
(2) in accordance with § 5-323 of this subtitle, the juvenile court finds termination of parental rights to be in the child's best interests without consent otherwise required under this section or over the child's objection.

* * *

[14] We are aware that the Court of Appeals has ordered rebriefing and reargument in *In Re Adoption/Guardianship of C. E.*, No. 77, September Term 2017, on the issue of "whether the parental rights of both parents must be terminated in order to grant guardianship" in a TPR proceeding. But the Court's order in *C.E.* was entered on August 13, 2018. Trial in the case before us began on November 14, 2017.

and to D. immediately after D.'s birth; Ms. C. had been incarcerated for a substantial portion of D.'s life; and Ms. C. would remain incarcerated for approximately one year after the first day of trial in the TPR action. Moreover, the Department had at its disposal, and entered into evidence, a copy of the *In Re M. S.* decision, which affirmed the termination of Ms. C.'s parental rights in another child based in large part on a pattern of medical neglect similar to what was experienced by D.

Third, in her brief to this Court, Ms. C. excoriates trial counsel for failing to object at various times during the trial to the introduction of hearsay evidence. But this is precisely the sort of post-trial exercise of hindsight that *Strickland* warns courts not to undertake.[15]

Fourth, to this Court, Ms. C. argues that trial counsel failed to call relatives and non-relatives as witnesses to testify that they were willing to care for D. There is nothing in the record to support this assertion. In fact, the Department's evidence showed that its caseworkers contacted all of Ms. C.'s siblings, Sherri A., Tanelle A., and Troy A., and that all of them were unable or unwilling to be a placement resource for D. Pastor Blackwood also could not care for D. because she was 77 years old and was already caring for a 26-

[15] In any event, trial counsel was hardly asleep at the wheel. She objected on numerous occasions during the Department's presentation of its case, and called Mother and Sherri A., Ms. C.'s sister as witnesses. A theme of her direct examination of each witness was to highlight Mr. J.'s fitness as a parent and Sherri A.'s and Ms. C.'s willingness to work cooperatively with Mr. J. for D.'s benefit if he were awarded custody. Additionally, trial counsel may well have decided not to object the social workers' summaries of D.'s medical history, Ms. C.'s past convictions, or her incarceration status because the actual records were admissible as public and/or business records.

year-old former foster youth with special needs. Assuming there were other relatives or nonrelatives willing to care for D., those individuals had no contact with the Department prior to the TPR action.

Finally, Ms. C. accuses trial counsel of failing to comply with Md. Rule 19-301.2[16] by failing to adopt the trial strategy enunciated by Ms. C. when she requested a postponement at the beginning of trial. This contention is meritless. The rule requires a lawyer to *consult* with his or her client regarding the "objectives of the representation." The colloquy between Ms. C. and the Court made it clear that Ms. C. and trial counsel did not disagree about the objective, viz., that Ms. C. would not lose her parental rights, but rather as to the means best calculated to achieve that result. Representation is not constitutionally deficient because the lawyer declines to permit the client to dictate trial strategy.[17]

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[16] The rule states in pertinent part:

> (a) [A]n attorney shall abide by a client's decisions concerning the objectives of the representation and, when appropriate, shall consult with the client as to the means by which they are to be pursued. An attorney may take such action on behalf of the client as is impliedly authorized to carry out the representation. An attorney shall abide by a client's decision whether to settle a matter.

[17] Comment [1] to Rule 19-301.2 states in relevant part (emphasis added):

> The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the attorney's professional obligations. Within those limits, a client also has a right to consult with the attorney about the means to be used in pursuing those objectives. *At the same time, an attorney is not required to pursue objectives or employ means simply because a client may wish that the attorney do*

The second prong of the *Strickland* analysis is whether, in light of the totality of the evidence, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Because we have concluded that Ms. C. has not rebutted the strong presumption that trial counsel's performance was not deficient, we need not engage in what would be a hypothetical exercise.

3.

Ms. C.'s final argument is that some of the trial court's findings as to her unfitness were defective because they were based upon hearsay evidence. Specifically, Ms. C. points to the court's findings as to D.'s medical condition at the time of her birth, the efforts of Child Protective Services to extend services to D. and Ms. C. immediately after D.'s birth, Ms. C.'s substance abuse history, Ms. C.'s criminal record, and Ms. C.'s failure to seek proper medical care for D.'s ear infections while D. was in Ms. C.'s care. She asserts that all of these findings were based on hearsay evidence. Thus, according to Ms. C., the trial court's ultimate conclusions as to Ms. C.'s parental fitness and the existence of exceptional

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> *so*. . . . In questions of means, *the attorney should assume responsibility for technical and legal tactical issues*, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

circumstances were irredeemably flawed. Although there is some substance in Ms. C.'s contentions, they are not a basis for appellate relief.

Three principles of the law of evidence point to this result. The first is that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Md. Rule 2-517(a). The second is Md. Rule 2-517(b), which authorizes a court to grant a continuing objection "[a]t either the request of a party or upon [the court's] own initiative." However, a continuing objection "is effective only as to questions clearly within its scope." *Id.* Accordingly, if the focus of the questioning changes to another topic, but then returns to what is objectionable, a new objection must be made. *See* Joseph F. Murphy, Jr., MARYLAND EVIDENCE HANDBOOK (4th ed. 2010) § 106[A] at 32. The final principle is that appellate courts will not reverse a judgment because objectionable testimony is admitted, if the substance of the objectionable testimony is presented to a fact-finder without objection through the testimony of other witnesses or by other evidence. *See, e.g.*, *Yates v. State*, 429 Md. 112, 120-21 (2012); *DeLeon v. State*, 407 Md. 16, 30–31 (2008). With this in mind, we turn to the instances cited by Ms. C. in her brief.

During the initial testimony of Mikka White, a Department witness, trial counsel objected to a question eliciting from White the basis of her opinion as to whether D. had been the victim of abuse or neglect while in Ms. C.'s care. The trial court ruled that White could testify as to the bases of her opinion. White proceeded to discuss D.'s medical

history, her ruptured eardrums resulting from repeated ear infections, and Ms. C.'s arrest. Neither Ms. C.'s nor Mr. J.'s counsel asked for a continuing objection. On redirect, however, when asked about the results of a physical examination of D., White, without objection, testified that D. "had sustained hearing loss from multiple ear infections and ruptured ear drums that weren't treated while in the care of [Ms. C.]." Furthermore, Ms. C.'s sister, Sherri A., and Mr. J. both testified, also without objection, that D. was born substance-exposed.

Much the same scenario played out during the testimony of Amy Heikkinen, the Department's social worker assigned to D.'s case. There was an initial objection to Ms. Heikkinen's testimony about the circumstances that brought D. into foster care after Ms. C.'s arrest, and the trial court admitted that testimony to show the basis of Heikkinen's opinion that D. had been neglected while she was in Ms. C.'s care. But there was no request for a continuing objection, nor was there an objection Heikkinen's subsequent testimony that D. had seen a pediatrician on only one occasion before being placed in shelter care, and that, when D. was taken to a doctor after she was admitted into shelter care, she was diagnosed with active infections in both ears and that there was scar tissue around both eardrums. Additionally, there was no objection when Heikkinen testified that the local Department of Social Services attempted to provide services to Ms. C. because D. had been born substance-exposed but could not locate her. And Sherri A., Ms. C.'s sister, testified that social service caseworkers visited Ms. C. when she lived at the Cooksville home.

Sherri A. and Mr. J. testified that after Ms. C. left the Cooksville home they also lost track of Ms. C. and D.

Moreover, the juvenile court's order that D. was a child in need of assistance was admitted into evidence. In the order, the CINA court found that Ms. C. was "unwilling/unable to provide proper care [to D.] due to drug addiction and resulting negative consequences[.]" In the same order, the CINA court found that Ms. C. was "currently incarcerated." Ms. C. herself testified that she had been incarcerated continuously since her arrest. Heikkinen testified, without objection, that Ms. C.'s anticipated release date was "[S]pring 2019." Although the juvenile court found that Ms. C. "has a record of thirteen convictions for thefts, assaults and similar offenses during the period from 2003 through 2016," the court did not use this finding as one of the relevant facts it considered in determining unfitness and exceptional circumstances. Instead, it relied upon the fact that Ms. C. had been incarcerated for 20 months and would remain incarcerated for more than another year.

The preceding analysis leads us to conclude that any evidentiary errors were waived or were harmless.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.