

Circuit Court for Baltimore City
Case No. T15338002, T153338003, & T15338004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1679

September Term, 2016

IN RE: ADOPTION/GUARDIANSHIP OF
M.K., I.K. AND N.K.

Reed,
Friedman,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: September 5, 2017

*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 arises out of juvenile court proceedings that terminated the parental rights of M.K., I.K., and N.K.’s biological mother. Mother argues that the juvenile court erred in two respects. First, she asserts that it abused its discretion by denying her motion for a new trial after Baltimore City deputy sheriffs allegedly denied her entry into the courthouse during trial. Second, she asserts that the juvenile court erred by erroneously admitting three exhibits that contained inadmissible hearsay. All parties agree that the exhibits were erroneously admitted. Because we hold that their admission was not harmless error, we vacate and remand the case for a new trial. For that reason, we need not decide whether the trial court abused its discretion in refusing to grant a new trial based on Mother’s alleged exclusion from the courthouse.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2012, the Baltimore City Department of Social Services (“DSS”) began an investigation into allegations that M.K., I.K., and N.K. were “neglected, sexually abused, and possibly physically abused.” At that time, M.K. was five years old, I.K. was four years old, and N.K. was two years old. DSS determined that the children were neglected because of Mother’s “failure to properly care [for] and protect the children” and that the children “were unkempt and dirty.” DSS also noted that “[t]he children were not up to date with their immunization shots” and that “[M.K.] was not homeschooled as reported by [Mother].” As a result, M.K., I.K., and N.K. were each declared a Child in

Need of Assistance (“CINA”). DSS placed the children in the care and custody of a foster family, the Ms, where they have remained since December 2012.

DSS filed a motion in the Circuit Court for Baltimore City to terminate Mother’s parental rights with regard to M.K, I.K., and N.K. A trial was held and, the following day, the juvenile court issued a Memorandum Opinion and Order terminating Mother’s parental rights. Mother noted an appeal.

DISCUSSION

Mother objects to the admission of three exhibits at her trial, each of which was produced by the Medical Services Division of the Circuit Court for Baltimore City:

Exhibit 39 “Termination of Parental Rights Evaluation,” written by Brenda S. Harriel, LCSW-C (dated May 2, 2016). This document presents an evaluation of the children’s foster father, Mr. M.¹

Exhibit 56 “CINA Disposition Evaluation,” written by Mary P. Yox, LCSW-C (dated June 12, 2013). This document reports Ms. Yox’s evaluation of Mother and includes specifically her diagnoses of schizophrenia, depression, and borderline personality features. The report opined that Mother did not have the stability to care for M.K., I.K., and N.K.

Exhibit 57 “Terminatoin [sic] of Parental Rights,” written by Ruth T. Zajdel, Ph.D. (dated May 6, 2016). This document is a cover memo with three additional reports, which we have renumbered as 57A-C:

¹ Because we find that the erroneous admission of Exhibits 56 and 57 substantially prejudiced Mother, we decline to discuss the prejudicial effect, if any, of Exhibit 39’s admission.

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- 57(A) “[Mother’s] Parental Fitness Report,” unsigned report evaluating Mother’s ability to care for M.K., I.K., and N.K. It includes a thorough evaluation of Mother’s personal history, the status of her mental health, and her ability to parent the children.
- 57(B) “[Foster Parents’] Bonding Session,” unsigned report of an observation session between M.K., I.K., and N.K., and their foster parents, the Ms. It concluded that the children have a strong attachment to the Ms.
- 57(C) “[Mother’s] Bonding Session,” unsigned report of an observation session between M.K., I.K., and N.K., and Mother. It concluded that the children did not have a significant bond with Mother.

All parties agree that these exhibits are hearsay, and that they are not admissible under the business records exception unless an appropriate foundation is provided by someone with knowledge of the contents, not just a custodian of records. *In re: T.A.*, ___ Md. App. ___, ___ No. 2110, Sept. Term 2016, slip op. at 10-14 (Aug. 30, 2017); *In re Adoption/Guardianship No.95195062/CAD in Circuit Court for Baltimore City*, 116 Md. App. 443, 464 (1997) (holding that a report created for the specific purpose of a CINA hearing was hearsay and not admissible under the business records exception to inadmissible hearsay).² No such foundation witness was offered.

² We have not considered whether the court could have admitted the Exhibits under the less formal rules of evidence that are allowed in some proceedings. *See* Md. Rule 5-101(c)(6) (“[T]he court, in the interest of justice, may decline to require strict application of the rules in ... [d]isposition hearings ... including permanency planning hearings.”); Rule 5-101(c)(7) (“[T]he court, in the interest of justice, may decline to require strict application of the rules in [child custody or visitation] [m]odification hearings.”). Moreover, we were asked to consider the Exhibits as a whole and thus we have had no

Despite the fact that these records should not have been admitted into evidence, we will not reverse if the mistake turns out to have been harmless. *In re: Yve S.*, 373 Md. 551, 616 (2003). Although there is no precise standard, “[i]t is not the possibility, but the probability, of prejudice” that is the focus, and a reversible error must be one that both affects the outcome of the case and is “substantially injurious.” *Id.* at 618 (internal citations omitted). Appellate review of harmless error must be on a case-by-case basis and must balance “the probability of prejudice in relation to the circumstances of the particular case.” *Id.*

Pursuant to § 5-323 of the Family Law (“FL”) article of the Maryland Code, a juvenile court may terminate parental rights without consent if it finds by clear and convincing evidence that termination is in the best interests of the child. FL §5-323(b). The statute provides a number of factors to guide the juvenile court’s consideration of the child’s best interests. FL § 5- 323(d). These factors are by no means exclusive, and a court may use any additional factor it finds relevant to the best interests of the child. *Id.* A parent’s mental illness is not one of the factors the court is required to consider, nor could it be. *See In re Adoption/Guardianship Nos. J9610436 & J9711031*, 368 Md. 666, 698-99 (2002) (holding that even if the parent had a mental disability, that disability was not in itself sufficient evidence that termination of parental rights was in the best interest of the

occasion to consider whether there is specific language within these exhibits that is admissible. *See T.A.*, slip. op at 12 n.4.

child). Yet mental illness can be a root cause that contributes to many of the conditions that compel termination. That was the case here. As we demonstrate below, the juvenile court found that Mother's mental illness created the conditions that made termination in the children's best interest. Critically, the only place in the record from which the juvenile court could learn about Mother's mental illness and its effects on the children was in Exhibits 56 and 57. Thus, when Exhibits 56 and 57 are removed from consideration, there is insufficient evidence remaining in the record to support the juvenile court's findings. For that reason, the error was not harmless and we must vacate and remand.

The juvenile court produced an extensive, 21-page written Memorandum Opinion and Order in this case, carefully organized around the FL § 5-323(d) factors and additional non-statutory factors that it considered important to its analysis. In that opinion, the juvenile court found that Mother's diagnosis with schizophrenia and depression was relevant to the following statutory factors:

- “The extent to which the parent has maintained regular contact with the child.” FL § 5-323(d)(2)(i)(1).
- “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.” FL § 5-323(d)(4)(i).
- “The child's feelings about severance of the parent-child relationship.” FL § 5-323(d)(4)(iii).
- “The likely impact of terminating parental rights on the child's well-being.” FL § 5-323(d)(4)(iv).

Additionally, the juvenile court found Mother’s schizophrenia and depression relevant to its analysis of the following non-statutory factors:

- The possible emotional effect on the child if custody was changed to the biological parent.
- The intensity and genuineness of the parent’s desire to have the child.
- The stability and certainty as to the child’s future in the custody of the parent.³

In its analysis of the non-statutory factors listed above, the juvenile court explicitly referred to Exhibits 56 and 57, and found that Mother’s schizophrenia and depression severely impaired her ability to act in the best interest of her children. Specifically, the juvenile court found, based on the clinical opinions contained in the Exhibit 56 and 57 medical reports, Mother’s “[s]chizophrenia ... precludes her ability to successfully plan and carry on with any regularity the activities of daily living.” Moreover, “[M]other’s disorganized thoughts impair[ed] her ability to focus on and maintain stable housing, stable work[,] or on the necessary care needed for three young children.” Further, the juvenile court found Mother’s

³ Non-statutory factors that courts consider have been compiled in our case law and include, but are not limited to, the following: the length of time the child has been away from the biological parent; the age of the child when care was assumed by a third party; the possible emotional effect on the child of a change of custody; the period of time which elapsed before the parent sought to reclaim the child; the nature and strength of the ties between the child and the third party custodian; the intensity and genuineness of the parent’s desire to have the child; and the stability and certainty as to the child’s future in the custody of the parent. *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 326 (1997).

failure to address her mental health issues and “refusal to take ... medication continue[d] to hinder her ability to care for her children and impose[d] negatively on her judgment.”

In our view, it is clear that the juvenile court relied heavily on the medical assessment of Mother’s mental illness contained in Exhibits 56 and 57, and drew conclusions about the best interests of these children based on those assessments. Although Mother’s erratic behavior and questionable decision-making are evident in the record, the juvenile court’s finding that Mother had schizophrenia and depression, and, critically, that these illnesses prevented her from maintaining regular contact with and care for her children, is not.⁴ For those reasons, we cannot say that admission of Exhibits 56 and 57 was harmless and did not prejudice Mother. We, therefore, hold that admission of those Exhibits was reversible error. Consequently, we vacate the termination of Mother’s parental rights and remand for a new trial.⁵

⁴ Although Mother’s diagnosis with schizophrenia and depression is also referenced in a Healthcare for the Homeless medical report, which was admitted into evidence without objection, this evidence does not change our analysis for two reasons: *first*, it is not clear to us that admission of this medical report does not violate the Maryland Rules. Although Mother did not object to admission of the Healthcare for the Homeless report, the report did not have a sponsoring witness to testify to its contents. See *supra* at 4. *Second*, even if admissible, the report does not make the same clinical conclusions about the effect of Mother’s schizophrenia and depression on the best interests of M.K., I.K., and N.K. referenced in the juvenile court’s Memorandum Opinion.

⁵ Of course, on retrial the Department may choose to bring a sponsoring witness who will make these exhibits admissible.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY, SITTING AS A
JUVENILE COURT, VACATED AND
REMANDED FOR FURTHER
PROCEEDINGS. COSTS TO BE PAID BY
APPELLEE.**