Circuit Court for Frederick County
Case Nos. C-10-JV-18-000185, C-10-JV-18-000186

NREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1429

September Term, 2019

IN RE: A.E. and A.E.

Kehoe,
Leahy,
Wells,

JJ.

Opinion by Wells, J.

Filed: May 13, 2020

Appellant, the Father of two daughters, Am.E. and Ar.E.,[1] appeals from an order, entered September 3, 2019, in the Circuit Court for Frederick County, sitting as a juvenile court, which changed the CINA[2] permanency plans of his daughters from reunification with the parents to adoption. He raises two claims,[3] which we have reordered for ease of exposition:

> I. Whether it was ineffective assistance of counsel when Father's previous attorney did not file a timely motion to withdraw as Father's counsel thus precluding Father from filing pleadings on his own; and
>
> II. Whether the juvenile court erred by denying Father a continuance to obtain new counsel.

Because we find no merit in either of these claims, we affirm.

BACKGROUND

Father noted a previous appeal in this case from the juvenile court's ruling that had found his daughters to be CINA. For background, we quote our unreported decision, which affirmed that prior ruling:

> Child Protective Services, accompanied by police officers, visited the home of [Am.E.], [Ar.E.], Father, and Mother. CPS worker Kelly Lawson observed the uninhabitable condition of the house: human and animal

[1] We take the suggestion from the brief of Appellee, Frederick County Department of Social Services ("Department"), and designate the children "Am.E." and "Ar.E." to distinguish them from each other.

[2] "CINA" stands for "child (or children) in need of assistance."

[3] Father does not challenge the juvenile court's ultimate decision to change the permanency plans.

> excrement coated the floors and bathroom; thousands of flies and maggots swarmed the living room and kitchen; decaying food and trash covered the floors; and the refrigerator contained no edible food. Both children were extremely dirty. One of the children had matted hair that contained living and dead insects, a band-aid, and other unidentified debris.
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> The children were removed from Mother and Father's care. Five days later, the county code enforcement authorities condemned the condominium. A few weeks later, Lawson returned to the home to find the house was clean, repainted, newly carpeted, and had new bedding. A week later, the circuit court, sitting as a juvenile court, conducted CINA adjudicatory hearings.
> [***2**]
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> * * *
>
> At the hearing, Lawson testified to the condition of the house and about past allegations of domestic violence made by Mother against Father. One of the allegations concerned an incident in which Mother reported that Father had held a gun to her head.
>
> . . . Mother then described the incident during which Father had held a gun to her head.
> [***3**]
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> * * *
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> Because the circuit court sustained the allegations in the CINA petition, the court then moved on to the disposition stage. At the disposition hearing, the circuit court found the children to be CINA because they had been neglected. The circuit court found that it was in the children's best interests to be removed from Mother and Father's care. The circuit court based this decision upon finding that the house was unlivable, and because the parents had let the house get to such a deplorable condition[.]

In re: A.E. and A.E., Sept. Term, 2018, No. 2297, slip op. at 1-3 (filed May 3, 2019) (footnotes omitted).

Initially, the permanency plan was for reunification with the parents. A permanency plan review hearing was held on April 24, 2019, during which counsel for the children noted that, although she was then recommending reunification, she "would be asking for a plan change" if "progress [was not] made" by the parents. At the conclusion of that hearing, the juvenile court found that the permanency plan of reunification was "in the best interest of the children" at that time. The court also placed certain conditions on the parents, such as participation in counseling and substance abuse treatment programs, as well as their cooperation in permitting various social services providers to release information to the court regarding their progress. The court concluded by scheduling another permanency plan review hearing for July 31, 2019.

By the time that the July 31st hearing was convened, the Department had changed its recommendation. Apparently dissatisfied with the parents' progress, the Department, with the concurrence of counsel for the children, moved for a change in the permanency plan from reunification with the parents to adoption. Unfortunately, it filed its report, detailing the grounds for its change in recommendation, nine days prior to the hearing date, in violation of a statutory notice requirement,[4] leaving the juvenile court no alternative but to continue the matter until September 3, 2019.

[4] Maryland Code (1974, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"), § 3-823(d) requires that "[a]t least 10 days before the permanency planning hearing, the local department shall provide all parties and the court with a copy of the local department's permanency plan for the child." Moreover, CJP § 3-826 requires that, "[u]nless the court directs otherwise, a local department shall provide all parties with a written report at least 10 days before any scheduled disposition, permanency planning, or review hearing under § 3-819 or § 3-823 of this subtitle."

Father was represented by a panel attorney who had been provided by the Office of the Public Defender. Apparently, they had a contentious relationship, and, on August 19, 2019, fifteen days before the pending permanency plan review hearing, Father sent an email to his counsel, asking that she withdraw her representation "ASAP so that it is complete prior to the hearing." Counsel complied with that request and promptly filed a motion to withdraw as well as a motion to shorten time. After obtaining a response from counsel for the children, the circuit court granted the motion to withdraw on August 29, 2019, just two business days prior to the scheduled hearing.

The following day, just one business day prior to the scheduled permanency plan hearing, Father filed pro se motions for: (1) court-appointed counsel, (2) for an evaluation under the Interstate Compact on the Placement of Children (ICPC) as to whether his parents could assume custody of the children, (3) to require the Department to file separate reports for each child, (4) to strike or redact the Department's report, and (5) to strike its exhibits. Then, on September 3, 2019, Father appeared at the permanency plan review hearing without counsel.[5]

The juvenile court denied Father's motion to appoint counsel, explaining that it lacked authority to do so. As for Father's remaining motions, the court declared that they were not ripe, as they had been filed one business day before the hearing, leaving opposing parties no opportunity to respond, and it therefore would not consider them. At the end of

[5] Mother did not appear at the hearing, and her counsel was permitted to withdraw his appearance. She subsequently noted an appeal but thereafter abandoned that appeal.

the hearing, the juvenile court entered an order, changing the permanency plans for each daughter from reunification with the parents to adoption. Father then noted this appeal.

DISCUSSION

Standard of Review

In reviewing an order of a juvenile court in a child custody case, "Maryland appellate courts apply three different but interrelated standards of review[.]" *In re: Adoption of Cadence B.*, 417 Md. 146, 155 (2010). We review a juvenile court's factual findings for clear error. *Id.* (citation and quotation omitted). If "it appears that the [juvenile court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless." *Id.* (quoting *In re: Yve S.*, 373 Md. 551, 586 (2003)). And, finally, we review a juvenile court's "ultimate conclusion . . . founded upon sound legal principles and based upon factual findings that are not clearly erroneous" for "clear" abuse of discretion.[6] *Id.*

Analysis

I.

Father contends that his appointed counsel rendered ineffective assistance in failing to file a timely motion to withdraw after he demanded that she do so, thereby precluding

[6] "Clear" abuse of discretion appears to be a rhetorical flourish rather than a different, more deferential, legal standard in comparison with mere abuse of discretion. *See In re: Ashley S.*, 431 Md. 678, 704 (2013) (noting that a juvenile court's "ultimate decision to order a permanency plan goal of adoption is reviewed under an abuse of discretion standard").

him from filing timely motions and otherwise effectively presenting his case. This contention is without merit.

The right to counsel in CINA proceedings is provided by statute. Section 3-813 of the Courts & Judicial Proceedings Article ("CJP") provides 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.
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> (b) Except for the local department and the child who is the subject of the petition, a party is not entitled to the assistance of counsel at State expense unless the party is:
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> (1) Indigent; or
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> (2) Otherwise not represented and:
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> (i) Under the age of 18 years; or
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> (ii) Incompetent by reason of mental disability.
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> (c) The Office of the Public Defender may not represent a party in a CINA proceeding unless the party:
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> (1) Is the parent or guardian of the alleged CINA;
>
> (2) Applies to the Office of the Public Defender requesting legal representation by the Public Defender in the proceeding; and
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> (3) Is financially eligible for the services of the Public Defender.

See also Md. Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 16-204(b)(1)(v)-(vi) (providing that an indigent party is entitled to representation by the Office of the Public Defender in "a proceeding involving children in need of assistance

under § 3-813 of the Courts Article" as well as, "for a parent," family law proceedings involving guardianship and adoption).

"[I]mplicit in the grant of the right to counsel," whether by constitutional provision or by statute, "is the right to effective assistance of counsel." *In re: Adoption of Chaden M.*, 422 Md. 498, 509 (2011) (citing *State v. Flansburg*, 345 Md. 694, 703 (1997)). We have held that the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), originally developed in criminal cases, also applies to claims of ineffective assistance of counsel in the family law context, whether in guardianship or CINA proceedings. *In re: J.R.*, __ Md. App. __, Sept. Term, 2019, No. 459, slip op. at 44 (filed Feb. 28, 2020) (holding that *Strickland* test applies to claim of ineffective assistance in a CINA proceeding); *In re: Adoption/Guardianship of Chaden M.*, 189 Md. App. 411, 433 (2009), *aff'd*, 422 Md. 498 (2011) (applying *Strickland* test to claim of ineffective assistance in a guardianship proceeding).

Under the *Strickland* test, a party claiming ineffective assistance of counsel must demonstrate both deficient performance and prejudice. *Strickland*, 466 U.S. at 687. Counsel performs deficiently where her representation falls "below an objective standard of reasonableness," *id.* at 688; and prejudice ensues where there is a "reasonable probability that, but for" that deficient performance, "the result of the proceeding would have been different." *Id.* at 694.

Because, "ordinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel," ineffective assistance claims are disfavored on direct appeal. *J.R.*, slip op. at 45-46 (quoting *Chaden M.*, 189 Md. App. at 434-35). Only where the

critical facts are not in dispute, and the record is sufficiently developed to resolve the claim, will we address an ineffective assistance claim on direct appeal.[7] *Chaden M.*, 189 Md. App. at 435.

Here, we can do so because Father's counsel did not perform deficiently. Several documents in the record inform our decision. The first is a copy of an email, which Father sent to his then-counsel, on August 19, 2019, stating:

> Please go ahead and withdraw from this case so that I can submit my own filings before the next court date if needed. Please do so ASAP so that it is complete prior to the hearing. Please confirm when you have done this.

The second is the motion to withdraw, filed by counsel, the same day she received Father's request to withdraw from the case, asking that she "be allowed to withdraw from this case as expeditiously as possible."[8] The Certificate of Service for that motion attests that a copy was emailed to Father, as requested. To expedite the court's consideration of the motion to withdraw, counsel also filed, at the same time, a motion to shorten time, which the juvenile court granted, thereby ordering any other parties to respond by the close of business on August 22, 2019.

[7] Otherwise, provided that an appellant has asserted a bona fide claim, we would, ordinarily, remand for a "separate collateral fact-finding proceeding." *Chaden M.*, 189 Md. App. at 435. In *J.R.*, there was no need to do so, because we vacated and remanded on a different ground. *J.R.*, slip op. at 47.

[8] In accordance with Maryland Rule 2-132(b), which requires that "the motion shall be accompanied by the client's written consent to the withdrawal," counsel attached a copy of Father's email to the motion.

Thereafter, counsel for Am.E. and Ar.E. filed a response to the motion to withdraw, expressing no opinion as to the motion itself, but reminding the court that the matter previously had been continued on motion by Father and Mother (and over the objections of the children and the Department). The response further requested, given the prejudice the children would suffer were the matter further delayed, that no additional continuances be granted. Ultimately, on August 29, 2019, one week after the children's response and ten days after the motion to withdraw had been filed, the juvenile court granted the motion.

On this record, we conclude that Father's former counsel did precisely what he asked her to do and did so as quickly as possible. Counsel did not perform deficiently in filing the motion to withdraw, and, thus, we need not consider the prejudice prong in concluding that counsel was not ineffective. *See Strickland*, 466 U.S. at 697 (noting that "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one").

II.

Father contends that the juvenile court erred in denying him a continuance so that he could obtain new counsel. He further complains that he was "prejudiced by counsel's untimely withdrawal from this matter," prejudice that was underscored by the court's

subsequent refusal to rule on several of Father's motions because they had been filed on the eve of trial and were not ripe.[9] This contention is without merit.

Initially, we note that it was Father who expressly requested counsel to withdraw, two weeks before the rescheduled hearing. Father cannot now complain that he was "prejudiced by counsel's untimely withdrawal from this matter," because any "prejudice" he may have suffered was entirely self-inflicted.

Moreover, we have held that a circuit court's decision whether to grant or deny a continuance is within the court's "sound discretion." *Serio v. Baystate Props., LLC*, 209 Md. App. 545, 554 (2013) (quoting *Das v. Das*, 133 Md. App. 1, 31 (2000)). Those decisions, in turn, are grounded in the text of Maryland Rule 2-508, which provides 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**.
>
> * * *

(Emphasis added.)

Here, among the circumstances the juvenile court properly could consider, in determining what "justice may require," were: first, that Father had sought the withdrawal of his counsel, just two weeks before the rescheduled hearing in this matter; second, that,

[9] On August 30, 2019, the day after the motion to withdraw had been granted and one business day prior to the already-rescheduled hearing, Father filed the following motions: Motion for Court-Appointed Counsel; Motion for Interstate Compact on the Placement of Children (ICPC) Evaluation; Motion to Separate Court Reports; Motion to Strike/Redact Report; and Motion to Strike Exhibits. [**Appeal Vol. 10 at 4, 7**]

initially, he had done so in order to represent himself, but then, at the very last minute, he claimed that his intention had been to obtain new counsel not to proceed *pro se*, a shift which the court could construe as a delaying tactic; third, that Father had been aware, at least since the postponement of the July 31st hearing, of the Department's intention to seek a change in the permanency plan and should have been ready to proceed on September 3rd; fourth, that the matter already had been continued previously, over the objections of both the children and the Department; and, finally, that the matter at issue involved the custody of children, a matter which should be resolved as expeditiously as possible.[10] *See, e.g.*, *Ashley S.*, *supra*, 431 Md. at 718 (2013) (observing that "an important goal of the CINA law is to limit the time children spend in foster care because of the detrimental effects on their well-being") (citing *In re: Cadence B.*, 417 Md. 146, 164 (2010)); *In re: Najasha B.*, 409 Md. 20, 38 (2009) (observing that "delay is inconsistent with the CINA Subtitle's purpose of expeditiously ensuring a placement and/or the provision of services to remedy the circumstances requiring the court's intervention") (citing CJP § 3-803).

"An abuse of discretion occurs 'where no reasonable person would take the view adopted by the court' or if the court acts 'without reference to any guiding rules or principles.'" *Serio*, 209 Md. App. at 554 (quoting *North v. North*, 102 Md. App. 1, 13 (1994) (in banc)). Under these circumstances, we certainly cannot say that the juvenile court abused its discretion in denying Father's motion for a continuance.

[10] Timeliness in matters surrounding child custody extends to appellate procedure. Indeed, this appeal is governed by Maryland Rule 8-207, which mandates expedited appeals in child custody cases such as this.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT FATHER.