

Circuit Court for Prince George's County
Case No. CAD17-12955

UNREPORTED*
IN THE APPELLATE COURT
OF MARYLAND

No. 2206

September Term, 2023

LINDA ANN BANKS

v.

JULIAN IRWIN BROWN, JR.

Arthur,
Tang,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: July 23, 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 Rule 1-104(a)(2)(B).

Linda Banks (“Mother”) appeals from three orders entered by the Circuit Court for Prince George’s County: (1) an order ruling that her request to postpone a hearing before the magistrate was moot; (2) an order adopting the magistrate’s proposed order that granted a motion to modify child support filed by Julian Irwin Brown, Jr. (“Father”) and dismissed a counter-complaint for custody and child support filed by Mother; and (3) an order denying Mother’s exceptions to the magistrate’s proposed order.

In an informal brief, Mother raises four issues that we have rephrased and consolidated as follows:¹

1. Did the circuit court err or abuse its discretion in ruling that Mother’s request to postpone the hearing before the magistrate was moot?
2. Did the circuit court err or abuse its discretion in granting Father’s motion to modify child support and dismissing Mother’s counter-complaint for custody and support?
3. Did the circuit court err or abuse its discretion in denying Mother’s exceptions?

¹ Mother phrased the issues as:

Issue 1: The court erred and abused its discretion when it denied my motion for sole custody without rescheduling the hearing due to my ill son, effectively denying me the ability to argue my case.

Issue 2: The court erred and abused its discretion when it denied my motion for sole custody.

Issue 3: The court erred and abused its discretion when it reduced the child support by 50%.

Issue 4: The court erred and abused its discretion when it denied my November 2023 Petition for Exceptions without reason or explanation. I would like the Appellate Court of Maryland to consider my Petition for Exceptions and its exhibits.

For reasons to follow, we are unable to address Mother’s issues because the record is incomplete. Accordingly, we remand the case to the circuit court for further proceedings consistent with this opinion.

BACKGROUND

Mother and Father are the parents of a minor child (“Child”). In July 2018, the circuit court entered an order establishing a custody arrangement for the Child and ordering Father to pay child support.

Five years later, in July 2023, Father filed a Motion to Modify Child Support (“Motion to Modify”). In October 2023, Mother filed a Counter-Complaint for Custody and Child Support (“Counter-Complaint”). A hearing before a magistrate was scheduled for Monday, November 6, 2023, at 9 a.m.

On Sunday, November 5, 2023, at 2:50 p.m., the day before the scheduled hearing, Mother filed a Motion to Request a New Hearing Date (“postponement request”) because the Child was ill and could not attend the hearing or be left alone. In her request, Mother stated that she had planned to bring a character witness and the Child, who was twelve years old, “so [the Child] could speak to the magistrate himself.” She explained that the Child had developed a fever the day before and continued to have a fever on Sunday. Mother requested that the hearing be rescheduled or, in the alternative, that the hearing be held remotely. Mother argued that granting a postponement would be in the Child’s best interest. The certificate of service on the motion indicated that Mother emailed Father a copy of the motion on Sunday.

The hearing before the magistrate proceeded on the morning of November 6, and Mother did not appear. As we explain later, the transcript of the November 6 hearing was not included in the record, so it is unclear whether the magistrate was aware that Mother had filed the postponement request, what Father represented at the hearing in that regard, and how the magistrate addressed Mother’s absence or resolved the motion, if at all. The record only reflects that, at 2:09 p.m. that same day, the circuit court issued an order ruling that the postponement request was “moot.”

On November 13, 2023, the magistrate issued a proposed order to grant Father’s Motion to Modify and dismiss Mother’s Counter-Complaint without prejudice. It read:

The above-captioned matter was scheduled for a hearing before the Family Magistrate on November 06, 2023, on [Father’s] Petition to Modify Child Support filed on July 26, 2023, and [Mother’s] Counter Complaint for Child Support filed on October 16, 2023.

Present at the hearing: [Father] without counsel[.]

IT IS HEREBY ORDERED, that [Mother’s] Counter Complaint for Child Support filed on October 16, 2023, be and is hereby dismissed without prejudice.

IT IS FURTHER ORDERED, that [Father’s] Petition to Modify Child Support filed on July 26, 2023, be and is hereby granted.

AND IT IS FURTHER ORDERED, that

The Consent Custody, Access and Child Support Order dated June 20, 2018, be modified to the extent that [Father] is directed to pay to [Mother] the sum of \$506.00 per month as child support for the minor child . . . commencing August 1, 2023. Said payments are to be made directly between the parties.

Both parties are required to notify the [c]ourt in writing within 10 days of any change of address or employment so long as the support order remains

in effect. Failure to do so may result in a fine not to exceed \$250.00, and may result in the obligor not receiving notice of proceedings.

Failure to comply with the above paragraph of this Order shall subject the obligor to a penalty not to exceed \$250.00.

The obligor shall make all payments until the wage withholding is in effect and payments are being withheld by the employer.

This case be and hereby is closed for statistical purposes only. PAYMENTS ARE TO CONTINUE.

Date

Judge

/s/
Magistrate, Thomas J. Rogers, Jr.

All testimony, Family Magistrate's findings of fact, conclusions of law, and Recommendations were electronically recorded and said recording is made a part of the court file for a period of two (2) years. The Family Magistrate makes recommendations in the form of a final Order. Pursuant to Maryland Rule 9-208(f), the parties are advised that if written exceptions are not filed on or before November 16, 2023, the attached Order will be submitted to the Court for approval. If exceptions are filed, a copy must be mailed or personally delivered to the opposing party or their attorney if they are represented.

(Emphasis added).

Again, because the hearing transcript was not included in the record, we do not know what evidence was presented, the arguments Father made, the magistrate's findings, or the reasons for the recommended rulings in the proposed order. Furthermore, the docket entries do not indicate that the magistrate prepared and filed written recommendations with a brief statement of his findings, so we are unaware of any findings that may have been made. *See* Md. Rule 9-208(e)(1) ("Except as otherwise provided in section (d) of this Rule

[contempt proceedings], the magistrate shall prepare written recommendations, which shall include a brief statement of the magistrate’s findings and shall be accompanied by a proposed order.”).

On November 15, 2023, Mother filed exceptions to the magistrate’s proposed order. Maryland Rule 9-208(g)(1) sets out the requirements for the excepting party. In pertinent part, the rule requires the excepting party to order a transcript of “so much of the testimony as is necessary to rule on the exceptions,” arrange for payment, and file a certificate of compliance confirming that these steps have been completed. It further provides that the transcript shall be filed within 30 days or longer (but not exceeding 60 days after the exceptions are filed) as the magistrate may allow. *Id.* “For good cause shown, the court may shorten or extend the time for the filing of the transcript. The excepting party shall serve a copy of the transcript on the other party. The court may dismiss the exceptions of a party who has not complied with this section.” *Id.*

The docket entries do not indicate that Mother filed a certification of compliance showing that she had ordered the transcript of the November 6 hearing. Nor was there any indication that she requested an extension of time to file the transcript with the circuit court.

On December 20, 2023, the circuit court signed the magistrate’s proposed order. The court also denied Mother’s exceptions without explanation.²

On January 17, 2024, Mother noted a timely appeal of the court’s orders.

² No hearing was scheduled on Mother’s exceptions; neither party requested one. *See* Md. Rule 9-208(h)(1) (“The court may decide exceptions without a hearing, unless a request for a hearing is filed with the exceptions or by an opposing party within ten days after service of the exceptions.”).

Incomplete Record on Appeal

While Mother’s appeal was pending, a record of the circuit court proceedings was transmitted to this Court; however, the transcript of the November 6 hearing was not included. On April 3, 2024, this Court issued a show cause order for Mother to explain why her appeal should not be dismissed due to failure to order the transcript.³

Mother explained that she attempted to obtain the transcript but could not do so because the transcriber could not find an audio recording of the hearing. She emailed the circuit court’s Office of the Court Reporters and the transcriber (Amicus Transcription, LLC) about the transcript. These communications indicate that on November 15, 2023, the day she filed her exceptions, Mother ordered the transcript of the November 6 hearing for her exceptions. In her request, she specified that she needed the transcript by December 1, 2023. There were various email exchanges between Mother and the transcriber over the next month about the status of completing the transcript. Ultimately, on January 22, 2024, the transcriber issued a letter to Mother explaining: “After numerous attempts to secure the audio for transcription from Prince George’s County Circuit Court, I have been unable to obtain it. Therefore[,] a transcript is unable to be produced. A refund of the estimated cost has been refunded to your credit card.”

On May 3, 2024, this Court issued an order indicating that the show cause order had been satisfied and that Mother’s appeal shall proceed. In addition, this Court ordered the

³ It is the appellant’s responsibility to order the transcript. *See* Md. Rule 8-411(a)(2) (“the appellant shall order in writing from the court reporter a transcript” of any portion of any proceeding necessary for the appeal).

circuit court to produce, within 15 days, either an audio recording of the hearing or a written statement indicating that such a recording could not be produced.⁴ The court did not respond.

On June 6, 2024, this Court entered an order stating that the circuit court had not responded to our previous order and that Mother’s appeal should proceed without a hearing transcript. We noted further that “[s]hould the Panel assigned to consider this appeal later determine that it cannot decide the appeal without transcripts, the appeal may be dismissed or remanded for further proceedings at that time.”

DISCUSSION

Our analysis and answer to Mother’s questions depend on our independent review of the record. *See* Md. Rule 8-131(c) (“When an action has been tried without a jury, an appellate court will review the case on both the law and the evidence.”). If this Court concludes that the substantial merits of a case cannot “be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court.” Md. Rule 8-604(d)(1).

⁴ Maryland Rule 8-414(a) provides, “On motion or *on its own initiative*, the appellate court may order that a material error or omission in the record be corrected.” (Emphasis added). The Court’s order to correct the record may “direct the clerk to take any additional action to implement the correction.” Md. Rule 8-414(c).

A.

Postponement Request

As to the first issue, Mother argues that the court erred or abused its discretion in denying her request to postpone the November 6 hearing due to the Child’s illness. Preliminarily, we note that the court’s order did not explicitly state that the postponement request was denied; the word “moot” was stamped on the postponement request. Clearly, however, the postponement request was not granted; the November 6 hearing proceeded in Mother’s absence.

Under Maryland Rule 2-508(a), a court “may continue or postpone a trial or other proceeding as justice may require.” “The determination of whether justice requires a continuance ‘lies within the sound discretion of the trial judge.’” *Att’y Grievance Comm’n of Md. v. O’Neill*, 477 Md. 632, 661 (2022) (quoting *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006)). We review the court’s decision for abuse of discretion, and we will reverse “only in ‘exceptional instances where there was prejudicial error.’” *Serio v. Baystate Properties, LLC*, 209 Md. App. 545, 554 (2013) (citation omitted). “A court abuses its discretion when ‘no reasonable person would take the view adopted by the trial court or when the court acts without reference to any guiding rules or principles.’” *In re K.L.*, 252 Md. App. 148, 185 (2021) (citation omitted).

Regarding a court’s exercise of discretion when faced with a postponement request in the context of a child custody case, this Court’s decision in *In re McNeil*, 21 Md. App. 484 (1974), is instructive. There, the issue was whether a juvenile court abused its

discretion in denying a mother’s postponement request and proceeding with an exceptions hearing in her absence. *Id.* at 496. The mother’s minor children had initially been committed to the care and custody of the Department of Social Services (the “Department”), but the mother later filed a petition to have the commitment order revoked. *Id.* at 486. A magistrate held a hearing on the mother’s petition and subsequently recommended revoking the commitment and returning the children to their mother. *Id.* After the Department filed exceptions, the matter was set for a hearing before the juvenile court. *Id.* At the beginning of that hearing, the mother’s counsel informed the juvenile court that the mother could not attend because one of her children was sick. *Id.* at 486–87. For that reason, and additional reasons related to the availability of some of the mother’s witnesses, counsel requested a continuance. *Id.* at 486–88. The juvenile court denied the request and proceeded with the hearing in the mother’s absence. *Id.* at 488. The juvenile court ultimately dismissed the mother’s petition. *Id.* at 493.

On appeal, we held that the juvenile court had abused its discretion in denying the mother’s postponement request. *Id.* at 500. In so doing, we noted that there was “no right more fundamental to any parent than to be given a reasonable opportunity to be present at any judicial proceeding where the issue is whether or not the parent should be permitted to have custody of its child.” *Id.* at 496. In light of that fundamental right, we found it difficult to conceive how the juvenile court could “proceed with the hearing not only in the absence of [the mother], but without making a realistic inquiry into the circumstances of her absence, or ascertaining whether she had been guilty of a pattern of unconcern.” *Id.* at 498.

We explained that while certain extenuating circumstances may justify a court’s decision to hold a custody hearing in a parent’s absence, none of those circumstances were present in that case, and “[t]here certainly was nothing of an emergency nature about the hearing[.]” *Id.* at 499. We concluded that the case was “one of those exceptional instances where refusal to grant a continuance was so arbitrary as to constitute a denial of due process.” *Id.*

Reaser v. Reaser, 62 Md. App. 643 (1985), is also instructive, although not related to child custody. There, the wife, in a divorce proceeding, requested that the trial be postponed so that she could obtain counsel. *Id.* at 645. The court denied the request, and the case proceeded to trial. *Id.* at 646. After the court entered judgment and the wife appealed, we reversed, holding that the court had abused its discretion in denying the wife’s postponement request. *Id.* at 650. In reaching that decision, we noted that the court had failed to give any reason for denying the continuance request. *Id.* Further, there did not appear to be any emergency situation necessitating the case to proceed immediately. *Id.*

In the instant case, the circuit court did not give a reason for ruling that Mother’s postponement request was moot. One possible explanation is that the postponement request was filed over the weekend before the Monday morning hearing on November 6, and it might not have been brought to a judge’s attention in time. Another possibility is that the magistrate might have become aware of the postponement request and dealt with it upon realizing that Mother did not appear at the hearing.⁵ The problem is that we do not have

⁵ See Md. Rule 9-208(b)(5) (“Subject to the provisions of an order referring a matter or issue to a magistrate, the magistrate has the power to regulate all proceedings in the hearing, including the power to: . . . continue . . . the hearing, as required[.]”).

the transcript of the November 6 hearing, so we cannot tell if the magistrate was aware of the Mother’s postponement request or if the magistrate made a realistic inquiry into the circumstances of Mother’s absence. *See McNeil*, 21 Md. App. at 498. Additionally, because we do not have the transcript, we cannot tell if any emergency necessitated the case to proceed immediately. *See id.* at 499; *Reaser*, 62 Md. App. at 650. For the reasons stated, we cannot address the first issue without the transcript and an explanation from the circuit court for why it ruled that the postponement request was moot.

B.

Adopting Magistrate’s Proposed Order & Denying Mother’s Exceptions

Separately, the circuit court did not provide a reason for adopting the magistrate’s proposed order and denying Mother’s exceptions. To the extent that the court considered the magistrate’s findings that were purportedly placed on the record, we do not have the transcript of the November 6 hearing to evaluate those findings. Without the transcript and an explanation from the court as to why it adopted the magistrate’s proposed order and denied Mother’s exceptions, we cannot evaluate either decision.

C.

Limited Remand

Ordinarily, when a transcript necessary to determine an appeal is omitted from the record, this Court has the discretion to dismiss the appeal. *See Town of Cheverly Police Dep’t v. Day*, 135 Md. App. 384, 391 (2000). But dismissal is not appropriate if the lack

of a transcript “was caused by the act or omission of a judge, a clerk of court, the court reporter, or the appellee[.]” Md. Rule 8-602(c)(3).

When the lack of a transcript is not the fault of the appealing party, our appellate courts have remanded the case without affirming or reversing to allow the court to address what transpired so that we could properly evaluate the parties’ claims. *See, e.g., King v. State Roads Comm’n of State Highway Admin.*, 284 Md. 368 (1979); *Dishman v. Dishman*, 59 Md. App. 435 (1984); *see also* Md. Rule 8-604(d)(1).

In *King*, the appellant established an error in the method of jury selection utilized in that case. 284 Md. at 371–72. The Supreme Court of Maryland held that it was appropriate to remand the case for the limited purpose of determining whether the appellant had timely objected to utilizing that method, a fact that the transcript failed to disclose. *Id.* at 374–75. The Court instructed the trial court on what it needed to do on remand:

On remand, if, after considering the record, the arguments of counsel, any trial notes he retained, or any other legitimate source, the trial judge’s recollection is refreshed to the extent that he can certify as to what occurred with regard to the alleged objection, the following action should take place: If the court finds the petitioners did not make a timely objection, as specified by this opinion, the judgments previously recorded on May 4, 1978, should be re-entered; however, if it finds such an objection was registered before the jury was impaneled, a new trial should be provided. On the other hand, if the trial judge is unable to reach a conclusion as to whether a timely objection was made, then, in that event, a new trial should be conducted.

Id. at 375.

In *Dishman*, this Court remanded a civil contempt case involving nonpayment of child support because the transcript of a hearing, during which the appellant purportedly was advised of his right to counsel and waived it, was missing through no fault of the

appellant. 59 Md. App. at 442. Relying on *King*, this Court remanded the case “for certification by the trial court as to what transpired.” *Id.* The Court directed the trial court on remand to consider the record. *Id.* at 442–43. If, after this review, the trial judge could recall and certify what occurred and, as a result, make a finding as to whether there was an intelligent, voluntary, and knowing waiver, the judge should proceed to do so. *Id.* If the judge found such a waiver, the judge “should certify the facts to us so that we can review the case.” *Id.* at 443. However, a new hearing should be conducted if the judge could not conclude whether such a waiver was made. *Id.*

In the instant case, the record is incomplete because of the lack of the transcript of the November 6 hearing, but through no apparent fault of Mother. In this case, as in *King* and *Dishman*, we find that justice will be served by permitting further proceedings. *See* Md. Rule 8-604(d)(1). Accordingly, we remand the case to the circuit court with orders structured as follows:

1. We direct the magistrate to certify what occurred as to (a) whether the magistrate addressed Mother’s absence and postponement request at the November 6 hearing, and if so, how; and (b) the evidence presented at the hearing and the magistrate’s findings and recommendations as to Father’s Motion to Modify and Mother’s Counter-Complaint.

2. If the magistrate is able to provide the certification based on his recollection of the hearing, then we direct the magistrate to prepare and file written recommendations to include a certification of what transpired regarding Mother’s absence and postponement

request (if anything at all), a summary of any arguments, a summary of the evidence presented, and findings made on the record on November 6. In that case, we further direct the circuit court to explain (a) why it ruled that Mother’s postponement request was moot, (b) why it adopted the magistrate’s proposed order, and (c) why it denied Mother’s exceptions.

3. If the magistrate is unable to certify what transpired at the November 6 hearing, then a new hearing on the merits of Father’s Motion to Modify and Mother’s Counter-Complaint should be conducted.⁶

CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE’S COUNTY, WITHOUT AFFIRMANCE OR REVERSAL, FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID ½ BY APPELLANT AND ½ BY APPELLEE.

⁶ We assume that the reason the circuit court did not respond to this Court’s June 6, 2024, order is because it could not find the audio recording of the November 6, 2023 hearing. If the court is able to locate the recording on remand, we direct the court to transmit a copy of the recording to this Court. In that case, we still direct the magistrate to “prepare written recommendations, which shall include a brief statement of the magistrate’s findings[.]” Md. Rule 9-208(e)(1). The circuit court must still explain (a) why it ruled that Mother’s postponement request was moot, (b) why it adopted the magistrate’s proposed order, and (c) why it denied Mother’s exceptions.