Circuit Court for Baltimore County
Case No. 03-C-17-011225 CT

CHILD ACCESS

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2438

September Term, 2018

CARLOS ALBERTO CASTRO BARRIGA

v.

ESTEFANIA SIMICH

Berger,
Leahy,
Wells,
JJ.

Opinion by Leahy, J.

Filed: July 3, 2019

The underlying proceedings in this case were initiated in the Circuit Court for Baltimore County by E.S. ("Mother"), Appellee. She filed a complaint against C.B. ("Father"), Appellant, for sole physical and legal custody of their minor child, G.C.S., with access for visitation. Father filed a cross-complaint for joint legal custody of and visitation with G.C.S. The matter was initially set for a custody hearing before a magistrate in early September 2018. The court rescheduled the custody hearing to an earlier date twice thereafter; the first, upon Mother's request, and the second, upon a change in the court's calendar. Father, who is a resident of Peru, filed a motion to continue the custody hearing, asserting his inability to attend. The court failed to grant Father's motion and, as a result, the case proceeded to a custody hearing before a magistrate in August in Father's absence. Ultimately, the magistrate recommended, *inter alia*, granting sole legal and physical custody of G.C.S. to Mother and rights of visitation to Father. The circuit court entered an order to that effect on August 15, 2018.

Before this Court, Father presents one issue, which we have rephrased as follows:[1] did the circuit court abuse its discretion in failing to grant his motion for continuance of the custody hearing?[2]

[1] In his brief, Father presents his question as follows: "Did the court's decision on the case violate the appellant's right to be heard and his right of defense, in that the custody hearing proceeded without his attendance, having failed to consider his request for rescheduling given the short notice period and the fact that he is a Peruvian citizen who resides in Peru?"

[2] Both parties proceeded *pro se* in the circuit court. Father continues to proceed *pro se* on appeal before this Court. Mother did not file a brief.

For the reasons discussed below, we hold that the circuit court's failure to grant Father's motion for a continuance, under the circumstances of this case, was an abuse of discretion warranting a remand. We shall vacate the judgment of the circuit court and remand the case for further proceedings.

BACKGROUND

Mother and Father have one child, G.C.S., born on April 16, 2013. Father resides in Peru. On November 17, 2017, Mother filed a *pro se* complaint against Father, seeking sole legal and physical custody of G.C.S., along with child support. Mother and Father were not married.

Father was served in person with Mother's complaint on December 21, 2017, in Peru.[3] In his answer and counter-complaint for custody, Father requested joint legal custody and visitation with G.C.S. With regard to visitation, Father requested specifically that: G.C.S. visit him in Peru twice per year "during her vacations[,] for one month on each occasion; G.C.S. spend "every second Christmas" with him; and Mother pay for the airline tickets "given her comfortable financial and professional situation." In response to Father's counter-complaint, Mother asserted, among other things, that the costs for "any travel expenses to Peru [] be split between both parties[,]" and she requested that the court dismiss Father's counter-complaint.

[3] Nearly four months later, on April 9, 2018, Mother filed a request for an order of default against Father for his failure to file a responsive pleading to her complaint for custody. The court granted Mother's request and entered an order of default against Father. Also proceeding *pro se*, Father moved to vacate the order of default, which the court granted. He attached to his motion to vacate an answer and counter-complaint for custody.

The court scheduled a custody hearing for September 10, 2018. However, on July 5, 2018, Mother filed a letter with the court, requesting an earlier date for the custody hearing so that she could renew G.C.S.'s passport and visit her sick father overseas before the end of August and before G.C.S. began school in September. The bottom of the letter included a statement that, "*A copy of this request has been sent to [Father]," though the letter did not include a certificate of service. The court granted Mother's request and rescheduled the custody hearing for July 30, 2018 ("July Custody Hearing"). The court issued the hearing notice for the July Custody Hearing on July 10, 2018. Six days later, on July 16, 2018, the court issued a third hearing notice, advising the parties that the custody hearing had been rescheduled for August 1, 2018 ("August Custody Hearing"), due to a change in the court's calendar.

On July 25, 2018, Father filed a motion for postponement of the July Custody Hearing.[4] In his motion, dated July 23, 2018, Father asserted that he lived in Peru and that he would be unable to attend the hearing due to the short notice of the July Custody Hearing date, which he claimed he received on July 20. He explained that he could not make the hearing date (less than two weeks away) for "economic and employment reasons" and could not take leave of work to travel to the United States. Although Father did not request a specific date, he averred that he would "be in a position to travel [to the United States] as of the second week of December, when [he would] have annual leave available." With

[4] Father did not file a second motion for postponement after the court rescheduled the custody hearing to the August Custody Hearing date.

regard to the renewal of G.C.S.'s passport, Father advised the court that he already had an appointment at the United States embassy in Peru to get his "statement of consent required for passport issuance" notarized.[5]

The docket entry for Father's motion for postponement reflects that it was "moot" and includes the notation, "Case reset to 8/1." The record does not contain a court order ruling on Father's motion, but a handwritten note on the top of the motion provides: "case reset to 8/1 due to change in change in [sic] court's calendar."

The magistrate proceeded with the August Custody Hearing, and it is uncontested that Father was absent from the proceeding.[6] According to the magistrate's written report, issued the day after the hearing, the magistrate judge found that G.C.S lived with Mother and had never lived with Father. The magistrate also found that G.C.S. last saw Father in September of 2017. Accordingly, the magistrate recommended that it would be in the best interest of G.C.S. for: Mother to have sole physical and sole legal custody of G.C.S.; Mother to keep Father advised of G.C.S.'s medical and educational matters; Father to have

[5] We note that, before this Court, Father represents that he signed the Statement of Consent for G.C.S.'s passport before a notary on July 30, 2018. He includes a receipt for a shipment of documents to Mother, also dated July 30, 2018. Father further represents on appeal that, "despite the supposed urgency to renew the passport, to the best of [his] knowledge[,] the trip did not ultimately [occur] (and if indeed it did, [he] was not informed of [it] and was not given the opportunity to see h[is] daughter)."

[6] The magistrate's report, dated August 1, 2018 (the date of the custody hearing), bears only the signatures of Mother and the magistrate. The signature block for Father is blank.

visitation "as agreed;"[7] and Father to continue paying child support to Mother in the amount of $300 to $350 per month. The circuit court entered an order to the same effect two weeks later, on August 15, 2018, noting that Father did not file any exceptions to the magistrate's report and written recommendations.

Father noted his timely appeal to this Court on September 14, 2018.[8]

DISCUSSION

I.

Before this Court, Father contends that the circuit court erred in failing to consider his motion for postponement. Father represents that, despite the "particular circumstances" of his relationship with Mother and G.C.S., both of whom live in a different country from him, "both parents agreed, and it was an express desire of [Mother], that both would be involved in their child's development and emotional formation" and that Father "has

[7] We note that although the court ordered visitation "as agreed upon" by the parties, there is nothing in the record indicating any agreement between the parties with regard to visitation.

[8] Father's initial brief, filed on January 16, 2019, did not include a record extract. On the last page of that brief, Father included the following statement:

> The appellant, [C.B.] sent to the Court of Special Appeals of Maryland by copies of the Case History, the Transcripts of Proceedings, circuit court orders and decisions, and other relevant evidence on November 28th, 2018.

This Court ordered Father to file a corrected brief and a record extract in conformity with the applicable Maryland Rules on or before March 11, 2019. On March 8, 2019, Father filed a corrected brief and record extract with this Court. The corrected brief makes precisely the same arguments as those in the initial brief, but includes citations to the record extract. The record extract does not include a transcript, or any portions thereof, from the custody hearing before the magistrate on August 1, 2018.

always maintained a relationship of respect, support, transparency and fluid communication with [Mother.]" By failing to consider his motion, Father continues, the custody hearing proceeded in his absence, thereby violating Maryland Rule 2-311(f)[9] and depriving him of his due process rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Continuances

Motions for continuances or postponements are governed by Maryland Rule 2-508, which states, in relevant part: "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." Md. Rule 2-508(a). The Court of Appeals has "not specified what the phrase 'as justice may require' means, but ha[s] said that the decision to grant a continuance [or postponement] lies within the sound discretion of the trial judge." *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006). "Absent an abuse of that discretion we historically have not disturbed the decision to deny a motion for continuance" or postponement. *Id*. (citations omitted). An abuse of discretion

[9] We reject Father's argument that the circuit court's failure to grant his motion for postponement violated Maryland Rule 2-311(f). That rule provides, in pertinent part:

> A party desiring a hearing on a motion, . . . *shall request the hearing in the motion or response under the heading "Request for Hearing." The title of the motion or response shall state that a hearing is requested.* Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.

(Emphasis added). Nowhere in the record or in Father's motion is there a request for a hearing on his motion for postponement, as required by the rule. Moreover, to the extent Father argues that holding the custody hearing in his absence violated Maryland Rule 2-311, we disagree. Rule 2-311 governs motions, only.

is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (internal quotations omitted). Stated otherwise, "an abuse of discretion exists where 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 Andre J.*, 223 Md. App. 305, 323 (2015) (brackets and internal quotations omitted).

The Court of Appeals has stated that "in some exceptional situations, [the] refusal to grant a continuance has been held to be reversible error." *Plank v. Summers*, 205 Md. 598, 605 (1954) (citation omitted). The case before us marks one of those exceptional circumstances.

This Court's decision in *In re McNeil*, 21 Md. App. 484 (1974), is instructive. There, the issue was whether the juvenile court abused its discretion in denying the mother's request for a continuance and proceeding with an exceptions hearing in her absence. *Id.* at 496-97. The mother had filed initially a petition to have her minor children committed to the Department of Social Services ("the Department") because of her inability to care for them. *Id.* at 486. Both minor children were committed to the Department and later placed in foster care. *Id.* The mother's circumstances having changed, she filed a petition for review of the commitment. *Id.* A master held a hearing on the petition for review and recommended revoking commitment and returning the children to their mother. *Id.* That same day, the Department filed exceptions to the master's report and the matter was set for a hearing before the juvenile court. *Id.*

At the beginning of the merits hearing, counsel for the mother advised the court that the mother could not attend the hearing because one of her children was sick. *Id.* at 486-

87. For this, and other reasons relating to the mother's witnesses, counsel for the mother requested a continuance, which the court denied. *Id.* at 487, 496. The court proceeded with the hearing, throughout which the mother's counsel made, and the court denied, several more requests for a continuance. *Id.* at 488-493. Ultimately, the juvenile court dismissed the mother's petition. *Id.* at 493-94.

On appeal, this Court held that the juvenile court's "refusal to grant a continuance to permit the mother to be present" was arbitrary and constituted reversible error. *Id.* at 500. 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:"

> We can think of 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. We believe that there was grave and serious error on the part of the trial judge in compelling the hearing to proceed in the absence of the [mother], and we find that it was arbitrary and unreasonable for him to refuse to grant a continuance so that she might be present.

Id. at 496-97, 499. This Court took particular issue with the juvenile court's decision to "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 (emphasis added). And, despite counsel's proffer as to the substance of the mother's testimony had she been present for the hearing, the record did not reflect that the court "gave any consideration at all to the question of whether the mother's testimony would be competent or material." *Id*. at 498.

The holding in *In re McNeil* was not without limits:

> We do not hold that it is never permissible to hold a custody hearing in the absence of one or both parents. Under some circumstances such a hearing could be necessary and proper, but no such circumstances were present in the instant case. *There certainly was nothing of an emergency nature about the [merits] hearing. . .* for both children were permitted to remain with the [mother] for several weeks after [the court's initial] decision [adopting the master's recommendations], and, as we noted earlier, [the other minor child] was still in [the mother's] care when the matter came on for argument before us[.]

Id. at 499 (emphasis added). Although this Court speculated that the juvenile court refused to grant the continuance "out of concern for the convenience of other witnesses in the case who were then present in his courtroom[,]" we underscored that "[a] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to due process an empty formality." *Id.* Accordingly, because the mother "was denied [her] reasonable opportunity to be heard[,]" this Court ultimately concluded that the case must be remanded for a new hearing. *Id*. at 500.

We recognized another "exceptional instance" in *Reaser v. Reaser*, 62 Md. App. 643, 645 (1985). In *Reaser*, this Court reversed the trial court's denial of the wife's request for a continuance in a divorce proceeding. *Id*. at 650. The husband in that case initiated the underlying proceedings by filing a complaint for absolute divorce. *Id*. at 645, 649. The wife filed a cross-complaint for limited divorce and also a contempt petition against the husband. *Id*. at 649. Six days prior to the merits hearing, the wife requested a continuance to obtain counsel. *Id*. The court denied the continuance and proceeded with the hearing. *Id*. at 645-49. At the conclusion of the proceeding, the court granted the husband an absolute divorce but dismissed the wife's counter-complaint for divorce and her contempt petition. *Id*. at 647.

On appeal, this Court relied on the factors set out in *In re McNeil* "militating in favor of a continuance" and concluded that the court's denial of the wife's continuance constituted an abuse of discretion. *Id*. at 648-50. This Court reasoned:

> No reason was given for the denial of the continuance. We know that [the court] in September expressed concern that the case had not proceeded to trial on the merits. We might speculate that the age of the case played a role in the court's decision. If this were so, it would not provide sufficient justification for the denial of the continuance particularly when no prejudice to the other side was shown and no objection voiced. There does not appear to have been any emergency situations necessitating that the case proceed immediately. No inquiry was made of appellant as to how long it would take her to get counsel.

Id. at 650. In a footnote, we further recognized that the wife's contention that she was unaware she would have to go to trial until a few days before trial commenced was supported by the record and constituted "another basis for our conclusion that the trial judge abused his discretion." *Id.* at 650 n.2.

We return to the instant case. As discussed, the docket entry for Father's motion for a continuance reflects that Father's motion was treated as "moot" and includes an annotation stating, "Case reset to 8/1." It is uncontested that the magistrate then proceeded with the custody hearing on August 1, 2018, in the absence of Father. The court gave no explanation for its ruling on the underlying motion, and it does not appear from the record that the court gave any consideration to Father's motion for a continuance. Father's motion for a continuance informed the court that he could not attend the July Custody Hearing because he lived in Peru and could not travel until *mid-December* when he could take off work. Accordingly, under these circumstances, it is difficult for us to conceive of grounds for ruling that Father's motion was moot.

Additionally, "[t]here does not appear to have been any emergency situations necessitating that the case proceed immediately." *Reaser*, 62 Md. App. at 650; *In re McNeil*, 21 Md. App. at 499. The custody hearing, which was originally scheduled for September, was rescheduled to an earlier date because Mother wanted to renew G.C.S.'s passport so that they could visit Mother's sick father overseas before the end of August. The record reveals that, prior to and at the time of the August Custody Hearing, G.C.S. was living with Mother, and Father had organized the necessary consent for G.C.S.'s passport renewal. *Cf. Touzeau*, 394 Md. at 675 (affirming the denial of a continuance when, among other things, the case "was expedited as a consequence of the immediate impact that [the minor child's] relocation had on her relationship with [the father]" and when "a delay would have completely obviated the expedited nature of the proceedings"). Though we sympathize with Mother's need to visit her sick father overseas with her child, it is unclear why that trip required Mother to first secure permanent legal custody of the child,[10] or why

[10] We note that federal regulations require both parents (or each of the minor's legal guardians) to execute a passport application for a minor under 16 years of age. 22 C.F.R. § 51.28 (2008). The regulations permit, however, one parent or legal guardian to apply for the minor's passport if the applying parent provides either "[a] notarized written statement or affidavit from the non-applying parent or legal guardian . . . consenting to the issuance of the passport" or "[d]ocumentary evidence that such person is the sole parent or has sole custody of the minor." 22 C.F.R. § 51.28(a)(3). Such documentary evidence includes, but is not limited to, a court order:

> [1] granting sole legal custody to the applying parent or legal guardian containing no travel restrictions inconsistent with issuance of the passport; or, [2] specifically authorizing the applying parent or legal guardian to obtain a passport for the minor, *regardless of custodial arrangements*; or [3] specifically authorizing the travel of the minor with the applying parent or legal guardian[.]

22 C.F.R. § 51.28(a)(3)(ii)(E) (emphasis added).

this need overrode Father's fundamental right "to be given a reasonable opportunity to be present at any judicial proceeding where the issue is whether or not [he] should be permitted to have custody of [his] child." *Id*. at 496. As this Court has explained, "[a] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to due process an empty formality." *In re McNeil*, 21 Md. App. at 499.

In the instant case, Mother sought an earlier date for the custody hearing presumably so that she could obtain a sole custody award for purposes of renewing G.C.S.'s passport, without Father's consent, to visit her ailing father. The record reflects, however, that Father informed the circuit court, in his motion for a continuance, that he was willing to provide notarized consent to the child's passport application and that he had scheduled an appointment for July 30 at the U.S. Embassy in Peru to complete this process. Father's notarized consent, Mother would not need sole legal custody to renew G.C.S.'s passport. 22 C.F.R. § 51.28(a)(3)(i). Further, even if the court was not satisfied with Father's representation, Mother could have renewed the passport with a court order that "authoriz[ed] the applying parent or legal guardian to obtain a passport for the minor, *regardless of custodial arrangements*" or "authoriz[ed] the travel of the minor with the applying parent[.]" 22 C.F.R. 51.28(a)(3)(ii)(E) (emphasis added). *Cf. Ansell v. Ansell*, 759 S.E.2d 916, 918-19 (Ga. 2014) (finding an abuse of discretion in the trial court's order requiring the father to execute documents consenting to a renewal of the minor child's passport when the record failed to reveal the court's consideration of the federal regulations "recognizing a court order as a means by which a parent may obtain a passport . . . if the parent is unable to obtain a notarized written statement or affidavit of consent[.]").

Given these alternatives available to Mother in renewing G.C.S.'s passport without an award of sole legal custody, it would not be reasonable to prioritize Mother's desire to expedite the custody proceedings for the purpose of obtaining the child's passport by way of a custody award over Father's fundamental right to be given a reasonable opportunity to be present at the custody proceedings before the magistrate. *Cf. Dolson v. Mitts*, 99 A.D.3d 1079 (N.Y. App. Div. 2012) (finding an abuse of discretion in the trial court's order awarding the mother sole legal custody for the purpose of obtaining a passport for the minor child because, in issuing the award, the court "refused to adjourn the proceeding when the father . . . requested an attorney" and, therefore, deprived him of his fundamental right to counsel).

Given the circumstances of this case, we hold, therefore, that the circuit court's failure to grant Father's motion for a continuance was an abuse of discretion and the case must be remanded.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED; CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION; APPELLEE TO PAY COSTS.