Circuit Court for Anne Arundel County
Case No. C-02-JV-17-000383

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 14

September Term, 2021

IN RE: A.P.

Fader, C.J.,
Beachley,
Zic,

JJ.

Opinion by Fader, C.J.

Filed: August 3, 2021

Z.C. ("Father"), the father of four-year-old A.P., appeals an order entered by the Circuit Court for Anne Arundel County, sitting as a juvenile court, that changed A.P.'s permanency plan to custody and guardianship by a non-relative and then granted custody and guardianship of A.P. to his foster parents, Mr. and Mrs. B ("the Bs."). Father argues that the juvenile court made erroneous factual findings and abused its discretion in making its ultimate decision. Finding no error or abuse of discretion, we will affirm.

BACKGROUND

When A.P. was born in October 2016, both he and his mother, T.P. ("Mother"), tested positive for marijuana and PCP. In July 2017, Mother was observed to be impaired while attending a group therapy session and admitted to having abused unprescribed Xanax she had purchased on the street. Following that incident, the Circuit Court for Baltimore City denied a request by the Baltimore City Department of Social Services to place A.P. in shelter care and transferred the matter to the Circuit Court for Anne Arundel County. The following month, after Mother left then-ten-month-old A.P. unattended overnight, the Anne Arundel County Department of Child Services (the "Department") removed A.P. from Mother's custody, placed him in shelter care, and filed a petition with the Circuit Court for Anne Arundel County that asserted that A.P. was a child in need of assistance ("CINA").[1] In the petition, the Department asked the court to authorize continued shelter care.

[1] A "child in need of assistance" is one who requires court intervention because: (1) the child has been abused or neglected, or has a developmental disability or mental disorder; and (2) the child's "parents, guardian, or custodian are unable or unwilling to give

Father has never had custody of A.P. He filed for custody of A.P. shortly following the July 2017 incident, but his paternity was not established until these proceedings.

In its Second Amended Petition With Request For Shelter Care, filed in August 2017, the Department included allegations concerning Mother's history of mental health issues and substance abuse, and the July and August incidents. The Department also identified Father as one of two potential fathers, noted that he had previously sought custody of A.P., stated that he had a "history of abusing PCP," and expressed ongoing concerns about his ability to parent A.P. The Department specifically referenced an incident in March 2017 in which Father had advised Mother "to feed [A.P.] coconut milk and formula and probiotics and apple juice," which had caused A.P. to become ill and require hospitalization "due to low sodium, dehydration and a severe rash . . . that mimicked a burn." The juvenile court authorized continued shelter care.

After a CINA adjudication hearing held in September 2017, the juvenile court issued an order in which it sustained all of the factual allegations in the Department's second amended petition and found that: (1) the Department had made reasonable efforts to reunify the family or eliminate the need for A.P.'s removal; (2) Father was A.P.'s biological father; and (3) A.P. had been neglected and Mother and Father were unable or unwilling to provide proper care for his needs. The court concluded that A.P. was a child in need of assistance and placed him in the Department's custody. The juvenile court also authorized supervised visitation with both Mother and Father, and authorized a

proper care and attention to the child and the child's needs." Md. Code Ann., Cts. & Jud. Proc. § 3-801(f) (2020 Repl.).

permanency plan of reunification. The Department placed A.P. in foster care with the Bs., where he has remained ever since.

Over the next two years, Father participated in supervised visitation with A.P.[2] Although Father's visits were largely consistent between 2017 and mid-2019, the Department noted several instances of behavior that it concluded raised questions about Father's ability to safely parent A.P. These included: (1) providing A.P. sweet tea instead of milk because of Father's stated belief that "milk causes mucus"; (2) "los[ing] sight of [A.P.]" during a visit, which resulted in A.P. "running naked" and urinating on a carpet; (3) expressing reluctance and irritation at the process of changing A.P.'s diaper and repeatedly putting the diaper on backwards; (4) failing to respond appropriately when A.P. became "very thirsty" at a trampoline park, first by declining to buy water, and then, after being directed to a water fountain, by obtaining only a small amount of water; (5) encouraging A.P. not to use his eyeglasses because Father believed A.P. would grow out of them; and (6) using vocabulary and directions that the caseworker believed were "too advanced" for a child of A.P's age. Although Father requested unsupervised visitation during at least one review hearing, the court ordered that visitation remain supervised based on some of the incidents relayed by the Department and the court's concern that Father was not capable of parenting A.P. independently.

[2] Because Mother did not note an appeal from the juvenile court's ruling that is at issue here, we do not address issues that are particular to her. We observe, however, that she filed a line indicating her support of Father's position.

In March 2019, based upon the Department's request, the juvenile court ordered that A.P.'s permanency plan be changed from reunification to adoption by a non-relative. In accordance with that plan, the Department subsequently sought to terminate Father's parental rights and sought authority to consent to A.P.'s adoption by the Bs. During a hearing, however, the Department rescinded its request and sought a second change in the permanency plan, this time to custody and guardianship by a non-relative.

In February 2020, following a permanency planning hearing that had been held the prior month, a magistrate issued a report and recommendation that concluded that it would be in the best interests of A.P. to grant the change in plan and recommended awarding custody and guardianship to the Bs., "the only family he has truly ever known." The magistrate observed that "[i]t has never been an issue of [Father's] willingness to care for [A.P.], but his ability to do so is in question." Father timely filed exceptions.

Due to delays associated with the COVID-19 pandemic, the juvenile court did not convene a hearing on the exceptions until September 2020. Three witnesses testified on behalf of the Department: Megan Saperstein, a social worker for the Department (who was called as a witness by Father); Dr. Michael Gombatz, a psychologist who evaluated Father for mental health issues in October 2018; and Terri Lowther, a supervisor at the Department. Ms. Saperstein testified that she had observed instances where Father exhibited poor judgment in caring for A.P., pointing specifically to the incident involving obtaining water for A.P. at the trampoline park.

Dr. Gombatz, whom the court accepted as an expert in the field of general psychology, testified that he had diagnosed Father with "adjustment disorder with mixed

emotional features" and had observed "evidence based on histrionic personality types" with paranoid, narcissistic, and schizoid traits. Dr. Gombatz identified concerns about Father's "ability to make adequate decisions for the child, to be able to reflect on what the child needs developmentally and being able to put [himself] in the child's position . . . and not react emotionally." Although Dr. Gombatz conceded that he had not directly evaluated Father in almost two years, he testified that he had reviewed more recent reports of Father's behavior, which he had received from the Department, and believed that Father "still has significant problems with judgment . . . [because] the information that was provided has multiple examples of severe errors in judgment."

Ms. Lowther, whom the court accepted as an expert in the field of social work, testified that she did not believe reunification was appropriate because Father did not seem to understand A.P.'s physical needs, such as his need for glasses. She also testified that she had concerns about Father's long-term lack of employment and income, and his dwelling having only a single bedroom.

Counsel for A.P. called Mrs. B., A.P.'s foster mother, to testify. She testified that A.P. was comfortable around Father and called him "Dad," but tended to be more reserved than normal during visits with him and did not cry or act upset when the visits ended. Mrs. B. also testified that A.P. had close relationships with both her and Mr. B., and had become integrated into their family.

Father testified on his own behalf. He stated that he currently lived in a one-bedroom apartment but would be able to obtain a larger two-bedroom residence if he had A.P. in his care. He acknowledged that he had not been regularly employed in 17 years

and had sciatic nerve damage in his back. However, he denied having difficulty caring for A.P. and stated that he himself was taken care of by a large support network of family and friends. Father also acknowledged that he had not seen A.P. in person for most of late 2019 and 2020 and had communicated with A.P. only by telephone.

In addition to testifying on his own behalf, Father called two witnesses: Beverli Mormile, a psychologist, and LaToya Nkongolo, a licensed social worker and drug and alcohol counselor. Dr. Mormile, whom the court accepted as an expert in the field of psychology, testified that she had diagnosed Father with an unspecified personality disorder with histrionic traits and an adjustment disorder. She clarified, however, that she had discerned "nothing that would harm [Father] or that would put him in a situation where his child would be in danger." Ms. Nkongolo, whom the court accepted as an expert in clinical social work, testified that Father had been a patient of hers from April 2018 to September 2019. Ms. Nkongolo testified that she initially diagnosed Father with schizotypal personality disorder but later changed her diagnosis to adjustment disorder with anxiety, which is a less severe diagnosis. Ms. Nkongolo stated that other than Father's anxiety, she had "no qualms about him being able to properly care for [A.P.]."

Following the hearing, the court entered a memorandum and an accompanying order in which it concluded that it was in A.P.'s best interest for the permanency plan to be changed to guardianship and custody with the Bs., awarded custody of A.P. to them, and, as a result, found that A.P. was no longer a child in need of assistance. In its memorandum, the court made findings of fact based on the evidence presented at the hearing. Notably, the court credited Dr. Gombatz's testimony about the implications of Father's mental

health on his ability to care for A.P., and expressly found that "Ms. [Nkongolo]'s testimony lacked certain credibility with the Court." The court noted that Ms. Nkongolo's testimony and her changed diagnosis were largely "based on [Father's] self-reporting[.]"

In stating its conclusions, the court noted that its "primary concern [wa]s the health and welfare of [A.P.]." The court then expressly considered each of the six factors identified in § 5-525(f)(1) of the Family Law Article. First, the court analyzed A.P.'s "ability to be safe and healthy in the home of the child's parent," stating that

> the issue is whether the child will be safe in the father's care. The Court received credible testimony that indicates in the negative. [Father] has difficulty making proper decisions. Although he has received [the Department's] services to assist in enhancing his parenting skills, it does not appear there has been progress.
>
> At the same time, the Court finds that [though] many of the visitations have been successful, as the child grows and ages, it is apparent that [Father] has limited capacity to appreciate [A.P.'s] changing needs. When asked what additional services are available to assist [Father], none could be delineated. There has been no progress from supervised to unsupervised visitation in the three-plus years that this case has been pending. The Court is concerned about [Father's] mental stability. Testimony of his diagnosis raises concern about the stress associated with raising a child and [Father's] disabilities. His oppositional approach to matters he finds unfavorable is not conducive to his obtaining custody.

The court next analyzed the second factor, A.P.'s attachment and emotional ties to Father. The court noted that although A.P. recognized Father and called him "Daddy," A.P. "appears reserved when around [Father] and does not cry when he leaves him after visitation."

Regarding the third factor, the "child's emotional attachment to the child's current caregiver and the caregiver's family," the court observed that A.P. was "attached to the

B[.] family," in whose care he had been "for most of his life," and that the Bs. had "integrated him into their family, taking him on outings, family vacations[,] to church, community activities, and including him in family celebrations."

With respect to the fourth factor, the length of time A.P. has resided with the current caregiver, the court noted that A.P. had been in the custody of the Bs. for three years, the majority of his life. Other than Mother, the Bs. had been A.P.'s only care providers.

In considering the fifth factor, the "potential emotional, developmental, and educational harm to the child if moved from the child's current placement," the court determined that A.P. may suffer emotional and developmental harm if removed from the Bs.' care. Although the court acknowledged that "there was no direct testimony regarding the effect" on A.P.'s development if removed from his current placement, the court was concerned that A.P.'s development might suffer if he were taken from a place where he was receiving physical and educational services to a place where he potentially would not. The court pointed to Father's lack of understanding regarding A.P.'s need for glasses as an example of its concerns.

Finally, the court discussed the sixth factor, the "potential harm to [A.P.] by remaining in State custody for an excessive period of time." The court observed that A.P. had already "been in limbo for the past several years," and that Father's request was "to give [Father] another six months 'to see what happens.'" The court found that not to be in A.P.'s best interest in light of the absence of any definitive plan that might result in Father gaining "the necessary skills to parent [A.P.] successfully," the absence of improvement in

Father's parenting skills over the prior three years, and Father's continuing inability "to care for [A.P.'s] needs."

Based on its weighing of the § 5-525(f)(1) factors, the court concluded that their totality merited changing the permanency plan to custody and guardianship by a non-relative, awarding custody and guardianship to the Bs., and finding that A.P. was no longer a child in need of assistance. This timely appeal followed.

DISCUSSION

In reviewing the decision of a juvenile court to alter a permanency plan in a CINA case, we apply three "distinct but interrelated" standards of review. *In re M.*, ___ Md. App. ___, No. 807, Sept. Term 2020, 2021 WL 2673357, at *11 (filed June 30, 2021) (quoting *In re J.R.*, 246 Md. App. 707, 730 (2020)). We review the juvenile court's findings of fact under a clearly erroneous standard and its conclusions of law without deference. *In re J.R.*, 246 Md. App. at 730-31. If the juvenile court's "ultimate conclusion . . . [is] founded upon sound legal principles and based upon factual findings that are not clearly erroneous," the court's "decision should be disturbed only if there has been a clear abuse of discretion." *In re Caya B.*, 153 Md. App. 63, 74 (2003) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

"In cases where a child in need of assistance has been placed outside of the family home, the juvenile court must determine a permanency plan consistent with the child's best interests." *In re Andre J.*, 223 Md. App. 305, 320 (2015); *see also In re Adoption of Ta'Niya C.*, 417 Md. 90, 104 (2010) ("'[T]he best interest of the child remains the ultimate governing standard' in . . . permanency plan proceedings." (quoting *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 496 (2007))). To make such a

determination, § 3-823 of the Courts and Judicial Proceedings Article directs juvenile courts to consider the six statutory factors prescribed by § 5-525(f)(1) of the Family Law Article. At regular intervals, a juvenile court will reassess the plan and "is required to '[c]hange the permanency plan if a change . . . would be in the child's best interest.'" *In re M.*, ___ Md. App. ___, 2021 WL 2673357, *14 (first alteration in original) (quoting Cts. & Jud. Proc. § 3-823(h)(2)(vi)). "Every reasonable effort shall be made to effectuate a permanent placement for the child within 24 months after the date of initial placement." Cts. & Jud. Proc. § 3-823(h)(4).

Although the overarching consideration in any CINA case is the best interest of the child, courts must also give due consideration to a parent's fundamental right to raise a child. *See In re Rashawn H.*, 402 Md. at 497. A court accounts for this right by starting with the presumption that it is in the best interest of a child is to be in the custody of a natural parent. *See In re Yve S.*, 373 Md. at 571. "[T]he statutory scheme presumes that, unless there are compelling circumstances to the contrary, the plan should be to work toward reunification[.]" *In re Andre J.*, 223 Md. at 321 (internal quotation marks removed). Nonetheless, although weighty, a parent's right to care and custody of a child is not absolute. *See In re Yve S.*, 373 Md. at 568. The presumption that the best interest of the child is to be in the custody of a natural parent is rebutted "when the [juvenile] court declare[s a child] to be a Child in Need of Assistance[.]" *In re Caya B.*, 153 Md. App. at 76. Accordingly, in a CINA proceeding, a parent's interests are adequately protected when the juvenile court (1) makes the CINA finding that the child is need of assistance because the child has been abused or neglected and the parents "are unable or unwilling to give

proper care and attention to the child and the child's needs," (2) maintains the presumption of reunification in determining the appropriate permanency plan, and (3) gives appropriate consideration to the § 5-525(f)(1) factors in determining whether the presumption has been overcome. *See In re Adoption of Cadence B.*, 417 Md. 146, 149 n.1, 156-57 (2010) (quoting Cts. & Jud. Proc. § 3-801(f)).

Here, the juvenile court concluded that A.P. was a child in need of assistance in 2017. Neither Mother nor Father contested that decision at the time, and it is not under review here. The juvenile court then maintained the presumption of reunification by initially adopting a permanency plan of reunification, ensuring that the Department made reasonable efforts in pursuit of that plan, and continuing that plan until the court concluded that it was no longer in A.P.'s best interests. The court also gave appropriate consideration to the § 5-525(f)(1) factors in its analysis, as reflected in its memorandum opinion.

Father asserts that the court erred in assessing the § 5-525(f)(1) factors, but his assertions of error ultimately amount to disagreements with the juvenile court's assessment and weighing of the evidence. First, Father argues that the juvenile court erred in finding that "there was credible testimony that [A.P.] would not be safe in [Father's] care." We disagree. A trial court does not commit clear error in its factual findings so long as there is any competent evidence supporting those findings. *Spaw, LLC v. City of Annapolis*, 452 Md. 314, 339 (2017). Additionally, "if there are evidentiary facts sufficiently supporting [an] inference made by the trial court," we will defer to the trial court "instead of examining the record for additional facts upon which a conflicting inference could have been made[.]" *State v. Smith*, 374 Md. 527, 547 (2003).

Here, the court considered the testimony of all the witnesses, which included expert testimony that Father had exhibited "severe errors in judgment" and lacked the "ability to make adequate decisions for the child," and concluded that A.P. would not be safe in Father's care. The juvenile court credited the testimony of the Department's witnesses and questioned the credibility of at least one of Father's expert witnesses. Although Father argues, in effect, that the court erroneously credited the Department's expert witnesses over his, it is the province of the factfinder to weigh the testimony of witnesses, including expert testimony, and to credit or discard it. *See Walker v. Grow*, 170 Md. App. 255, 275 (2006); *see also Montgomery County Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 423 (1977) ("Evidence offered by social workers, psychologists and psychiatrists may be necessary in custody cases. The equity court, however, is entitled to weigh that evidence along with contradictory testimony and its own observations."). On this record, we are satisfied that the juvenile court's determination was supported by competent evidence and thus not clearly erroneous. *See In re Barry E.*, 107 Md. App. 206, 211, 219-20 (1995) (upholding the finding of the juvenile court that children would not be safe with their natural mother when expert testimony was adduced that the mother's mental health issues impeded her ability to safeguard her children).

Father also complains of delays during the course of the proceedings below, including a COVID-related delay in holding the hearing that ultimately resulted in the court's final change in the permanency plan and award of custody and guardianship to the Bs. However, as in this Court's recent decision in *In re M.*, 2021 WL 2673357, at *15-16, the delay associated with the pandemic did not contribute substantially to the outcome of

this case. A.P.'s time in the custody of the Department had already exceeded the 24-month guideline for achieving permanency in § 3-823(h)(4) of the Courts Article well before any pandemic-related delays occurred, and nothing in the record suggests that the court would have reached a different decision had the hearing occurred earlier.[3]

Finally, Father contends that the juvenile court abused its discretion in determining that it would be in the best interest of A.P. to change the permanency plan to custody and guardianship by a non-relative, and to award custody and guardianship to the Bs. When we review the order of a juvenile court in changing a permanency plan, we may overturn the court's decision "only if we determine the order is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *In re D.M.*, 250 Md. App. 541, ___ (2021) (quoting *In re Shirley B.*, 419 Md. 1, 19 (2011)). That is because trial courts have broad discretion to consider testimony and make inferences in determining the best interests of a child. *See id*. Here, based on the court's consideration of each of the § 5-525(f)(1) factors and weighing of the totality of the information before it, we cannot say that the court abused its discretion in changing the permanency plan or in awarding custody to the Bs. Accordingly, we will affirm the ruling of the juvenile court.

[3] Father also contended at oral argument that the juvenile court gave unwarranted weight to Father's lack of progression from supervised to unsupervised visitation because Father never received judicial review of his visitation status. However, the record reveals that Father did request unsupervised visitation in August 2019, and the court rejected it based on evidence that caused the court to conclude that Father was unable to care for A.P. without supervision. Regardless, a lack of progression toward reunification is well within the purview of a juvenile court to consider when determining the best interest of a child. *See In re Andre J.*, 223 Md. App. at 326.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.