VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 21st day of April, 2016.

Reginald C. Way, Appellant,

against Record No. 150910
Circuit Court No. CL13-3820

Andrea M. Way, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Virginia Beach.

Reginald C. Way appeals a final judgment issued by the Circuit Court of the City of Virginia Beach, which denied his petition requesting that he be appointed as guardian and conservator for his incapacitated wife. The court instead granted a cross-petition filed by Reginald D. Hunt and Sharon Etheridge, requesting that they be appointed as co-guardians and that a third party be appointed as conservator. We granted appellant's assignment of error challenging the court's denial of his motion to continue the trial. Finding that the court did not abuse its discretion in denying the continuance, we affirm.

I.

In 2013, Reginald C. Way ("husband") and Andrea M. Way ("wife") had been married for more than ten years. Pursuant to Code § 64.2-2001(A), husband filed a petition in July 2013 requesting that the circuit court appoint him as guardian of his wife and conservator of her estate. In his amended petition, husband alleged that wife had been hospitalized at a psychiatric center and was later discharged with a recommendation that wife be admitted into a professionally managed memory-loss facility. Upon her discharge, husband claimed, wife was taken against his wishes to the home of her sister, Sharon Etheridge. Reginald D. Hunt, wife's son from a previous relationship, intervened and filed a cross-petition asking the court to appoint him and Etheridge as co-guardians and co-conservators.

The court scheduled a trial for August 18, 2014. On the day of trial, the court discovered that the prehearing notice, required by Code § 64.2-2004, and the evaluation report, required by

Code § 64.2-2005, had not been timely provided by the litigants. The trial judge instructed the parties to consult with his assistant to reschedule a new trial date on the judge's calendar. The parties did so and agreed on October 24, 2014, as the new trial date. Both parties subsequently filed timely notices with the clerk confirming the rescheduled trial date.

On October 10 and 12, 2014, husband's counsel sent letters to the clerk's office requesting the issuance of 11 subpoenas for trial witnesses. On the October 10 letter, delivered that same day, a clerk made a hand-written notation stating, "10.14.14. tc to [husband's counsel]/Message/no hearing on 10/24 at 2:00 pm. Waiting." J.A. at 58. On the October 12 letter, the clerk wrote "10.16.14. tc to atty – Message – not no court/on the Docket for 10/24." Id. at 60. On the October 12 letter, a separate notation stated "10.20.14. tc from [husband's counsel] – will Schedule and then request subp." Id.[1] On October 21, 2014 the clerk's office mailed back to husband's counsel her uncashed checks submitted with the subpoena request. Id. at 61. The clerk's office never issued any of the requested subpoenas.

On the day of trial, October 24, 2014, husband's counsel requested a continuance because the clerk's office would not issue her witness subpoenas. Counsel advised the court that she had personally met with someone in the clerk's office who advised her that "the clerk's office wasn't aware of the case that you have on your docket." Id. at 68-69. The court asked counsel to proffer the expected witness testimony. Counsel provided proffers for several witnesses, agreed to dismiss others, and noted that two witnesses were present in the courtroom. The trial judge and counsel engaged in a lengthy exchange about the specific relevance of each witness. The court also addressed the circumstances surrounding the refusal of the clerk's office to issue the requested subpoenas. After reviewing counsel's proffers, the trial court held:

> I find that your witnesses were reasonably available to you by telephone. These are not witnesses that would only appear by subpoena. The mere fact that you subpoenaed them, and the subpoenas didn't get issued by the clerk's office for whatever reason, you still could have had those witnesses here by a simple telephone call. So I will deny your motion.

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[1] At a later hearing, the trial court clarified that the clerk's office had left messages for husband's counsel on October 14 and 16, 2014. Counsel called the clerk back on October 20, 2014. Counsel "asked what needed to happen, and the Clerk's office advised that a hearing should be scheduled through the Judge's office, and the clerk asked [counsel] to call her back to affirm the hearing date so she could issue the subpoenas." J.A. at 308-09.

Id. at 88.[2] The court added as alternative grounds for denying the continuance that the witness proffers did not present legally relevant evidence, id. at 100, 307-08, and that husband's counsel did not exercise due diligence in attempting to resolve the clerk's misunderstanding prior to trial, id. at 69 (noting that "we could have cleared [the problem] up with one phone call"); id. at 309 (advising husband's counsel that she "did not inform the Court . . . that there was a subpoena issue").

II.

Whether to grant or deny a continuance rests "within the sound discretion" of the trial court. Ortiz v. Commonwealth, 276 Va. 705, 722, 667 S.E.2d 751, 762 (2008) (quoting Haugen v. Shenandoah Valley Dep't of Soc. Servs., 274 Va. 27, 34, 645 S.E.2d 261, 265 (2007)). An appellate court can reverse only if the trial court committed an "abuse of discretion" and thereby caused "resulting prejudice." Id. This two-pronged test has long been the standard under Virginia practice. Satisfying both prongs of the test is "essential to reversal," rendering the presence of one inconsequential in the absence of the other. Butler v. Commonwealth, 264 Va. 614, 621, 570 S.E.2d 813, 817 (2002). We cannot reverse if the complaining litigant "has shown no prejudice resulting from what he claims was an abuse of discretion" in granting or denying a continuance motion. Quintana v. Commonwealth, 224 Va. 127, 135, 295 S.E.2d 643, 646 (1982). Prejudice, moreover, may not be presumed; it must clearly appear from the record.

In this case, the trial court did not abuse its discretion in denying husband's continuance motion. Of the several grounds offered by the trial court for its decision, we find most persuasive the fact that husband's counsel did not exercise due diligence in seeking to resolve the subpoena issue prior to trial. The clerk's office left two messages for husband's counsel, one on October 14 and the other on October 16. Inexplicably, counsel waited until October 20 to call the clerk back, as evidenced by the clerk's notation on the October 12 letter. At some point, counsel visited the clerk's office in an attempt to resolve the problem. Even so, upon discovering the confusion concerning the trial date, counsel made no effort to advise the trial court of the problem. Nor did counsel attempt to serve attorney-issued subpoenas through a

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[2] The trial court's statement appears to be inaccurate with respect to three of husband's proffered witnesses. Counsel called these three prior to trial. One was out of town, another did not answer counsel's call, and the third stated that she "would have to have a subpoena." J.A. at 88-89.

private-process server. See Code § 8.01-407(A). Counsel found herself on the eve of trial with none of her witnesses subpoenaed and, yet, did next to nothing to resolve the problem.

Given these circumstances, we cannot say that the trial court abused its discretion in finding that husband's counsel did not exercise due diligence. As we have often said, the abuse of discretion standard presupposes that the trial court "has a range of choice, and its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." Lawlor v. Commonwealth, 285 Va. 187, 212-13, 738 S.E.2d 847, 861 (2013) (alteration and citation omitted). "Only when reasonable jurists could not differ can we say an abuse of discretion has occurred." Grattan v. Commonwealth, 278 Va. 602, 620, 685 S.E.2d 634, 644 (2009) (quoting in parenthetical Thomas v. Commonwealth, 44 Va. App. 741, 753, 607 S.E.2d 738, 743 (2005)); see also Noll v. Rahal, 219 Va. 795, 801, 250 S.E.2d 741, 745 (1979).

We acknowledge the quandary counsel faced upon learning that the clerk had no knowledge of a trial scheduled by the trial judge's office. The trial court, however, did not abuse its discretion in finding that counsel should have promptly brought this fact to the court's attention so that the miscommunication could be remedied prior to trial. For this reason, we affirm.[3] The appellant shall pay to the appellees two hundred and fifty dollars damages.

This order shall be certified to the said circuit court.

JUSTICE KELSEY, with whom CHIEF JUSTICE LEMONS and JUSTICE GOODWYN join, dissenting.

The abuse-of-discretion standard is perhaps the most deferential level of review possible of a pure judgment call made by a trial judge — particularly in cases where, as here, the decision does not turn on a factor conceptually out of sync with settled principles of law. Even so, a review of the record — both at the micro level focusing on specific decisionmaking and the macro level focusing on the overall tenor of the proceeding — leads me to the conclusion that the trial court abused its discretion in denying the continuance motion.

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[3] Given our holding, it is unnecessary to rule upon the trial court's alternative grounds for denying the motion to continue. See generally Alexandria Redevelopment & Hous. Auth. v. Walker, 290 Va. 150, 156, 772 S.E.2d 297, 300 (2015) ("[W]e strive to decide cases on the 'best and narrowest grounds available.'" (citation omitted)).

I.

This is not a case in which counsel waited too late to request witness subpoenas and simply showed up at trial befuddled and unprepared. Instead, in this case, husband's counsel encountered an unprecedented situation that no trial lawyer could have reasonably expected. At the direction of the trial judge, counsel scheduled a new trial date with the judge's assistant. Counsel then filed a notice of the hearing with the clerk's office. A week before trial, however, the clerk inexplicably took the position that no trial had been scheduled.

Two messages were left by the clerk's office for counsel on October 14 and 16, but it is unclear whether they were left with counsel's receptionist or recorded as voicemails. It is also unclear when counsel first heard about those messages[4] or what they specifically said.[5] Counsel stated in her exceptions to the trial court's order that the "first time" she "discovered that case was not on the docket was on Friday, October 17, 2014," when she "was finally able to reach" the clerk. J.A. at 295.[6] Counsel then stated that she not only called opposing counsel, see id., but she also "attempted to either procure a continuance or schedule a conference call to no

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[4] Husband's exceptions to the trial court's order stated that "[c]ounsel had received a phone message previously by counsel's receptionist that [the clerk] had called," and that "[c]ounsel was not aware of any voice recorded messages that were left until after counsel spoke with the clerk's staff in person on October 22nd or 23rd." J.A. at 295. The clerk's notations of each of the phone calls only specify that a "[m]essage" was left without any notation of the manner in which those messages were left. Id. at 58, 60. The trial court's own recitation of the facts also does not disclose the manner in which the messages were left. Id. at 308. At oral argument, Hunt's counsel stated that two voicemails were left with husband's counsel, see Oral Argument Audio at 21:51 to 22:29, but husband's counsel stated that messages were left by the clerk without specifying the manner in which those messages were left, see id. at 5:35 to 5:47.

[5] Although the clerk's notations for the two phone calls on October 14 and 16 state "no hearing on 10/24 at 2:00 pm" and "no court/on the Docket for 10/24," J.A. at 58, 60, husband's exceptions stated that "[n]othing else was indicated regarding what the call was about" when her receptionist informed her that the clerk had called, id. at 295.

[6] On counsel's October 12 letter, the clerk made a handwritten notation stating: "10.20.14. tc from [husband's counsel] – will Schedule and then request subp." Id. at 60. This note, as the majority correctly observes, implies that counsel telephoned the clerk on Monday, October 20, rather than Friday, October 17, as counsel remembers it. The trial court did not attempt to reconcile this discrepancy, nor do I find it necessary to do so. The difference between Friday and Monday is immaterial to my view of this appeal.

avail," id. at 296. The clerk's office was closed on October 18 and 19, the weekend before the October 24 trial.

In short, by the time husband's counsel realized the predicament she was facing, it was simply too late to remedy it. I would have little sympathy for counsel if this problem was in any way her fault. But it was not. It appears to be wholly the fault of the judge's staff, the clerk's office, or both. Either the judge's staff failed to communicate with the clerk's office, or the clerk's office failed to make the appropriate docket entries. Either way, husband's counsel did her part (as did opposing counsel) in filing a notice of hearing with the court. And those notices were in the court's file at the time the clerk incorrectly declared that no trial date had been set. If it is necessary to blame someone for lack of due diligence, I am unpersuaded that it should be the litigants or their counsel.

II.

I also believe that the trial court was too hasty in discounting the legal relevance of some of the proffered testimony — thus leading the court improvidently to minimize the prejudicial effect of denying the continuance request. At multiple stages in the proceedings, the court appeared to frame the case before it merely as one requiring a judicial determination of "the best placement" for a dementia patient. Id. at 89. "I am trying to find a good placement for [wife]. *All of the other issues need to go away*, and we need to decide what is the best placement for [wife]. So I'll hear whatever evidence anyone wants to present which goes to the issue of what is the best placement." Id. (emphasis added).[7]

The issues that were swept away by this ruling included the very issues specifically framed by the pleadings in this case. The litigants agreed that wife's debilitating condition was severe enough to require full-time care. They also agreed that she needed the appointment of a guardian and conservator. The contested issue was *who* should be appointed as guardian and conservator. Two competing petitions were before the court. After husband filed the original

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[7] This framing of the case failed to recognize other factors that the trial court was required to consider, such as "the suitability of the proposed guardian or conservator." Code § 64.2-2007(C)(vi). Furthermore, the guardian ad litem's report on the petition was required to address not only the "proper residential placement of the respondent," but also "the propriety and suitability of the person selected as guardian or conservator." Code § 64.2-2003(C)(iv), (vi).

petition, Hunt intervened to object to husband's appointment and to request that he and his aunt be appointed instead.[8]

Because these competing petitions revealed a serious fracture in the emotional stability of the family, I understand the trial court's efforts to encourage a compromise.[9] But when it became obvious that was not going to happen, the judicial task remained, and it required the court to determine not only whether to appoint a guardian and conservator but also which of the disputants should be given those powers. The court relied upon the recommendation of the guardian ad litem ("GAL") that favored Hunt and Etheridge and disfavored husband. This recommendation, however, rested upon hearsay evidence from some of the very witnesses that husband attempted to subpoena. Husband's counsel pointed out specific statements in the GAL's report that he contested. Several of the proffered witnesses, counsel claimed, would undermine the factual predicates of the GAL's recommendation.[10]

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[8] Hunt alleged that husband "failed to provide an adequate level of care" and "neglected" wife's medical condition. J.A. at 6. Hunt also alleged that wife, following her hospitalization, "was released to Sharon Etheridge as a result of the investigations that took place at Virginia Beach Psychiatric Center and/or Adult Protective Services." Id.

[9] The encouragement to settle, however, could not be characterized as understated. See, e.g., id. at 40 ("So, I mean, just think about where we're going before we waste a lot of time and money going there."); id. at 44-45 ("Do you-all want to try to resolve this, or are we going to have a full-blown trial and spend as much money as we can?"); id. at 50 ("This is going to be a contested hearing. You're going to go through this irrespective of the fact of all of the circumstances that are pending before us, and I'm pretty astounded, but have a nice day. . . . I'll be the judge on the case. There's not going to be another judge, and we'll hear the case. I think this is an unfortunate turn of events, it's an unfortunate circumstance, but I'll hear it.").

[10] The trial judge expressly relied upon the GAL's report and stated, "I would like to hear any evidence to tell me or prove to me why the guardian's recommendation is not the appropriate course of action." Id. at 89-90. Husband's counsel, however, tried multiple times during the hearing to do just that. "But, Your Honor," husband's counsel advised the court, "there are some things that the guardian ad litem has indicated in her report specifically indicating that, according to some staff at Dr. Wang's office, [wife] has f[a]red better since she's been in the care of Ms. Etheridge, which I think may highlight that somehow [husband] was neglectful." Husband's counsel further voiced her concern "that without Dr. Wang [available to testify at trial] there is a question of what her condition was during the time when [wife] was taken out of the home, unbeknownst to my client, [husband]." Id. at 70-71. Moreover, despite counsel's proffer about testimony concerning husband's allegation that Etheridge was inappropriately using wife's funds, the court decided instead to rely on the GAL's "feeling" that no one was trying to "deplete" wife's funds. Id. at 91.

In addition, several of husband's witnesses were offered to demonstrate that Hunt and Etheridge had been engaged in a not-too-subtle effort to exclude husband from his wife's life and would likely continue to do so, without restraint, if they ended up with plenary power over wife's personal decisions and property interests.[11] If true, this allegation would have been highly relevant. It would not be in wife's best interests to be alienated from her husband. On the other hand, if proven to be untrue, husband's allegation would have shown just the opposite — that his inability to work with other family members and, perhaps, his distorted perception of their care for his wife supported the conclusion that her son and sister would best serve her interests. The trial court, however, shut down this evidentiary contest in no uncertain terms,[12] even to the point of threatening husband's counsel with contempt of court.[13] In doing so, I believe, the court assumed away the principal factual issue in contest by relying upon a GAL recommendation without allowing husband an opportunity to contest its factual basis.

The exchange that best captures the tone of this trial occurred at the end of the October 24 proceeding. Husband's counsel restated her request that the court "hear all of the witnesses" and consider the historical circumstances leading up to the present dispute. Id. at 100. The court responded, "I disagree with you that it's very important. And if your witnesses were here, I

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[11] Husband's counsel proffered that husband "has been essentially shut out of his wife's care. [Hunt and Etheridge] put bars on medical records." Id. at 46. Husband allegedly did not even "know where his wife was" on two separate occasions. Id. at 72. This was consistent with husband's statements to the GAL that Etheridge "refused to give him the necessary code to access his wife during her treatment" at the Virginia Beach Psychiatric Center, "told lies" about his relationship with wife, and wanted to "benefit monetarily" from being wife's guardian and conservator. Id. at 24. In response to Etheridge's claim that she "never ever told [husband] that he could not visit his wife" and husband's statement that "she did" just that, the court responded: "It doesn't matter." Id. at 109. Husband also alleged Hunt and Etheridge had "threatened" him. Id. at 106. The trial court made no response to that allegation.

[12] In response to the proffer from husband's counsel that Etheridge used wife's funds, blocked husband's access to wife while she was hospitalized, and made inaccurate but "serious" allegations against husband, the trial court responded: "Not relevant right now. Not relevant right now." Id. at 79. Counsel asserted that husband was "best suited" to care for his wife and proffered that when husband "finally saw his wife, because he hadn't seen her for over a year, she immediately started calling out his name at night." Id. at 87. "I don't need to hear this right now," id., the court stated as it briefly recessed to handle another matter.

[13] Id. at 121-22 ("I am going to find you in contempt if you keep going . . . after I have told you I am not going to hear it. . . . I am going to find you in contempt if you continue.").

would hear from them." Id. On its face, that statement seems to be a concession that the proffered witnesses were legally relevant. Why would the court want to hear from irrelevant witnesses? The court, however, followed that remark with, "But you find relevance where I find no relevance." Id. When counsel attempted to proffer evidence of the "history" leading up to the dispute between the litigants, the court stated: "I am not looking at history. I am over history. I am trying to deal with the current situation. We have [multiple] people in the courtroom . . . . I am not going to make everybody sit here for another hour-and-a-half going through that." Id. at 116.

I respectfully disagree with my trial court colleague. The judicial task in this case required the court to choose which of the competing petitioners would best serve wife's needs in the future. "Virginia law recognizes the maxim that, sometimes, the most reliable way to gauge a person's future actions is to examine those of his past." Tackett v. Arlington Cty. Dep't of Human Servs., 62 Va. App. 296, 330, 746 S.E.2d 509, 526 (2013) (citation omitted). By categorically refusing to consider any evidence of the past, the court hobbled its ability to make a reliable prediction of the future. Whatever efficiency the court gained by truncating the evidence was outweighed by tainting the ultimate decision with the perception that it was the product of a hurried and unreliable process.

III.

In sum, I believe the trial court abused its discretion by not continuing the case after the clerk refused to issue husband's witness subpoenas. This ruling prejudiced husband because it denied him an opportunity to present relevant evidence seeking to support his petition and to defeat Hunt's cross-petition. I thus would reverse the final judgment and remand for trial on all disputed factual issues.

A Copy,

Teste:

Peter L Harrington

Clerk