

Circuit Court for Montgomery County
Case No. 6-I-18-35

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2625
September Term, 2018

IN RE: C.H.

Meredith,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: June 4, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal addresses an order entered by the Circuit Court for Montgomery County, sitting as a juvenile court on August 31, 2018, at which time the court transferred custody of C.H. --- who had previously been adjudicated a child in need of assistance (“CINA”) --- from the child’s natural mother, L.A. (“Mother” or “Ms. A.”), appellant, to the child’s natural father, S.H. (“Father”), and closed C.H.’s CINA case as requested by the Montgomery County Department of Health and Human Services (“the Department”), appellee.

In this appeal, Mother presents a single question: “Did the trial court err by failing to grant a continuance and closing C.H.’s [CINA] case when Ms. A. was not present?” For the reasons explained herein, we perceive neither error nor abuse of discretion in the court’s decision to proceed with the scheduled review hearing.

BACKGROUND

The pertinent background of this case is set forth in great detail in the opinion we filed in consolidated Appeals No. 734, September Term, 2018, and No. 1113, September Term, 2018. We will not repeat here Mother’s history with the Montgomery County Department of Health and Human Services. Suffice it to say that, on April 11, 2018, three of Mother’s children were declared CINA, based upon her agreement with facts alleged in the Department’s amended petition, as reflected in the court’s order entered on April 17, 2018. S.H. is the natural father of one of those three children, namely, C.H. S.H., too, consented to C.H. being declared CINA in April 2018. Pursuant to Md. Code, § 3-801(f) of the Courts & Judicial Proceedings Article (“CJP”), a “child in need of assistance” means “a child who requires court intervention because: (1) The child has been abused, has been

neglected, has a developmental disability, or has a mental disorder; and (2) The child’s parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child’s needs.”

Although all three children were initially left in Mother’s custody pursuant to an order of protective supervision, on May 8 or 9, 2018, all three children were taken into custody by the Department, and at the conclusion of an emergency hearing on May 9, 2018, the court ordered that C.H. “be placed in the temporary care and custody of his father [S.H.]”.

On May 31, July 13, and July 27, 2018, the court heard evidence regarding the removal of the children from Mother’s custody and her desire to regain custody. On August 1, 2018, the court entered an order ruling that it was in the best interest of C.H. to remain in the care and custody of his father (S.H.), and for the other two children to remain in foster care. A review hearing was scheduled for August 27, 2018.

When the case was called on August 27, 2018, Mother was not in court. Her counsel who had been representing her in the CINA proceedings appeared, and told the court that Mother was incarcerated on a no-bond warrant in Washington County, following her arrest on August 15, 2018, for failing to appear before her probation officer. Counsel could offer the court no indication when Mother might be released. Mother’s attorney, who had just returned from an out-of-town trip, acknowledged that she had not requested a writ of *habeas corpus* to secure Mother’s appearance at the hearing. Mother’s attorney requested a continuance so she could speak with Mother, and so she could try to arrange for Mother to participate in the hearing.

The Department’s attorney pointed out that the twelve days between Mother’s arrest and the hearing had provided ample time to arrange for Mother’s appearance.¹ The Department advocated going forward with the scheduled review hearing, particularly because the Department and the attorney for the children contended that C.H. presented no child welfare issues.

Counsel for the Department and the children then proffered their recommendations as to the best placement for the children: X.A. should move to a residential treatment center; J.A. should remain in his foster home, where he was doing “really well”; and C.H. should remain with Father, where he was “absolutely happy and content,” and his CINA case should be closed.

Although Mother’s attorney agreed that X.A. and J.A. should remain in care, she argued that it would be “quite a disaster for [C.H.] and his relationship with his mother” if the court granted custody of C.H. to Father and closed the case because counsel feared that Father would not cooperate with Mother regarding visitation. In addition, Mother claimed entitlement to reasonable efforts toward reunification with C.H.

Attempting to balance the needs of the children against Mother’s unavailability, but reluctant to postpone the review hearing to some unknown date on which Mother might be released from jail, the court ruled:

I think the job that the Court [is] supposed to do here is try to balance the rights of the children, which frankly are paramount with the rights of the parents and I think what’s happened for mother in this case is that she has

¹ The fact that Mother was facing incarceration in Washington County for a violation of probation had been the subject of testimony at the removal merits hearing on July 13, 2018.

perhaps hit the place where she has to think hard about what happens next and how it happens. She's clearly — it was clear from the videos of the night that [C.H.] was missing and I mean no disrespect, sir. I know he wasn't really missing, but she thought he was is the point. And the chaos that followed both her conclusion that he, he had gone somewhere or was lost or missing or taken and the sort of the — what ended up being sort of the cycle down over that night and I get it. You might be upset at what had happened and then be exhausted. But she was also angry and belligerent and had clearly lost the capacity to make a different arrangement once she knew that her son was safe. And she didn't — it was — she clearly had hit a place where she needed to be somewhere else to get some help, which she clearly hasn't done.

I'm, I am struggling with the reality of asking her children to wait some more at this point. And really, frankly, for the baby[, J.A.,] and for [X.A.] it's no different. The only reality here, the only difference, truly, is that I'm being asked to allow [C.H.] to be able to go home with his dad and live with his dad.

I don't think[, Mother's attorney], that there's anything about this that reflects on your ability to act as mother's counsel. You didn't do this and you were away and you're entitled to be away. And mother got herself into this fix and I think she's going to have to work on getting out of this fix. But, that having been said, [C.H.] is also entitled to a childhood unencumbered by this kind of parental behavior that makes it so that there were 20 police officers looking for him.

* * *

[Father], what I want to say to you about this is that I recognize that you and mother may not have much of a conversational relationship, but you do have a son and you're going to have to find a way to communicate. I can't be the conduit for, for how this is going to go. He is entitled to have the best each of you can give him and that's going to require that you talk to mother on occasion and that she will talk to you on occasion. And while I recognize that that has not been an easy structure for either of you over time, he needs you to do that so that he gets what he's entitled to.

So, I think as far as the — what we’re theoretically here for, which is the 3-816.2,^[2] I don’t see any reason for us not to go forward with it. I think it’s appropriate under the circumstances to keep things moving in the right direction and certainly because of what this is—how do I say this? The juvenile court is a very forgiving place, particularly with regards to having to rethink or reconsider what’s happened and how it might change over time depending on how things go. I’ll also note that I think there are [a] number of pending appeals. . . . So it’s not lost on me that we’re in the middle of the load eye, we’re not on the outside. But, that’s where we are for now.

Mother’s attorney then elicited testimony from Father’s mother, with whom Father and C.H. lived, about the structure of the home and the manner in which C.H.’s grandmother and Father both cared for C.H., as well as testimony from the family’s social worker regarding the disputed status report which the social worker had authored.³

At the close of that testimony, the attorneys for the Department, the children, and Father submitted without calling additional witnesses. Mother’s attorney argued that, because Child Welfare Services had presented no evidence, no change in placement or status was warranted until the next hearing, especially considering Child Welfare Services’s failure to show reasonable reunification efforts.

² CJP § 3-816.2 (a)(1) requires the court to “conduct a hearing to review the status of each child under its jurisdiction within 6 months after the filing of the first petition under this subtitle and at least every 6 months thereafter” and to make required findings.

³ Mother’s attorney also moved to strike the status report from the record because she alleged it contained “material misrepresentations of fact.” The court agreed to red-line portions of the status report that had not been previously sustained, but pointed out that the court would consider only the allegations in the amended CINA petition which the court had sustained by agreement on April 11, 2018, as “the road map for the court” because, “to the extent that this social worker’s document is inconsistent with the First Amended Child In Need of Assistance Petition that was sustained, the First Amended Petition is what governs.”

Noting that Mother was then incarcerated, and being held without bond, and that the children had been out of her care since May 9, 2018, the court found that C.H. was safe with Father. The court therefore granted Child Welfare Services’s request to close C.H.’s CINA case. The court continued X.A. and J.A.’s placements until the next review hearing.

In its August 31, 2018 written order entered pursuant to Courts & Judicial Proceedings Article § 3-816.2, the juvenile court reiterated the required findings it had made at the review hearing on August 27, 2018, including:

- (i) Safety of the Child: The children are safe in their placements. The Department is working to find a Residential Treatment Center placement for [X.A.] following his AWOL from RICA [Regional Institute for Children and Adolescents]. [C.H.] has found a safe home with Father, and [J.A.] is doing well in his foster home. It would be unsafe to return the children to Mother at this time, due to her legal, physical, and substance abuse problems.
- (ii) Necessity for out of home placement: It is not possible to place [X.A.] or [J.A.] with Mother because she is incarcerated. [C.H.’s] case will be closed and he will reside with Father.
- (iii) Compliance with care plans: Although she has intermittently tried to comply, Mother has been unsuccessful. Her incarceration is one more barrier to compliance. [C.H.’s] Father has been compliant.
- (iv) Progress toward alleviating issues necessitating the Court’s jurisdiction: Progress is being made, as [C.H.] is going to live with his Father. However, [X.A.] is slated to move into a Residential Treatment Center and [J.A.] is in foster care. Upon release from incarceration, Mother must focus on mitigating her significant physical and substance issues.

- (v) Projected reunification date: The Department’s projected date for achieving the permanency plan of Reunification for [X.A.] and [J.A.] is January, 2019.^[4]

The court ordered that X.A. and J.A. remain CINA, committed to the custody of Child Welfare Services, with X.A. to be placed at RICA, pending discharge to a residential treatment center, and J.A. to be placed in foster care, pending possible placement in kinship care. The court closed C.H.’s CINA case and terminated its jurisdiction, granting custody to Father, with visitation to Mother. Mother appealed.

ANALYSIS

This Court observed in *In re E.R.*, 239 Md. App. 334 (2018): “the governing law precludes a court from finding a child to be a CINA if ‘there is another parent available who is able and willing to care for the child.’ CJ § 3-819(e).” (Citing *In re Russell G.*, 108 Md. App. 366, 377 (1996).)

Mother contends that the juvenile court erred or abused its discretion in declining to grant a continuance of the August 27, 2018 review hearing to allow her to be present at the hearing, or at least confer with her attorney, as she had a due process right to participate in the hearing that deprived her of custody of C.H. and closed his CINA case. Because she was denied the opportunity to participate in the hearing, Mother contends, prejudice must be assumed, and the court’s August 31, 2018 order as it relates to the closure of C.H.’s CINA case must be vacated, with the matter remanded for a new review hearing at which

⁴ During its oral ruling, the court noted that it was likely that future events relating to C.H. would “be in the family arena, not the CINA arena.”

she can be present. Mother does not specifically challenge the juvenile court’s factual findings or ultimate decision to grant custody of C.H. to Father. Her arguments challenge only the procedural context of the rulings.

With respect to requests to continue a hearing, the general rule is: “[T]he decision to grant a continuance lies within the sound discretion of the trial judge.” *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006). We will not disturb the denial of a request for continuance absent an abuse of discretion. *Id.* “An abuse of discretion occurs ‘where no reasonable person would take the view adopted by the [trial] court’ or where the court acts ‘without reference to any guiding rules or principles.’” *Johnson v. Francis*, 239 Md. App. 530, 542 (2018) (quoting *Powell v. Breslin*, 430 Md. 52, 62 (2013)) (alteration in *Johnson*).

We recognize: “‘A parent’s interest in raising a child is. . . a fundamental right.’” *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md. 666, 671 (2002) (quoting *In re Mark M.*, 365 Md. 687, 705 (2001)). And when “a state seeks to change the parent-child relationship, ‘the due process clause is implicated.’” *In re Maria P.*, 393 Md. 661, 676 (2006) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 25 (1996)). What “process is due,” however, is determined by the totality of the facts of each case, and due process is satisfied when “meaningful access to the courts” is provided. *In re Adoption No. 6Z980001*, 131 Md. App. 187, 199 (2000).

As a party in a CINA proceeding, which is civil in nature, a parent is “considered a person whose presence [at a hearing] is generally necessary under Rule 11-110(b).” *In re Maria P.*, 393 Md. at 672 (footnote omitted). Maryland Rule 11-110(b) states that, in juvenile causes, “[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.”

We have held, however, that, when a parent in a CINA case is incarcerated, due process does not confer an absolute right upon that parent to be present in the courtroom during a hearing. *In re Adoption No. 6Z980001*, 131 Md. App. at 194. In *In re Adoption No. 6Z980001*, the incarcerated father was not transported to court for a termination-of-parental-rights hearing, nor given an opportunity to testify by phone. In determining that he was not denied due process, we found it noteworthy that he had been given “a full and fair opportunity to defend while represented by able counsel” and did not claim that “any specific portion of the trial was affected by his absence or that his inability to testify via telephone hampered any specific portion of trial preparation or strategy.” 131 Md. App. at 199.

Similarly, in this case, Mother’s attorney proffered no information --- either at the review hearing or subsequent thereto --- that would have created a genuine dispute relative to Father’s fitness to care for C.H. As noted above, a child is not a CINA if there is one parent who is available, able and willing to care for the child. In this case, the evidence before the court was that Father --- who had been caring for C.H. since May 9 --- was available, able and willing to continue providing care for C.H.

In *In re Maria P.*, 393 Md. at 676-77, the Court of Appeals held that, when a juvenile court excludes a parent from a CINA proceeding, the record must indicate that the court considered the parent’s due process rights and expressed the factual basis of the decision.

Whether the exclusion of the parent constitutes sufficient prejudice to warrant a new hearing depends, to some extent, on the circumstances of the matter. *Id.* at 676-77 (citing *Green*, 366 Md. at 620).

In this matter, the juvenile court did not *exclude* Mother from the hearing. At the start of the review hearing, the juvenile court was informed that Mother was incarcerated, and that no one present in the courtroom had any knowledge about when she might be released from jail. Neither Mother nor her attorney had made arrangements for her to appear or participate via telephone. Mother had not been transported to the review hearing because no one filed a writ of *habeas corpus* to secure her attendance. In addition, the court was uncertain whether facilities were available to transport Mother to Montgomery County from another county under a writ. Given the uncertainty about when Mother might be available to participate in a review hearing, the court expressed its reluctance to put off review of the children’s status until some unknown date in the future.

With respect to Mother’s due process right to be present at the hearing, the court explained that it had to balance the rights of C.H., who is “entitled to a childhood unencumbered by this type of parental behavior,” against those of Mother, and added that it did not relish the “reality of asking her children to wait some more at this point.” In addition to considering Mother’s unavailability for the foreseeable future, the court recognized Mother’s history with the court (and her appearance at proceedings in this case just a few weeks earlier) before concluding there was no sufficient reason for granting Mother’s attorney’s request for a continuance. By balancing the parties’ rights and ruling that “it’s appropriate under the circumstances to keep things moving in the right direction,”

the court properly exercised its discretion in assessing whether to grant the request for continuance or proceed in Mother’s absence. The court’s decision to give added weight to the children’s need for review was not “beyond the fringe” of what we would deem acceptable, and therefore, not an abuse of discretion.

The court went on to consider the history of the matter, including the factual background as described, and previously sustained, in the amended CINA petition. Neither Mother, ably represented by counsel, nor Child Welfare Services, nor the children’s attorney, presented any evidence criticizing the quality of Father’s care of C.H. And, with the merits removal hearing having concluded only a month prior to the review hearing — and Mother’s arrest coming approximately two weeks after the merits removal hearing — Mother had had little opportunity to make meaningful progress in alleviating Child Welfare Services’ and the court’s concerns about her parenting and chaotic life. Indeed, Mother’s attorney conceded at the review hearing that it would be appropriate for X.A. and J.A. to remain in care, and, other than suggesting that granting custody of C.H. to Father would create visitation issues, Mother’s attorney proffered no reason the court should consider an outcome other than closing C.H.’s CINA case.

Therefore, under the specific facts of this case, because it was unlikely a continuance would have altered the outcome, Mother has not persuaded us that she was prejudiced by the court’s decision not to continue the review hearing until she could be present. *See Green*, 366 Md. at 620-21 (the focus of our analysis should not hinge on the fact of the exclusion of a party from the proceedings, but on “why the exclusion was prejudicial.”); *In re Ashley E.*, 158 Md. App. 144, 164 (2004), *aff’d*, 387 Md. 260 (2005) (In a civil case,

“prejudice means that it is likely that the outcome of the case was negatively affected by the court’s error.”).

Finally, we point out that the paramount focus of any CINA proceeding is the best interest of the child. *In re Blessen H.*, 163 Md. App. 1, 15 (2005), *aff’d*, 392 Md. 684 (2006). Here, the evidence before the juvenile court was undisputed that C.H. was unsafe with Mother but doing extremely well with Father, no longer requiring the intervention of the court as a CINA.

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