Circuit Court for Allegany County
Case No. 01-I-16-12589

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 48

September Term, 2018

IN RE: W.G., III

Wright,
Reed,
Eyler, Deborah S.
Senior Judge, Specially Assigned

JJ.

Opinion by Eyler, Deborah S., J.

Filed: November 16, 2018

On January 19, 2018, the Circuit Court for Allegany County, sitting as a juvenile court, entered an order granting a petition filed by the Allegany County Department of Social Services ("the Department"), an appellee, to grant custody and guardianship of W.G., III ("W"), also an appellee, to his maternal grandparents, and to terminate the juvenile court's jurisdiction. At the time, W was 9 years old. W's father, Mr. W.G.II ("Father"), the appellant, opposed the petition. W's mother, Ms. Pe. ("Mother"), an appellee, consented to the petition.

Father presents one question for review, which we have rephrased:

> Did the juvenile court err or abuse its discretion by changing W's permanency plan from reunification to custody and guardianship to a relative and by granting custody and guardianship of W to his maternal grandparents?

For the following reasons, we answer that question in the negative and shall affirm the orders of the juvenile court.

FACTS AND PROCEEDINGS

W was born in April 2008. At that time, Mother and Father were married and living in the home of Mother's parents, Mr. and Mrs. P, in Frostburg. Within a few months of W's birth, Mother and Father moved out of the Ps' home, taking W with them.

In September 2008, the Department investigated conditions in Mother and Father's home and found the home to be unsafe and unsanitary for a child.

In early 2009, Father threatened Mother with a firearm after he discovered her in bed with another man. W, who was not yet a year old, was not present during the incident. Mother sought an order of protection from abuse and filed for divorce. In

August 2009, Father was convicted of second-degree assault of Mother. In September 2009, Mother was granted an absolute divorce from Father and sole legal and primary physical custody of W.

Under the terms of the protective order and later the divorce judgment, Father was granted supervised visitation with W at a family crisis resource center in Allegany County. In April 2009, on W's first birthday, Father visited with him. From then through at least December 2014 – close to six years – Father had no contact with W. During that long stretch of time, Father was working as a scaffold erector, with jobs on the east coast from North Carolina to New Hampshire. He often was home on the weekends and worked only 9 months out of the year during other periods of time. He claimed that he tried to see W whenever he was home, but Mr. and Mrs. P (or Mother) thwarted his attempts, and that the visitation center only scheduled visits one weekend per month.[1] Mr. and Mrs. P disputed that they interfered with Father's access to W.

Meanwhile, Mother remarried and had another child, a daughter (J), in September 2010**.** Although W spent time with Mother, he lived with Mr. and Mrs. P, at their home in Finzel, Garrett County.

In May 2014, in the divorce case, Father filed a motion to modify visitation. In November 2014, the court modified visitation to permit Father supervised visits on weekends in his mother's home (as opposed to at the visitation center). According to

[1] Father presented no evidence to back up the latter assertion.

Father, he visited with W again for the first time since W's first birthday around Christmas of 2014 or 2015. Mr. P testified that Father resumed contact with W in May or June 2015. In mid-2015, Father began visiting with W approximately once per month for a few hours at a time.

By 2016, Father was working as a farmer in Allegany County. He was living in a camper on his mother's property in Oldtown. He had custody of his two children from a subsequent relationship – a daughter and a son – but they lived in the main house with his mother and she was their primary caregiver.

The events giving rise to the instant CINA case began on May 9, 2016. W was with Mother when her husband (J's father) overdosed on opiates and was transported by ambulance to the hospital. Mother also was transported to the hospital, for mental health treatment. During Mother's evaluation, she admitted to using heroin daily, and alleged that her husband was hurting her and her children. The Department assumed temporary custody of W and placed him with the Ps, where, as explained, he had been living under an informal custody arrangement. Christina Pratt, a Department social worker, was assigned to W's case.

On May 13, 2016, a juvenile court magistrate held a shelter care hearing and recommended continuing W's temporary placement with the Ps. The shelter care order adopting that recommendation directed that Father would have unsupervised visits with W "a minimum of one time per week" in a "public place" in Allegany County.

The Department filed a child in need of assistance ("CINA") petition, and on June 3, 2016, the juvenile court held an adjudicatory hearing. [2] It sustained the allegations of neglect of W in the petition and continued W's placement with the Ps, with limited guardianship to the Department. Father was granted continued weekly unsupervised visits with W.

On June 24, 2016, the juvenile court held a disposition hearing and found that W was a CINA.[3] It found that both Mother and Father had neglected W. Specifically with respect to Father, the court found that he had abandoned W "for a period of approximately 6 years" and that, in light of that prior abandonment, extraordinary circumstances existed that would make it "significantly detrimental" to W to be in Father's custody. (Citing *McDermott v. Dougherty*, 385 Md. 320, 325 (2005)). So long as he was not under the influence of drugs or alcohol, Father was permitted unsupervised 12-hour visits with W every other weekend.[4]

[2] A child in need of assistance is "a child who requires court intervention because: (1)[t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2)[t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." Md. Code (1974, 2013 Repl. Vol.), § 3-801(f) of the Courts & Judicial Proceedings Article ("CJP").

[3] J also was adjudicated a CINA and was placed in the Ps' custody. The Ps have since been granted custody of J.

[4] There is no evidence in the record that Father abused drugs. He did abuse alcohol, however, having been convicted of driving under the influence on two occasions, with the second conviction occurring in January 2015.

Beginning in May 2016, Ms. Pratt facilitated visits between W and Father every Sunday. In June 2016, W began individual therapy with Kelli Chan, MSW, a Department therapist who also had a private practice. In October 2016, Ms. Pratt arranged for Father and W to begin therapeutic visitation facilitated by Ms. Chan. Therapeutic visits were initiated because W often was reluctant to visit with Father. The therapeutic visits were to take place every other Wednesday and were in addition to an unsupervised visit on a weekend day.

Also in October 2016, Father was involved in a serious farming accident and was hospitalized for a week**.** Upon being discharged, he attended the first scheduled therapeutic visit with W and Ms. Chan. He did not show up for the next scheduled therapeutic visit, on November 2, 2016, and for the next 15 weeks did not contact Ms. Pratt to schedule visits. Father reinitiated contact with Ms. Pratt and W in February 2017. The therapeutic visits resumed, as did unsupervised day visits every weekend.

On September 27, 2017, upon Ms. Chan's recommendation, Father began having an overnight visit with W every other weekend, from Friday after school until Saturday evening. On the non-overnight visitation weekend, Father had a day-visit with W. He also continued to have therapeutic visits with W every other Wednesday, alternating with an after-school visit with W on the off weeks.

Meanwhile, in the ongoing CINA case, review hearings were held in August 2016, November 2016, and February 2017, during which time the juvenile court determined that W remained a CINA. On July 28, 2017, just over twelve months after W was

adjudicated a CINA, the juvenile court held an initial permanency planning review hearing and ordered that the permanency plan would remain reunification with a parent or guardian.

The next permanency planning review hearing was held over two days in January 2018. It was contested. The Department recommended a change in the permanency plan from reunification to custody and guardianship to Mr. and Mrs. P, pursuant to Md. Code (1974, 2013 Repl. Vol.), section 3-819.2(b) of the Courts and Judicial Proceedings Article ("CJP"). [5] In its case, the Department called six witnesses: Ms. Pratt; Mrs. P; Mr. P; Mother; Ms. Chan; and Kevin Simonsen, Ph.D., a psychologist who had performed a clinical evaluation of W in May 2017.

In addition to describing the timeline of events discussed above, Ms. Pratt testified that W enjoyed visiting with Father and that Father had completed all services recommended by the Department. Nevertheless, given "the length of time that [Father] ha[d] been out of [W]'s life" and W's secure attachment to Mr. and Mrs. P, Ms. Pratt recommended that W "remain in the custody of his maternal grandparents," with Father having visitation every other weekend from Friday through Sunday. Ms. Pratt noted that W was bonded with his half-sister, J, who also lived with the Ps. She emphasized that

[5] CJP section 3-819.2 provides that a juvenile court may grant custody and guardianship of a CINA to a relative or non-relative and that such an order "terminates the local department's legal obligations and responsibilities to the child."

since Father had reentered W's life more consistently, in 2015, he had had W in his care for no more than "one or two overnights" at a time.

Mrs. P testified that W had lived with her and her husband "[m]ost of his life." She clarified that he had slept at their house "all of his life," except for the brief period when he was an infant and lived with Mother and Father. With respect to W's relationship with Father, Mrs. P testified that W "didn't know [Father] existed for [the almost six-year] period [after his first birthday]." She explained that more recently, W "like[d] going" to visit with Father, but he "like[d] coming back too."

Mr. P testified that he is W's primary caretaker because he is at home, having retired due to a disability.[6] Mrs. P was working full-time at Frostburg State University as a housekeeper and also was working three two-hour evening shifts per week at the local Cracker Barrel restaurant**.** According to Mr. P, W was doing "great." He loved "building," playing with J, and playing outside.

Mr. P explained that Mother had been incarcerated for 8 months during the CINA case but recently had been released and was spending time with W again at the Ps' home. W was much happier now that he was seeing Mother regularly again and he had stopped having nightmares. Mr. P further testified that in addition to Father's regular visitation with W, Father called W "[e]very now and then." During the 17-week gap in visitation

[6] Mr. P had had surgery to replace two discs in his spine and had had three hip replacement surgeries. He testified that his disability did not interfere with his ability to care for W and J.

following Father's farming accident in October 2016, Father called once, but made no attempt to contact W for 12 weeks in a row.

Ms. Chan was accepted by the juvenile court as an expert in "trauma therapy." She began treating W in June 2016. She saw him once every two weeks for a 45-minute session, as well as during the therapeutic visits with Father. Therapy was initiated because W was experiencing anxiety, which Ms. Chan opined was most likely precipitated by Mother's incarceration and his inconsistent contact with Father.

Over the year in which Ms. Chan treated W, his anxiety had "decreased" "some." He was "happier" after Mother was released from jail. He had had "more consistent contact" with Father "over the . . . several months [before the hearing]" and their "relationship seem[ed] to be progressing." Father was "very appropriate" during visits with W. Initially, W had been reluctant to visit with Father, but now he was more comfortable and happy to attend visits. Nevertheless, W continued to experience frequent nightmares, which, in Ms. Chan's view, indicated "some [post-traumatic stress disorder ("PTSD")] and some anxiety."

Ms. Chan opined to a reasonable degree of professional certainty that it would "further traumatiz[e]" W, and exacerbate his anxiety, to remove him from Mr. and Mrs. Ps' home and place him in Father's custody. W told Ms. Chan that he likes spending time with Father, but feels "more comfortable, safer, more at ease, less anxiety, and less stress" when he is with the Ps and J. W developed a primary close attachment to Mr. and

Mrs. P because they were his consistent caregivers during his formative years (birth to 3 years), a time when Father was almost completely absent from W's life.

Ms. Chan further testified that W identified his "support system" to be Mr. P, Mrs. P, and Mother. Father's six-year absence from W's life had had a "huge impact" on him and had caused him to expect inconsistency from Father. Thus, Ms. Chan explained, when Father missed numerous visits early in their therapeutic visitation, W "took it in stride" because it was "par for the course." More recently, when Father missed a visit, W was very disappointed, which signaled to Ms. Chan that W was beginning to expect more consistency from Father. Ms. Chan viewed this as a positive development but opined that repairing the relationship between Father and W would take more time.

Ms. Chan recommended that W continue to have consistent contact with Father, including overnight weekend visits and possibly one overnight each week. She opined that W could have more extended time with Father during the summer and, if W developed a sufficient comfort level with Father, perhaps the parties could "go back to court and look at a custody change at that point."

Dr. Simonson was accepted by the juvenile court as an expert in psychology. He had evaluated W on May 26, 2017, as a result of behavioral problems at school. Mr. P brought W to the evaluation and provided a medical history and other pertinent information about W. Dr. Simonson conducted a clinical interview and administered the "Child PTSD Symptom Scale" ("CPSS"), the "Child Apperception Test" ("CAT"), and the Wechsler Intelligence Scale. The clinical interview, coupled with the CPSS, provided

"overwhelming data" consistent with PTSD. W was experiencing "intrusion symptoms" typical of PTSD, including nightmares and intrusive memories, and showed avoidance (*i.e.*, refusal to talk about trauma) and hyperarousal in the form of inattentiveness. Dr. Simonson opined that it would be "absurd" to remove W from the Ps' home because he needed "consistency[,] . . . predictability[,] and . . . structure," which they were able to provide, but Father (and Mother) had not provided. He later elaborated that changing W's custody would "exacerbate his psychological stress[.]"

In his case, Father testified that he was doing farming work six days a week, though his shifts were short because of the season. He acknowledged having been absent from W's life for long stretches of time, but claimed that his work responsibilities, coupled with the Ps' intransigence, were partly to blame. With respect to the more recent three-month gap in visits following his accident, Father testified that he had been prescribed Percocet for pain relief and had not wanted W to see him under the influence of narcotics, given Mother's history. He also had had difficulty arranging transportation to visit W during that time but acknowledged that he had not requested transportation assistance from Ms. Pratt.

At the conclusion of the evidentiary portion of the hearing, the Department's counsel argued that the relevant factors set forth at Md. Code (1999, 2012 Repl. Vol.), section 5-525(f) of the Family Law Article ("FL") weighed in favor of granting custody and guardianship to Mr. and Mrs. P. He emphasized W's attachment to them and to J; the length of time W had resided with the Ps; the negative impact on W that would result

from a change in custody, as opined to by Ms. Chan and Dr. Simonson; and W's inability to be "emotional[lly]" healthy in Father's home at this time. The Department advocated for regular, unsupervised visitation between W and Father every other weekend and once a week, as well as visitation with Mother.

Father's attorney argued that the permanency plan should remain reunification and that W should remain with the Ps during the school year and begin a graduated transition to Father's custody in the summer. Father's counsel urged the court to credit Ms. Chan's testimony that a summer transition plan was workable, and to reject Dr. Simonson's testimony given that he had met with W one time and had never observed W and Father together.

Mother's attorney and W's attorney concurred with the Department's recommendations. W's attorney emphasized that there were "exceptional circumstances" justifying a grant of custody and guardianship to the Ps because they had been W's primary caregivers for most of his nine years, while Father had been completely absent from W's life for two-thirds of that time.

The juvenile court ruled from the bench, finding that the FL section 5-525(f) factors weighed in favor of granting custody and guardianship to Mr. and Mrs. P, with alternate weekend visitation awarded to Father from after school Friday through 7 p.m. Saturday, plus every Wednesday night from after school to 8 p.m. We shall discuss the juvenile court's findings in more detail below.

This timely appeal followed.

STANDARD OF REVIEW

As the Court of Appeals explained in *In re Ashley S.*, 431 Md. 678 (2013), our standard of review is multi-layered:

> In CINA cases, factual findings by the juvenile court are reviewed for clear error. An erroneous legal determination by the juvenile court will require further proceedings in the trial court unless the error is deemed to be harmless. The final conclusion of the juvenile court, when based on proper factual findings and correct legal principles, will stand unless the decision is a clear abuse of discretion. *In re Yve S.*, 373 Md. [551, 586 (2003)].
>
> A juvenile court's ultimate decision to order a permanency plan goal of [custody and guardianship to a relative] is reviewed under an abuse of discretion standard. *In re Shirley B.*, 419 Md. 1, 18–9 (2011). Thus, to be reversed, that decision must "be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *In re Yve S.*, 373 Md. at 583–84.

Id. at 704 (some citations omitted).

DISCUSSION

In determining a permanency plan for a child adjudicated a CINA, a juvenile court shall "to the extent consistent with the best interests of the child," prioritize "[r]eunification with the parent or guardian" over a plan giving custody or guardianship to a relative. *See* CJP § 3-823(e)(1) (setting forth descending order of priority for permanency plans). Nevertheless, "if there are weighty circumstances indicating that reunification with the parent is not in the child's best interest, the court should modify the permanency plan to a more appropriate arrangement." *In re Adoption of Cadence B.*, 417 Md. 146, 157 (2010). In assessing whether to change a permanency plan, the juvenile court shall consider the factors specified in FL section 5-525(f)(1). CJP § 3-823(e)(2).

The six FL section 5-525(f)(1) factors are: 1) "the child's ability to be safe and healthy in the home of the child's parent"; 2) "the child's attachment and emotional ties to [his or her] natural parents and siblings"; 3) "the child's emotional attachment to [his or her] current caregiver and the caregivers' family"; 4) "the length of time the child has resided with the current caregiver"; 5) the "potential emotional, developmental, and educational harm to the child if moved from the child's current placement"; and 6) "the potential harm to the child by remaining in State custody for an excessive period of time."

The juvenile court made overlapping findings pertinent to all the above factors. It found that Father had abandoned W for about six years – from age 1 to age 7 – and had then ceased contact with him for a period of more than two months during the pendency of the CINA case. It found that Mr. and Mrs. P, W's maternal grandparents, had been W's primary caregivers for virtually all his life and that he had a strong emotional tie and attachment to them. W also was strongly bonded to his half-sister, J, who is in Mr. and Mrs. Ps' custody as well. The juvenile court credited the testimony of Ms. Chan and Dr. Simonson that W would be traumatized if he were to be removed from Mr. and Mrs. Ps' custody and placed in Father's custody; and that doing so would exacerbate his anxiety and PTSD. The court also credited the experts' testimony that W requires consistency and structure. Father had not demonstrated the ability to provide that consistency or structure, having been inconsistent in his contact with W for almost W's entire life. The juvenile court found that even though W had developed an attachment to Father and

could be physically safe in Father's custody, he would not be emotionally healthy were he to be removed from the only home he had ever known.

Father contends the juvenile court erred by changing the permanency plan from reunification with a parent to custody and guardianship to a relative, arguing that it should have adopted a concurrent plan of reunification and custody and guardianship and scheduled a review hearing for the summer, the time when Ms. Chan opined that reunification realistically could be accomplished. He argues that the juvenile court clearly erred by finding that W would not be safe, emotionally, in Father's home; that it failed to give proper weight to W's attachment to him and gave undue weight to W's attachment to the Ps and J; that it improperly focused on the almost six-year period when Father was not involved in W's life, rather than on his recent period of consistency; that it erred by giving Dr. Simonson's testimony too much weight with respect to the impact that a transition to Father's custody would have on W; and that it improperly weighed W's need for permanency without considering Ms. Chan's testimony about a summer transition.

The Department responds that the juvenile court made non-clearly erroneous findings of fact under each of the FL section 5-525(f)(1) factors, which supported its determination that a change in the permanency plan from reunification to custody and guardianship to a relative was necessary to serve W's best interests. It emphasizes that an appellate court may not second-guess the juvenile court's credibility assessments or its

weighing of expert testimony. Mother and W concur that the juvenile court did not err or abuse its discretion. We agree.

None of the court's factual findings were clearly erroneous. Father seeks to downplay his abandonment of W from his first birthday until he was almost seven years old as well as what he characterizes as the "brief disruption in visitation" in 2016/2017. Ms. Chan opined, however, that a child's primary attachments to adults form during the period from birth to 3 years and that Father's absence from W's life during most of that time had had a "huge impact" on W. Although Father maintains that his work commitments and his farming accident necessitated his absences, the evidence showed that Father made no significant effort to maintain contact with W by telephone or letter while he was working outside the state or to arrange visits on weekends or during other periods of time when he was off work; that he did not seek to modify his visitation with W for five years after the entry of the divorce judgment; and that after he resumed contact with W, he broke off contact for over two months without seeking any accommodation from the Department or letting W know the reason for this abrupt disappearance from his life. *See Cadence B.*, 417 Md. at 160-161 (reasoning that a father's "choice to absent himself" from his child's life is highly relevant in assessing whether a child could safely be returned to live with that parent and whether to do so would cause the child emotional harm).

Moreover, while Father argues that the court placed too much weight on Dr. Simonson's testimony considering his limited evaluation of W, it is not our province to

second guess the juvenile court's weighing of expert testimony. *See Walker v. Grow*, 170 Md. App. 255, 275 (2006) ("[t]he weight to be given [to an] expert's testimony is a question for the fact finder"). In any event, Ms. Chan, who at the time of the hearing had been treating W for 18 months and had been facilitating therapeutic visitations with W and Father, opined that W would be traumatized were he to be removed from the Ps' care and that it would exacerbate W's anxiety to relocate him. While Father focuses on Ms. Chan's suggestion that a summer transition might be less disruptive to W, it was clear in context that Ms. Chan was giving her opinion about the best way to minimize trauma to W if the juvenile court were to rule that reunification was appropriate. Ms. Chan was not opining that reunification with Father was in W's best interest.

The evidence strongly supported the juvenile court's findings that W could not be returned to Father's custody without additional trauma and exacerbation of his existing mental health issues; that he was primarily attached to Mr. and Mrs. P, even though he liked seeing Father; and that he considered the Ps' home to be his only home. Having made non-clearly erroneous findings on each of the pertinent factors, the juvenile court did not abuse its discretion in its ultimate determination that W's best interests would be served by changing his permanency plan to custody and guardianship to a relative and

granting custody to Mr. and Mrs. P, who had been his custodians and the primary parental figures in his life since he was 1 year old.

ORDERS OF THE CIRCUIT COURT FOR ALLEGANY COUNTY, SITTING AS A JUVENILE COURT, AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.