

Circuit Court for Caroline County
Case No.: C-05-FM-21-000297

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 0824

September Term, 2023

DAVID HARRIS MILLER

v.

LINDA DIANE WALLIS

Friedman,
Ripken,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 28, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to MD. R. 1-104(a)(2)(B).

At the time that the events discussed in this opinion occurred, the Maryland Rules governing remote electronic proceedings were found in Title 2, Subtitle 8 of the Maryland Rules. Just three weeks after the conclusion of these proceedings, however, new Rules regarding remote hearings went into effect.¹ As a result, caution must be exercised in relying on this opinion as a precedent. *See generally* MD. R. 1-104 (regarding precedential value of unreported opinions).

FACTS

Miller and Wallis were married in 2002. While married, both were convicted of crimes in federal court. *United States v. Miller*, 41 F.4th 302 (4th Cir. 2022) (regarding Miller); *see also id.* at 306 n.1 (regarding Wallis); *id.* at 309 n.4 (same). As we understand it, they served sequential terms in federal penitentiaries, first Wallis and then Miller. After her release, while Miller remained incarcerated, Wallis instituted divorce proceedings in the Circuit Court for Caroline County. Miller answered and counterclaimed, seeking alimony and a large monetary award.² The parties began to conduct discovery and prepare for trial.

¹ The Rules that we are reviewing were adopted on April 9, 2018, and were rescinded effective July 1, 2023. Rules Order (Apr. 21, 2023). A new Title 21, which consolidates rules governing remote electronic proceedings, went into effect after July 1, 2023. *Id.*

² We observe that Miller’s counterclaims may only be an attempt to relitigate old grievances against Wallis arising out of their respective fraud convictions. If that’s all they are, and they are demonstrated to be *res judicata*, the circuit court should dismiss them at its earliest convenience. Unless and until that is demonstrated, however, we must treat them as viable counterclaims.

On **August 08, 2022**, the circuit court issued a writ seeking to have Miller brought to court for an evidentiary hearing scheduled for October 13, 2022.³ The federal authorities did not comply, and Miller was not transported.

On **October 26, 2022**, apparently on its own motion, the circuit court entered an Order staying the matter “until the defendant can personally or virtually appear.” Wallis filed a motion to reconsider the October 26 order staying the matter. In that motion, Wallis argued that it was a hardship to be forced to remain married to Miller until his release and that there were potentially adverse economic consequences to Wallis.⁴

On **February 28, 2023**, the circuit court held a non-evidentiary hearing on Wallis’ motion to reconsider the court’s stay order dated October 26, 2022. Miller participated in the hearing telephonically. Wallis asked that the hearing be allowed to proceed so that Wallis didn’t have to remain married to Miller until his release (which was then computed to be in November, 2024).⁵ At that hearing, Miller informed the circuit court that he had requested a furlough to attend the evidentiary hearing but had been denied. Wallis disputed that Miller had requested furlough and pointed out that Miller had presented no

³ Miller’s brief suggests that he filed an emergency motion to quash this writ, and that the circuit court ignored his motion. We were unable to locate such a filing, but it is immaterial to our analysis.

⁴ A constant theme of Miller’s pleadings is his view that these economic consequences represent greed on Wallis’ part. Of course, it is neither uncommon nor inappropriate for parties to seek to maximize economic benefit in a divorce. We decline to hold Wallis’ motives against her any more than we hold Miller’s motives, which are also at least partially financial, *see supra* note 2 (discussing Miller’s motivations), against him.

⁵ For reasons that are not included in the record, Miller was released from the federal penitentiary on or about June 9, 2023.

documentation to support his claim. At the hearing, as if to prove Miller’s point, there were several times where the parties had a difficult time hearing each other over the telephone. At the conclusion of the hearing, the circuit court held the matter in abeyance and invited Miller to submit briefing on whether he could be furloughed to participate at an in-person hearing.

On **April 13, 2023**, the court issued a writ seeking to have the federal prison authorities produce Miller on June 7, 2023, for the divorce hearing.⁶

On **April 17, 2023**, Miller filed an emergency motion to quash the April 13 writ. In that motion, Miller asserted that he was, by virtue of his incarceration, unable to attend the hearing in person; that he was unable to participate by videoconference because, he said, the videoconferencing system used by the federal system is incompatible with the system used by Maryland Courts;⁷ and that a telephonic hearing would be prejudicial because he would be unable to (1) communicate with his witnesses; (2) observe the demeanor of witnesses; and (3) display and view exhibits. Miller specifically noted that the circuit court had not made the requisite findings under Maryland Rule 2-803(c)(2)(B) that holding a

⁶ Miller argues that this writ was defective because it misidentified his role at the hearing, was allegedly wrongly addressed, and contained the wrong phrase in Latin. Because the circuit court made no findings about the sufficiency of the writ or whether it was even received by the federal officials, we need not—and won’t—evaluate the merits of these concerns.

⁷ Miller asserts that the Maryland courts are “aware” of the alleged incompatibility between the federal and Maryland videoconferencing systems. He makes this allegation here, and throughout this litigation, without providing any proof of the source of the Maryland courts’ awareness or proof that the systems are indeed incompatible. We can’t know whether the circuit court was aware of this incompatibility, but we certainly aren’t.

telephonic hearing would not cause him substantial prejudice or adversely affect the fairness of the proceeding. On **April 18, 2023**, Miller also filed a motion to postpone the evidentiary hearing due to Wallis’ alleged failure to produce discovery. By separate orders dated May 11, 2023, the circuit court denied both motions.

On **June 7, 2023**, the circuit court held an evidentiary hearing in the case.⁸ Miller did not appear in person, by video, or by telephone. The following day, **June 8, 2023**, the circuit court issued an order that granted Wallis an absolute divorce from Miller⁹ and required that “each party shall retain any personal property in their possession,” except that Miller was allowed to retain certain specified items that were in Wallis’ possession and ordered to “pay directly” to Wallis, \$5,600 for “stimulus funds improperly retained” by Miller. Finally, the order denied Miller’s requested alimony and marital award, thus effectively dismissing Miller’s counterclaims.

Miller noted a timely appeal to this court.

ANALYSIS

Miller argues that the circuit court erred in holding an evidentiary hearing on June 7 without him present or having the ability to participate remotely. We observe that under the

⁸ Originally, the parties did not provide a transcript of the June 7 hearing. This Court ordered it to be prepared and transmitted to us to ascertain whether the circuit court made the findings required by Rule 2-803(c). In reviewing the transcript, we are satisfied that the circuit court did not. We thank the parties for their assistance.

⁹ The divorce was granted on the basis of Miller’s incarceration, pursuant to FL § 7-103(a)(3).

then-applicable Rules,¹⁰ the circuit court was *only* permitted to hold a remote evidentiary proceeding either with the consent of the parties or on findings that:

- (1) participation by remote electronic means is authorized by statute; or
- (2) the participant is an essential participant in the proceeding or conference; and
 - (A) by reason of illness, disability, risk to the participant or to others, or other good cause, the participant is unable, without significant hardship to a party or the participant, to be physically present at the place where the proceeding is to be conducted; and
 - (B) permitting the participant to participate by remote electronic means will not cause substantial prejudice to any party or adversely affect the fairness of the proceeding.

MD. R. 2-803(c) (2023) (repealed effective July 1, 2023).¹¹ Thus, unless everybody consents (they didn't), or there is a specific statute that authorizes remote participation in this type of proceeding (there isn't), the circuit court was required to make three specific findings: (1) that the participant is an “essential participant;” (2) that the participant cannot

¹⁰ See *supra* note 1.

¹¹ We also observe that at the time of the June 7 hearing, *supra* note 1, there were three other Rules that were relevant and should have been explicitly considered by the circuit court. *First*, the Rules required that “[i]f remote electronic participation is to be permitted in an evidentiary proceeding, the court, whenever feasible, shall give preference to requiring that the participation be by video conferencing rather than mere audio.” MD. R. 2-804(d). *Second*, the Rules required that “[a]ll participants shall be able to communicate with each other by sight, hearing, or both as relevant.” MD. R. 2-805(c)(1). And *third*, “... [a]ll participants shall be able to observe all physical evidence and exhibits presented during the proceeding, and the program shall permit participants to transmit documents as necessary.” MD. R. 2-805(c)(2). The circuit court, to our knowledge, did not attempt to satisfy any of these requirements. We note that although these Rules have been rescinded, the same requirements continue to appear, now in Rule 21-104(d) and (i).

appear in-person;¹² and (3) that remote participation won't cause "substantial prejudice" or undermine the "fairness of the proceeding." The circuit court made none of these required findings. We hold that a circuit court may not hold a remote evidentiary in the absence of these findings. MD. R. 2-803(c) ("...a court may exercise the authority [to hold a remote evidentiary proceeding] **only upon** [these] findings ...") (emphasis added); *see also You v. Jeon*, 2023 WL 4572077, at *8 n. 9 (Md. App. Ct. 2023).¹³ We further hold that failure to make these findings is an error of law and we remand for the circuit court to hold an in-person hearing or make the necessary findings to hold a remote one.¹⁴ Finally, because we hold that the circuit court failed to make the required findings, we need not and do not reach Miller's constitutional claims that he was denied due process of law.¹⁵

¹² The parties strenuously debate whether it was possible for Miller to participate and if Miller took sufficient steps to facilitate his participation. Although resolution of this issue involves the legal interpretation of the federal regulations, 28 C.F.R. § 570.30 *et seq.*, it also requires a factual determination regarding who made the request, how, and when. In the absence of a factual record at the circuit court, we cannot review whether it was "possible" for Miller to participate.

¹³ Although the new Rules are more explicit in requiring the trial court to make on-the-record findings, MD. R. 21-201(b) (requiring the court to "make findings in writing or on the record") that doesn't mean that on-the-record findings were not required under the old Rules.

¹⁴ Of course, on remand, the circuit court will apply the Rules as they are now constituted, including, if appropriate, the Rules governing remote hearings found in Title 21. Ironically, the Supreme Court has liberalized the availability of remote proceedings and the new Rules require the court to consider and make findings regarding only a single factor: "whether remote electronic participation would be likely to cause substantial prejudice to a party or adversely affect the fairness of the proceeding." MD. R. 21-201(b) (2024).

¹⁵ *See VNA Hospice of Maryland v. Dep't of Health & Mental Hygiene*, 406 Md. 584, 606 (2008) (Maryland appellate courts "will avoid deciding ... constitutional issues and decide ... case[s] on ... non-constitutional ground[s] if reasonably possible.").

Because neither party has appealed from the judgment of absolute divorce, we affirm that aspect of the circuit court's order. We remand for the circuit court to hold an evidentiary hearing either in person or, if it finds on the record that the relevant factors exist, a remote evidentiary hearing.

**JUDGMENT OF ABSOLUTE
DIVORCE AFFIRMED. ALL OTHER
ASPECTS OF JUDGMENT OF THE
CIRCUIT COURT FOR CAROLINE
COUNTY VACATED AND CASE
REMANDED WITHOUT
AFFIRMING OR REVERSING FOR
FURTHER PROCEEDINGS NOT
INCONSISTENT WITH THIS
OPINION. COSTS ASSESSED TO
APPELLEE.**