Circuit Court for Anne Arundel County
Case No. C-02-JV-18-234

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2285

September Term, 2018

IN RE: N.M.

Fader, C.J.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: February 19, 2019

We are asked whether the Circuit Court for Anne Arundel County, sitting as a juvenile court, erred in refusing to grant a continuance so that the key witness for the appellant Anne Arundel County Department of Social Services (the "Department") could testify in this Child in Need of Assistance ("CINA") proceeding. We hold that the juvenile court erred in failing to grant the continuance.

BACKGROUND

N.M. was born on March 29, 2018 to parents S.M. ("Mother") and J.M. ("Father"). On May 1, 2018, the Department filed a petition asking the juvenile court to authorize continued shelter care of N.M. and to find N.M. to be a CINA.[1] The Department's petition included the following allegations relevant to this appeal:

- On April 26, 2018, the Department received a report from Walter Reed Medical Center that N.M. was brought in "with an unexplained, complete disruption of the tissue underneath her tongue";
- During a criminal investigation on April 27, 2018, Mother and Father both stated "that they were not sure how [N.M.] got the injury";
- Father noticed "a little blood" in N.M.'s mouth around midnight that morning and Mother noticed "something wrong" around 5:00 a.m. Although Father was initially reticent to take N.M. to the hospital, they did so about an hour later;
- A team at Walter Reed evaluated N.M. "and diagnosed [her] with non-accidental trauma of the Frenulum (tissue under the tongue) as it was completely lacerated and disconnected from the tongue, and broken blood vessels/bruising" on the roof of her mouth. The team at Walter Reed "indicated that the injury was consistent with something being forced into

[1] A "child in need of assistance" is one who requires court intervention because the child has been abused or neglected, or has a developmental disability or mental disorder; and his or her "parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." Md. Code Ann., Cts. & Jud. Proc. § 3-801(f) (Repl. 2013; Supp. 2018).

the mouth" and that it had occurred within one to three days before entering the hospital;

- The team at Walter Reed determined "that the injury could not have come from a bottle, pacifier, or mother's nipple";
- N.M. had previously experienced a laceration on the top of her tongue when she was less than two weeks old. The Father had reported that the earlier injury resulted from "him placing his finger in [N.M.'s] mouth to soothe her." Mother, who had been hospitalized at the time, had not previously been aware of the earlier injury;
- On April 30, N.M. was ready for discharge from the hospital, although she was still suffering from an infection, pain, and feeding difficulties. The Department placed N.M. in emergency shelter care and removed her from the care of her parents; and
- The Department had not identified any family members who were willing and able to care for N.M.

Based on these allegations, the Department alleged that the return of N.M. to her parents' home was contrary to her safety and welfare and that removal from the home was necessary due to an alleged emergency situation.

On May 1, 2018, after a hearing, a magistrate judge ordered continuation of shelter care, which the juvenile court approved. The adjudication hearing before the magistrate, which was initially set for May 23, was postponed at the Department's request to June 5. Four witnesses testified: Mother; Father; Elizabeth Saperstein, the Department's assigned case worker; and Captain Amy Gavril, a Walter Reed physician. At the conclusion of the hearing, the magistrate found that N.M. had been abused and recommended that she be found to be a CINA with custody given to the Department. Mother and Father both filed exceptions and requested a de novo hearing before the juvenile court.

In a pre-trial conference held on July 31, 2018, the juvenile court set the case for a two-day adjudication hearing on September 13 and 27. The Department identified that it

would present three witnesses, including its expert, Dr. Gavril; Father also indicated that he would present three witnesses, including two experts; and Mother indicated that she would present two or three witnesses, including one expert.

On September 13, the Department's attorney opened the hearing by requesting a postponement. She explained that she had decided that it would make sense for Dr. Gavril, who was "probably [her] main witness," to testify on the same day as Mother's expert witness so that each expert could hear the testimony of the other. As a result, and because the military would only release Dr. Gavril on one of the two hearing days, the Department's counsel had decided unilaterally to secure Dr. Gavril's testimony only for September 27, the second scheduled hearing day.

The Department's counsel first informed counsel for the other parties of her decision on September 12, the day before the hearing was to begin, and was surprised that the other parties objected. She therefore opened the hearing by asking the court to either postpone the hearing until September 27 or allow her to begin her case with other witnesses and then take Dr. Gavril out of order on September 27. Counsel for N.M. supported the request for postponement.

Mother and Father both opposed the request. Mother's counsel pointed out that N.M. had already been in shelter care for more than four months, during which critical parent-child bonding time had been lost, and that the injury N.M. had sustained was not nearly as serious as the Department claimed. Mother's counsel also argued that the case could not proceed without Dr. Gavril because she "is their case, Your Honor." Indeed,

counsel argued, the critical allegations of the CINA petition were based entirely on Dr. Gavril, without whom "[t]he Court has no context, no understanding of what the actual issue is." Without hearing from Dr. Gavril, counsel contended, "we have nothing to put on . . . ." Mother's counsel further argued that Dr. Gavril's testimony was also necessary to introduce many of the medical records and that a postponement would be unfair to the parents, who continued to have to spend money on lawyers. Moreover, it would not be possible to finish the entire case on September 27 if Dr. Gavril did not testify until that day. As an alternative to postponement, Mother's counsel argued that if the court were inclined to grant the postponement, it should also conduct an immediate review of continued shelter care and release N.M. to her parents that day.

Father's counsel agreed, both that the postponement should be denied and that, in the alternative, the court should conduct an immediate review of shelter care and send N.M. home with the parents that day. Like Mother's counsel, Father's counsel also highlighted the significance of Dr. Gavril's testimony, arguing: "And with regard to postponement, Your Honor, the State's entire case, again, rests on Dr. Gavril . . . . I mean, these records . . . everything rests on Walter Reed and Dr. Gavril."

The court denied the request for postponement. The court faulted the Department for making the unilateral decision to schedule its critical witness for the second day of the hearing without consulting the court or opposing counsel and stated that it "cannot find extraordinary cause to grant a postponement under the circumstances." As a result of the Department's actions, the court stated, it was not able to carry out its responsibility to

"orderly conduct the trial." The court asserted that "the Department had an absolute responsibility not to make an assumption that it could unilaterally schedule witnesses within the two-day slot without such a coordination [with opposing counsel or the court], and quite frankly, the Department did so at its peril."

The parties then presented opening statements. The Department's opening statement focused on the severity and unexplained cause of the injury. The opening statements for Mother and Father both focused on undermining Dr. Gavril's conclusion that N.M.'s injury was indicative of abuse. Both argued that the medical records indicated that the injury became worse after N.M. was admitted to Walter Reed, that Dr. Gavril had ignored other explanations for the injury, and that Dr. Gavril's judgment should be questioned because she misidentified a birthmark on N.M.'s back as a bruise.

The Department began its evidentiary presentation with its case worker, Ms. Saperstein, who testified that the injury to N.M. was particularly concerning because infants of her age are incapable of injuring themselves and the Department could not identify any innocent cause of the injury. She testified about her investigation, including that she spoke with Dr. Gavril, who she identified as "the head of the Pediatric Child Abuse Unit at Walter Reed." The court sustained the parents' objections to any testimony from Ms. Saperstein regarding Dr. Gavril and Dr. Gavril's conclusions. The Department then introduced into the record a copy of the medical records from Walter Reed, although with all portions reflecting Dr. Gavril's thoughts and conclusions redacted.

After Ms. Saperstein's testimony concluded, the Department again requested a continuance "in the best interest of the child." The court denied the request, finding that "[t]he Department did not follow any shred of a proper procedure to arrange for this witness to appear on a different day than the beginning of this trial," and that the Department ignored its "absolute obligation to either coordinate with your fellow counsel about the scheduling of witnesses, generally, or to contact the Court." The court observed that the Department had the obligation to go first with its case, because it had the burden of proof, and that it was the court's "job to assure the orderly progress of this and every trial." Therefore, "to provide for the orderly conduct of this court, I have decided that there is no reasonable justification to continue; no extraordinary reason."

Rather than rest, the Department decided to extend its case by calling Mother. The court allowed the Department to do so, but stated that it would not permit the Department to present any further evidence after 4:30 that afternoon. When Mother's testimony was completed, the Department made yet another request for a continuance, which the court denied "[f]or the reasons previously stated."

Mother and Father then moved to dismiss the CINA petition on the ground that the Department had not presented sufficient evidence to prove the allegations in the petition. The court agreed with the parents that the Department had not presented any evidence, even viewed in the light most favorable to it, of abuse by the parents. The court agreed with the parents' interpretation of the redacted medical records that N.M.'s injury appeared to have worsened from the time she was admitted to Walter Reed—when the injury

appeared to the court to have been something less than a tear—until the doctors later observed the complete tear of the frenulum. Based on the evidence presented, the court determined that it "cannot parse any potential activity on the part of these parents from these intervening events [of the medical team]." In the absence of any explanation from the Department that would support the conclusion that the injury resulted from abuse by the parents rather than the actions of the Walter Reed medical team, the court concluded, the Department had "failed to prove by a preponderance of the evidence that the parents of [N.M.] caused a non-accidental injury to her mouth." The court therefore granted the motion to dismiss and ordered that N.M. "be returned to her parents immediately." The Department noted an appeal that same day.[2]

DISCUSSION

The Department contends that the juvenile court abused its discretion and abdicated its *parens patriae* responsibility when, without considering N.M.'s safety, it refused to grant a continuance that would have permitted Dr. Gavril to testify.[3] N.M.'s counsel agrees that the court abused its discretion by denying the continuance without giving any consideration to N.M.'s safety, but argues that we are unable to reverse the juvenile court's

[2] The Department asked the juvenile court to stay its ruling pending appeal, which the court denied. The Department then filed a motion for injunction pending appeal in this Court, which we denied, and a motion for injunction pending appeal and petition for writ of certiorari in the Court of Appeals, which that Court denied.

[3] The Department also argues that the juvenile court erred in sanctioning it without considering the required factors. However, we agree with Mother and Father that the juvenile court's denial of a continuance was not imposed as a sanction for misconduct by the Department.

decision because the Department failed to make a proffer as to what Dr. Gavril's testimony would have been if it had been permitted.

Mother, Father, or both of them contend (1) that the court implicitly considered N.M.'s best interest when it said that there was no extraordinary reason to delay further the adjudication hearing, (2) that the Department's failure to make a proffer as to what Dr. Gavril's testimony would have been precludes its appeal, (3) that the juvenile court properly determined that the alleged risk to N.M.'s welfare was outweighed by her interest in maintaining ties to her natural parents, and (4) that the court did not abuse its discretion because it ultimately based its decision on the evidence in the medical records that N.M.'s condition worsened as a result of the actions of the medical team that was evaluating her at Walter Reed; and (5) that, in light of the medical records, no testimony from Dr. Gavril could have sustained the Department's burden of proof.

"[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 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*).

THE JUVENILE COURT'S DENIAL OF A CONTINUANCE WAS AN ABUSE OF DISCRETION.

A. In the Circumstances Presented, the Absence of a Proffer Is Not Fatal to the Department's Claim.

Mother, Father, and N.M. all contend that the Department's failure to make a proffer as to what Dr. Gavril's testimony would have been precludes the Department's appeal. They base that argument on Rule 5-103(a)(2), which provides: "Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." As the Department points out, this Rule is not directly applicable here because the court did not make an evidentiary ruling excluding Dr. Gavril's testimony. Instead, the ruling under review is the court's denial of a continuance.

Although Rule 5-103(a)(2) is not directly applicable, it is still the case that an appellant who claims abuse of discretion must be able to prove prejudice to attain a reversal. *See Bradley v. Hazard Tech. Co*., 340 Md. 202, 206 (1995) ("Unless an appellant can demonstrate that a prejudicial error occurred below, reversal is not warranted."). Where the alleged abuse of discretion is the refusal to grant a continuance that was sought to enable the requesting party to present evidence, that would ordinarily require a proffer of what the evidence would show. Here, however, we find that the record sufficiently establishes the undisputed importance of Dr. Gavril's testimony to the Department's case

and that the substance of her testimony was apparent from the arguments made by all parties on the various motions for postponement or continuance and through the opening statements of the parties.

The critical issue in the case was whether the injury suffered by N.M., which was diagnosed and treated at Walter Reed, was indicative of abuse by her parents. Dr. Gavril, who Ms. Saperstein testified was "the head of the Pediatric Child Abuse Unit at Walter Reed," had testified before the magistrate and was identified as the Department's sole expert witness regarding its claims of abuse. The Department identified her as "probably [its] main witness"; Mother's counsel claimed that Dr. Gavril "is [the Department's] case" and that her testimony was necessarily to provide context for the Department's allegations and to admit certain medical records; and Father's counsel agreed that "the State's entire case . . . rests on Dr. Gavril." In short, although a proffer would certainly have been advisable and will often be necessary, in the unique circumstances of this case it was not necessary to establish the vital nature of Dr. Gavril's testimony and the prejudice to the Department's case without it.

B. The Juvenile Court's Denial of a Continuance Was an Abuse of Discretion.

We sympathize with the juvenile court's exasperation with the Department's lack of preparedness and lack of communication. The Department, which had the burden of proof, would ordinarily be expected to be prepared to put on its affirmative case first. Although the Department is correct that witnesses may be taken out of order, and that courts and opposing parties should generally be cooperative with respect to reasonable requests

to do so in proceedings such as these, it was not for the Department to decide unilaterally and with almost no notice that it was not going to make its primary witness available until the middle of the other side's case. This was not a case where the witness became unavailable unexpectedly or at the last minute, nor does there appear to have been any other barrier to communicating in advance with opposing counsel or the court regarding the scheduling of witnesses. In many, if not most, other types of cases, the court's decision to dismiss a plaintiff's lawsuit in similar circumstances would probably be considered well within its discretion.

But the court's role in a CINA case goes beyond its role in most other types of cases. The Court of Appeals explored that role in some detail in *In re Najasha B.*, 409 Md. 20 (2009)[4] and *In re Mark M.*, 365 Md. 687 (2001).[5] Neither of those cases is directly on point with the facts here, but the Court's discussions of the more proactive and protective role required of a juvenile court in CINA cases involving allegations of abuse or neglect guide our determination here. In *In re Najasha B.*, the Court observed that "[t]he broad policy of the CINA Subtitle is to ensure that juvenile courts (and local departments of social services) exercise authority to protect and advance a child's best interests when court

[4] In *In re Najasha B.*, the Court held that a juvenile court erred in dismissing a CINA petition at the request of a local department of social services over the objection of the child. 409 Md. at 39.

[5] In *In re Mark M.*, the Court held that a juvenile court erred in allowing a local department's therapist to determine when visitation could be resumed with a parent who had been found to have abused the minor child because, pursuant to § 9-101 of the Family Law Article, visitation could only be resumed if the court first determined that there was not a likelihood of future abuse or neglect. 365 Md. at 709-10.

intervention is required." *Id.* at 33. That is pursuant to the State's "*parens patriae* interest in caring for those, such as minors, who cannot care for themselves," and the "transcendent importance" of the child's welfare "when the child might . . . be in jeopardy." *Id.* (quoting *In re Mark M.*, 365 Md. at 705-06). Thus, "[u]nlike a typical civil plaintiff, [a local department of social services] is not seeking relief for itself in filing suit, but is initiating an action in the juvenile court with the purpose of advancing the child's welfare." *In re Najasha*, 409 Md. at 38-39.

Indeed, although a local department "has its own statutory mission, . . . in many respects, [it] acts as the court's agent in attempting to remedy the problems that prompt CINA proceedings." *Id.* at 39. The court itself "has a 'clear and continuous supervisory role to play'" in CINA proceedings, which "is invoked when abuse or neglect is alleged in a petition." *Id.* (quoting *In re Justin D.*, 357 Md. 431, 449 (2000)). "That which will best promote the child's welfare becomes particularly consequential where the interests of a child are in jeopardy, as is often the case in situations involving sexual, physical, or emotional abuse by a parent." *In re Mark M.*, 365 Md. at 706. Thus, "where abuse or neglect is evidenced, particularly in a CINA case, the court's role is necessarily more pro-active." *Id.* In such cases, a juvenile court "is in the unique position to marshal the applicable facts, assess the situation, and determine the correct means of fulfilling a child's best interests." *Id.* at 707.

It is in consideration of those principles that we must view the juvenile court's determination that the Department's lack of preparedness to present its case was "at [the

Department's] peril." In most other types of cases, that would be correct. Here, however, it was N.M.'s interests that were most directly in peril, not the Department's. The Department had raised allegations that N.M. had suffered a serious injury that could only have been inflicted by forcing an object—not including a pacifier, bottle, or nipple—into her mouth. The primary explanation the parents offered was the rather speculative possibility that medical professionals at Walter Reed may have been the real culprits in turning what was initially a minor injury into the serious one the Department identified. It would be an understatement to say that important questions remained as to whether N.M. would be safe if returned home.

In light of the universal agreement as to the critical nature of Dr. Gavril's testimony, the court was well aware that denying a continuance was likely to require the dismissal of the CINA petition without hearing the Department's most important evidence. And yet the reasons the juvenile court provided for denying the Department's three requests for a postponement or continuance were focused almost entirely on the Department's conduct and the efficiency of the court and the court's schedule. Both of those factors are undoubtedly relevant and important. A trial court has every right to expect counsel to be prepared and to communicate adequately with opposing counsel and with the court. A trial court also has every right to manage its docket in an orderly and efficient way and to make reasonable demands that counsel not undermine that. But when the safety of a defenseless infant is at stake in a CINA proceeding, a juvenile court must also, at a minimum, *explicitly*

consider the effect of a decision to deny the Department a continuance on the health and safety of the child. The juvenile court abused its discretion by not doing so here.[6]

Father argues that the court did not abuse its discretion because the Department's interest in protecting N.M. was outweighed by the interests of N.M. and the parents in maintaining their family ties. However, Father does not identify anywhere in the court's explanation for its decision where the court explicitly or implicitly balanced those considerations. To be sure, our courts have repeatedly recognized the fundamental liberty interest of parents in raising their children. *See, e.g.*, *In re Yve S.*, 373 Md. 551, 565 (2003). That interest is "a fundamental one that cannot be taken away unless clearly justified" and gives rise to a presumption "that it is in the child's best interest to be placed with a parent." *Id.* at 566, 572; *see also In re Joseph G.*, 94 Md. App. 343, 345 (1993) ("The fear of harm to a child or to society must be a real one predicated upon hard evidence to justify removing a child from the custody of a parent; it may not be simply a gut reaction or even a decision to err-if-at-all on the side of caution.") (quoting *In re Jertrude O.*, 56 Md. App. 83, 100 (1983)). For that reason, a juvenile court considering an opposed continuance request should also explicitly consider the effect of the continuance on the rights of the parents.

[6] Mother argues that the court did consider N.M.'s safety, as evidenced by the court's reference to the absence of an extraordinary reason to continue the case. Mother contends that this was an implicit reference to § 3-815(c)(4) of the Courts Article, which allows a court to extend shelter care for up to 30 days if the court finds it "is needed to provide for the safety of the child." But read in context, the court's comment appears to refer to the inadequacy of the Department's explanation for why it did not make Dr. Gavril available that day, not to any consideration of N.M.'s safety. And even if the comment were an implicit reference to consideration of N.M.'s safety, we hold that consideration of that important issue must be explicit.

Here, however, the parents themselves offered an alternative to denial of a continuance that would have protected their fundamental liberty interest while still allowing consideration of Dr. Gavril's testimony: immediate review of shelter care. At oral argument, the Department agreed that the court could have done just that. We do not suggest that such a review would be necessary or appropriate in every case in which the Department requests a continuance—indeed, we expect that most circumstances in which an unexceptional continuance is sought would not call for an immediate review of shelter care—but, in extreme cases, it can be an alternative to dismissal that is far more in keeping with the protective role required of the court in such proceedings.

To avoid the possibility of misconstruing the breadth of our decision, we make two additional observations. First, our holding is not that a juvenile court must grant the Department a continuance when it requests one. Our holding is rather that a juvenile court abuses its discretion when it denies a continuance without explicitly considering the effect of the decision on the health and safety of the child. Second, our holding today does not deprive a juvenile court of other options to enforce proper conduct in proceedings, including, in appropriate cases, through its contempt power or monetary sanctions.

Giving appropriate consideration to the health and safety of N.M., in light of the serious allegations of abuse that were at issue, the undisputed critical nature of Dr. Gavril's testimony, and the availability of an alternative course to protect the fundamental liberty interests of the parents, it was an abuse of discretion for the juvenile court to deny the Department's request for a continuance. We therefore remand for further proceedings,

which will necessarily include an updated assessment of N.M.'s circumstances based on events that have transpired since September 13, 2018. As the Department acknowledged at oral argument, if it is convinced that such events have demonstrated that its initial concerns were unwarranted—and if N.M.'s counsel concurs, *In re Najasha B.*, 409 Md. at 39—it should seek dismissal of its petition. If not, the court will need to entertain a new hearing on adjudication.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.