Circuit Court for Wicomico County
Case Nos. C-22-JV-18-000191
C-22-JV-000032

UNREPORTED

IN THE APPELLATE COURT OF MARYLAND

September Term, 2021, No. 0212
and
September Term, 2022, No. 0321

Consolidated Appeals

In re: K.H.

Graeff,
Reed,
Friedman,

JJ.

Opinion by Reed, J.
Concurring Opinion by Friedman, J.

Filed: December 16, 2022

This case is a consolidated appeal of two related cases: (1) a case regarding changing the child's ("K.H.") reunification with Mother, K.D. ("Appellant"), to the child being adopted by foster parents in a Child In Need of Assistance ("CINA") proceeding; and (2) the subsequent decision to terminate Appellant's rights and permit the adoption in the Termination of Parental Rights ("Termination") case. Specifically, Appellant challenges the juvenile court's April 12, 2021 interlocutory CINA order, which altered K.H.'s permanency plan from a concurrent reunification plan, or custody and guardianship to a relative, to a sole adoption plan, and (2) the juvenile court's April 20, 2022 order issued in a separate guardianship proceeding which granted Wicomico County Department of Social Services guardianship and terminated Appellant's parental rights.

This matter began when Appellee, Wicomo County Department of Social Services ("DSS") placed K.H. in shelter care on August 14, 2018 and discovered that she was born "substance exposed" about a month prior. Subsequently, DSS filed for a CINA proceeding. The juvenile court conducted a CINA proceeding on October 3, 2018. Fourteen days later, the trial court conducted a disposition hearing, awarding DSS a limited guardianship to place K.H. in a foster home.[1] When the court granted DSS limited guardianship, neither

[1] According to Appellant's brief and the hearing transcripts, the order of events regarding both the CINA and TPR hearings are as follows: CINA Proceedings – October 3, 2018 Adjudication (CINAT1); October 17, 2018 Disposition (CINAT2); January 16, 2019 Permanency Plan Review (CINAT3); June 19, 2019 Permanency Plan Review (CINAT4); October 19, 2019 Permanency Plan Review (CINAT5); January 15, 2020 Age Appropriate Consultation (CINAT6); August 5, 2020 Permanency Plan Review (CINAT7); January 6, 2021 Permanency Plan Review (CINAT8); April 7, 2021 Permanency Plan Review (CINAT9); September 15, 2021 Permanency Plan Review (CINAT10); and TPR Trial

parent was granted visitation. At the time, DSS's permanency goal for K.H. was reunification. After Appellant's inconsistencies with meeting the requirements of her permanency plan and a negative hair-follicle drug test in November 2020, DSS sought to change K.H.'s permanency plan to adoption. Ultimately, on April 7, 2021, the circuit court approved DSS's request to change K.H.'s childcare plan to adoption. Subsequently, on April 12, 2021, Appellant filed her notice of appeal addressing the change of the permanency plan.

Amid the CINA proceedings, on April 30, 2021, DSS shortly thereafter filed its first Termination petition, resulting in concurrent CINA and Termination proceedings.[2] However, on April 19, 2022, the CINA proceedings ceased when the circuit court terminated Appellant's parental rights. On April 25, 2022, Appellant promptly filed a notice of appeal. Concurrently, this Court stayed Appellant's CINA appeal [3] several times, beginning on May 20, 2021. Eventually, on May 12, 2022, we consolidated the CINA appeal and Termination appeal.

Dates – December 2, 2021 (TPRT11); December 3, 2021 (TRTR12); January 24, 2022 (TPRT13); and February 14, 2022 (TPRT14).

[2] The CINA case in the circuit court was C-22-JV-18-000191 and the TPR case was C-22-JV-21-000032. This Court repeatedly stayed the first appeal for the CINA case (CSA-REG-212-2021), and then consolidated it with the TPR appeal (CSA-REG-321-2022) on May 12, 2022.

[3] The Appellate Court of Maryland case number is CSA-REG-0212-2021.

In bringing her appeal in consolidated case nos. 0212 and 0321, Appellant presents three questions for appellate review, which we rephrased for clarity: [4]

I. Whether the juvenile court erred in holding DSS made reasonable efforts at relative placement for K.H.?

II. Whether DSS use of the Interstate Compact on the Placement of Children contributed to the juvenile court's error?

III. Whether the juvenile court properly found that K.D.'s parental rights should be terminated?

IV. Whether the juvenile court complied with the Indian Child Welfare Act?

For the following reasons, we affirm the juvenile court's decision.

FACTUAL & PROCEDURAL BACKGROUND

K.H. was born on July 6, 2018, to Appellant and Father.[5] When K.H. was born, Appellant admitted that K.H. was born "substance exposed." DSS received a report that

[4] Appellant presents the following questions:

I. Did the juvenile court err finding DSS made reasonable efforts at relative placement for K.H. where DSS admitted it ceased all efforts and didn't follow through; and was it insistence upon compliance with the Interstate Compact on the Placement of Children a contributing error?

II. Did the lower circuit court err finding by clear and convincing evidence K.D.'s parental rights should be terminated, where no evidence apart from "past is prologue" was introduced suggesting her previous drug addiction would imperil K.H., and affirmative evidence demonstrated she had remained clean?

III. Did the lower court comply with the Indian Child Welfare Act?

[5] According to the record, Appellant and Father were in a consensual relationship. Appellant reported alleged domestic violence throughout the relationship but did not follow through with obtaining any type of legal order to protect herself, nor follow through with the DSS's safety recommendations. Despite the abuse and violence issues with Father, he often frequented Appellant's home. In March 2019, Father assaulted Appellant and he was

stated Appellant tested positive for cocaine and marijuana. Upon discharge, DSS took K.H. and later placed her in shelter care on August 14, 2018. DSS extended K.H.'s stay in their physical custody multiple times and on August 21, 2018, filed a CINA petition.

Subsequently, the juvenile court held the adjudication hearing and disposition hearing in October. The magistrate issued proposed findings and separate orders for each hearing and signed both proposed orders a month later. The court sustained DSS's allegations in the CINA petition and found K.H. to be a CINA. The court also held that the Indian Child Welfare Act ("ICWA") did not apply.

Termination of Parental Rights (TPR) Proceedings

Amid CINA proceedings, including Permanency Plan Review Hearings, on April 30, 2021, DSS shortly thereafter filed its first Termination petition, resulting in concurrent CINA and Termination proceedings. However, on April 19, 2022, the CINA proceedings ceased when the trial court terminated Appellant's parental rights. On April 25, 2022, Appellant filed a notice of appeal of the trial court's decision. Concurrently, at the appellate level, the Court of Special Appeals stayed Appellant's CINA appeal (CSA-REG-0212-2021) several times, beginning May 20, 2021 Eventually, on May 12, 2022, we consolidated the CINA appeal and Termination appeal (CSA-REG-0321-2022).

Permanency Plan Hearing

arrested and held without bond for second-degree assault. After Father was released, Appellant did not remain sober and began missing visits. Notably, Father is not a party to the case because he did not appeal the court's guardianship order.

Throughout the CINA case, the juvenile court conducted multiple permanency plan hearings. Initially, on January 29, 2019, the juvenile court adopted DSS's permanency plan of reunification concurrent with custody and guardianship to a relative. DSS and the juvenile court maintained this plan throughout the July 12, 2019 and October 16, 2019 Permanency Plan Hearings. However, the court prohibited DSS from placing K.H. with a relative without facilitating an Interstate Compact on the Placement of Children **(**"ICPC") study**.**

DSS focused on granting Appellant substance abuse treatments and ultimate reunification. However, Appellant did not fully or consistently participate in all the programs. Nonetheless, Appellant progressed with her treatments enough for DSS to grant Appellant unsupervised sessions with K.H., beginning on July 28, 2020. Despite Appellant's progress, the Magistrate's Report and Recommendation endorsed by the court further recommended Appellant continue visitations once a week, as well as Appellant submitting a hair follicle drug test for reassurance and to have it on file. The Magistrate Report and Recommendation also recommended that Appellant submit the hair follicle test within three months.

However, as of October 30, 2020, Appellant did not submit a follicle test to DSS. In turn, on October 30, 2020, a DSS senior supervisor emailed K.H.'s then case worker about this, and as such, suggested DSS should "move forward with a bonding study between the child and foster parents," and to plan for Family Involvement Meetings ("FIM") to change plans to seek permanent plans for adoption. Appellant eventually

submitted a hair-follicle drug test in November 2020 and tested positive for cocaine. Despite this test result, DSS resumed supervised visits between Appellant and K.H. [6]

Relative Placement and Interstate Compact on the Placement of Children

During K.H.'s initial shelter care treatment, Father's niece, D.M. ("Niece"), contacted K.H.'s family and DSS to potentially serve as a relative placement option. Initially, Niece resided in Nevada and beginning on August 2, 2018, she participated in Family Involvement Meetings. DSS submitted and later re-submitted a revised request to Nevada for an ICPC home study for Niece's home. On March 27, 2019, Nevada authorities approved Niece's ICPC home certification, and later, on June 13, 2019, Nevada granted Niece a full license to operate a foster home in Nevada for K.H.'s placement particularly. DSS informed the court of Niece's ICPC confirmation on August 14, 2019. In May 2020, Niece relocated to California and attempted to complete a California home study. DSS did not move forward with obtaining California ICPC approval and ceased communication with Niece for about seven months. Niece reached out to DSS to inquire about the ICPC process. In response, on February 9, 2021, DSS responded to Niece stating that DSS is now pursuing adoption and was no longer considering Niece's family as primary placement.

Indian Child Welfare Act (ICWA)

Appellant contends that she is a descendant of the Blackfoot and Micmac Tribes

[6] According to DSS's Report before the June 19, 2019 Review Hearing, DSS allowed Appellant to have supervised visits "as long as [K.D.] is sober and not under the influence of any substance." After granting unsupervised visits, DSS and the Magistrate recommended that Appellant submit a hair-follicle drug test within three months for reassurance of her sobriety and to build trust.

and thus the Indian Child Welfare Act ("ICWA") governs jurisdiction over the case at bar. Appellee contends that the juvenile court correctly determined that ICWA does not apply because Appellant was unable to prove that she and K.H. are of Native American heritage. ICWA is a United States federal law that governs jurisdiction over the removal of Native American children from their families in custody, adoption, and foster care cases. *See* 25 U.S.C. §§ 1901–1963.

Appellant states that she discovered this information regarding her alleged Native American heritage on or before August 21, 2018 and later informed DSS. DSS reported to the court that they sent information regarding Appellant's alleged Native American heritage to the United States Department of Interior, Indian Affairs via certified mail and by email to a Micmac Tribe representative before August 27, 2018. DSS completed a "Notice of Child Custody Proceeding for Indian Child" and stated that they mailed it on August 23, 2018. On July 21, 2021, DSS sent additional correspondence to the Aroostook Bank of Micmac Indians, including both the CINA and Termination case numbers, to inquire about Appellant and K.H.'s Native American heritage and filed a copy of their inquiry to the court on September 15, 2021. DSS included that Appellant alleges that she was born in Canada to Native American parents but was raised by non-Native American parents via closed adoption.

On August 26, 2021, the Aroostook Band of Micmac Indians responded to DSS stating that neither Appellant nor K.H. were enrolled members because they lacked enough information to qualify. Similarly, a representative from the Bureau of Indian Affairs ("BIA") along with another piece of correspondence from the Aroostook Band of Micmac

stated that based on the information provided, neither K.H. nor Appellant were "enrolled members" of the tribe. On November 15, 2021, DSS filed a "Motion for Ruling that [K.H.] is not an "Indian Child" under ICWA," and included the letter from the Aroostook Band of Micmac. DSS also filed a Reply to its initial Motion. In response, the court granted DSS's motion and ordered that ICWA was not applicable to Appellant's case.

Similarly, during the Termination trial, DSS emphasized that the ICWA does not apply to this case because there was no evidence to demonstrate that Appellant was an active member of any Native American tribe. Appellant continued to raise her ICWA argument during her closing argument.

Juvenile Court's April 12, 2022 Order to Change the Permanency Plan to Adoption

On April 7, 2021, the court conducted a permanency plan review hearing, where Appellant asked the court to continue the reunification plan, but Appellant did not request that K.H. to be placed with a relative. Despite the Appellant's request, on April 7, 2021, the court ordered K.H.'s plan to change to adoption, which was entered on April 12, 2021. The next day Appellant appealed the order and Father did not.

Juvenile Court's April 20, 2022 Guardianship Order

Seven days later, following a four-day trial, on April 20, 2022, the juvenile court granted DSS's petition for guardianship and terminated Appellant's and Father's parental rights. On April 25, 2022, Appellant timely appealed the guardianship order. However, Father did not appeal the order. Accordingly, Appellees contend that because the guardianship order supersedes the CINA permanency plan order, if affirmed, there is no remedy the Court can provide regarding the permanency plan order CINA proceeding.

DISCUSSION

A. Standard of Review

In reviewing a juvenile court's decision, an appellate court utilizes three different standards. *In re Adoption of Ta'Niya C. 417*, Md. 90, 100 (2010) (citing *In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 297 (2005)). First, when an appellate court scrutinizes the juvenile court's factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. *In re Adoption/Guardianship of Victor A.*, 386 Md. at 297. Secondly, if it appears that the juvenile court erred as a matter of law, the appellate court applies the de novo standard of review. *In re Adoption/Guardianship of C.E.*, 464 Md. 26, 47 (2019). If so, the court will ordinarily be required to conduct further proceedings, unless the error is deemed harmless. *In re Adoption/Guardianship of Victor A.*, 386 Md. at 297. Thirdly, when an appellate court reviews the juvenile court's ultimate decision, the court applies the abuse of discretion standard. *Id.*; *see also In re Adoption/Guardianship of C.E.*, 464 Md. at 47. An appellate court will reverse the juvenile court's decision for abuse of discretion when the ultimate decision is "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. 551, 583-84 (2003).

B. Analysis

This court begins with a review of the relevant CINA statutory frameworks. The procedures governing proceedings when a child is alleged to be a CINA are set forth in MD. CODE ANN., CTS. & JUD. PROC. § 3-801 through § 3-830, and TPR proceedings are governed by sections 5–313 through 5–328 of the Family Law Article ("FL"). *In re*

Adoption of Jayden G., 433 Md. 50, 55 (2013). The circuit court has exclusive jurisdiction, inter alia, over proceedings arising from a petition alleging that a child is CINA. MD. CODE ANN., CTS. & JUD. PROC. § 3-803. A CINA is defined as:

> (f) a child who requires court intervention because:
>
> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
>
> (2) The 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 ANN., CTS. & JUD. PROC. § 3-801(f). Neglect is defined as:

> the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or individual who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate:
>
> (1) That the child's health or welfare is harmed or placed at substantial risk of harm; or
>
> (2) That the child has suffered mental injury or been placed at substantial risk of mental injury.

MD. CODE ANN., CTS. & JUD. PROC. § 3-801(s).

If the child is in need of assistance, the Department of Social Services must develop a "permanency plan" that is "consistent with the best interests of the child." CJP § 3-823(e)(1)(i); *In re D.M.*, 250 Md. App. 541, 560 (2021); *see also In re Adoption of Jayden G.*, 433 Md. 50, 55, 70 (2013). As the Supreme Court of Maryland [7] explained in *In re Damon M.*, the permanency plan "sets the tone for the parties and the court" and "provides

[7] During the November 8, 2022 election, Maryland voters approved the state's constitutional amendment to rename the Court of Appeals. The Court of Appeals is now titled the Supreme Court of Maryland, as of December 14, 2022.

the goal towards which [they] are committed to work." *Id.* In this regard, the permanency plan is "an integral part of the statutory scheme designed to expedite the movement of Maryland's children from foster care to a permanent living, and hopefully, family arrangement." *Id.* Permanency plans are decided in a "descending order of priority," which entails:

> (1) reunification with parent or guardian;
>
> (2) placement with a relative for adoption or custody and guardianship;
>
> (3) adoption by a nonrelative;
>
> (4) custody and guardianship by a nonrelative; or
>
> (5) another planned permanent living arrangement. CJP § 3-823(e); *see also* *In re D.M.*, 250 Md. App. 541, 561 (2021).

The juvenile court must review the permanency plan at a review hearing "at least every 6 months" until DSS is no longer committed to the child. *Id.* During the permanency plan hearing, the court must: (i) Determine the continuing necessity for and appropriateness of the commitment; (ii) Determine and document in its order whether reasonable efforts have been made to finalize the permanency plan that is in effect; (iii) Determine the extent of progress that has been made toward alleviating or mitigating the causes necessitating commitment; (iv) Project a reasonable date by which a child in placement may be returned home, placed in a preadoptive home, or placed under a legal guardianship; (v) Evaluate the safety of the child and take the necessary measures to protect the child; (vi) Change the permanency plan if a change in the permanency plan would be the child's best interest; and (vii) For a child with a developmental disability, direct the provision of services to obtain

ongoing care, if any, needed after the court's jurisdiction ends. CJP § 3-823(h)(2)(i)-(vii); *In re D.M.*, 250 Md. App. at 561.

Further, to determine the permanency plan, the court must evaluate the statutory factors listed in FL § 5-525(f)(1) and give "primary consideration" to the "best interests of the child[.]" CJP § 3-823(e)(2); FL § 5-525(f)(1); *In re D.M.*, 250 Md. App. at 561. Specifically, FL § 5-525(f)(1) describes factors to consider when determining the child's best interests, which could constitute both in-State and out-of-state placements. These factors include:

(i) the child's ability to be safe and healthy in the home of the child's parent;

(ii) the child's attachment and emotional ties to the child's natural parents and siblings;

(iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;

(iv) the length of time the child has resided with the current caregiver;

(v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and

(vi) the potential to harm the child by remaining in State custody for an excessive period of time. FL § 5-525(f)(1).

As such, the Department and the juvenile court must make "[e]very reasonable effort to permanently place the child within 24 months. CJP § 3-823(h)(4); *In re D.M.*, 250 Md. App. at 562.

I. Relative Placement

Appellant contends that the juvenile court abandoned the "descending order of priority" outlined in CJP § 3-823(e) by pursuing adoption to K.H.'s foster parents, her non-relatives, as opposed to prioritizing her placement with relative, Niece. Additionally, Appellant contends that DSS did not present a "compelling reason" to justify why K.H. should not be placed with an out-of-state relative, as opposed to the adoption plan. Alternatively, DSS contends that Appellant failed to raise any relative placement arguments during the juvenile court's proceedings, and as such waived the ability to raise the issue for appellate review. Appellee also contends that it was in the best interest of the child for K.H. to remain with her foster family as opposed to relative placement because she had bonded with the family her entire life and did not have an extensive relationship with Niece.

Firstly, the court must consider returning the child to the child's parent or parents. *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md. at 677–78 (2002); *In re Yve S.*, 373 Md. 551, 587 (2003). However, if this is not an option, the court may determine the child's permanency plan based on the "descending order of priority," which, as listed above, includes (1) reunification with a parent or guardian; (2) placement with a relative for adoption or custody and guardianship; (3) adoption by a nonrelative; (4) custody and guardianship by a nonrelative; or (5) another planned permanent living arrangement. CJP § 3-823(e); *In re D.M.*, 250 Md. App. at 562. When determining the permanency plan, the court is required to give primary consideration to the best interest of the child. *Id.* A crucial factor in determining what is in the best interest of the child is the

desire for permanency in the child's life. *In re Adoption of Jayden J.*, 433 Md. 50, 82; *see also* Nat'l Council of Juvenile and Family Court Judges, *One of the Key Principles for Permanency Planning for Children* (Oct. 1999). However, the court must also consider each of the factors listed in FL § 5-525(f)(1).

In *In re D.M.*, a similar case, we highlighted how the juvenile court applied each of the factors, while also emphasizing the importance of permanency in a child's life. Particularly, we emphasized the juvenile court's analysis on factors three and four: the children's emotional connection to their grandmother and her family unit, and the extensive amount of time the children lived with their grandmother. *In re D.M.*, 250 Md. App. 541, 564 (2021). D.M., one of the children in the case, lived with their grandmother for a significant portion of his life, while J.M. lived with his grandmother for his entire life. *Id.* Furthermore, court records indicated that the children bonded greatly with their half-brother, E.T., who also lived with their grandmother, and their maternal great-grandmother. *Id.* As such, we also reasoned that these factors were satisfied because the children had an emotional connection to their grandmother and her family unit. *Id.*

Here, like in *In re D.M.*, K.H. has lived with her foster family for a significant portion of her life. In fact, K.H.'s foster family is the only permanent home she's known since birth. Unlike the children in *In re D.M.*, K.H. did not have the same experience with her potential relative placement. Clearly Niece remained involved in K.H.'s case through her engagement in Family Involvement Meetings since August 2018 and maintained constant communication with DSS from August 2018 until February 2021, when the Department informed her that they were no longer considering her family for primary

placement. However, the Niece rarely saw her cousin K.H. to build a relationship and connection with her, which differs from the strong and stable connection the grandmother had with the children in *In re D.M*. Here, Niece merely saw her cousin in person once during the week of June 19, 2019, when DSS flew her to Maryland to attend the June 19, 2019 Review Hearing.

Also, in *In re D.M.*, we evaluated and affirmed the juvenile court's consideration of the fifth factor: the potential emotional, developmental, and educational harm if a child is moved from their current placement to another. *In re D.M.*, 250 Md. App. at 564-65. In that case, the juvenile court reasoned that "there's only so much change that . . . these children can handle all at once," and that it would not be in the children's best interest to move them from the stability of their grandmother's home when the children's father, Mr. M., had just begun to make progress. Similarly, here, K.H. could face emotional and developmental harm if moved from the stability of her foster home to live with a relative she had barely bonded with. DSS provides evidence from Dr. Samantha Scott who evaluated the bond between K.H. and her foster family, Mr. and Mrs. B. According to Dr. Scott's evaluation, K.H. has a secure emotional attachment to her foster parents, which she states is essential to child development. Although it may be preferable within the descending hierarchy to place a child in the care of a relative before a non-relative, § 3-823(e)(1)(i) states that this is only to the extent that it is consistent with the best interest of the child. As seen in *In re D.M.*, it is in the child's best interest to maintain stability within an emotionally secure environment, as opposed to residing with her cousin in California. As such, the juvenile court properly decided to place K.H. with her foster family, as

opposed to her distant relative's placement.

II. Interstate Compact for Placement of Children (ICPC)

Furthermore, Appellant contends that the juvenile court erred in applying the ICPC, which contributed to the juvenile court's failure to place K.H. with a relative. In contrast, DSS counters that Appellant waived her right to discuss relative placement, relating to the ICPC, because Appellant opposed placement with an out of state relative to begin with, and also because Appellant did not raise this argument during the juvenile court proceeding, thus waiving her right to appellate review of the matter.

The ICPC is a binding contractual agreement among all fifty states, the District of Columbia, and the U.S. Virgin Islands pertaining to the interstate placement of children. *In re R.S.*, 470 Md. 380, 389 (2020). The thought behind the ICPC was that, by removing barriers to interstate placement, vulnerable children could have more options for placement in the foster care system. *Id.* at 399. The ICPC requires the sending state to inform the receiving state before the child is placed in the receiving state. ICPC, art. III; *see also In re R.S.*, 470 Md. 380 at 400. Then, the out-of-state resident must undergo a pre-placement home study to determine whether they are a viable placement option for the child. *Id.* If the state administration does not approve of the placement, ICPC prohibits the sending state from moving forward with the placement. *Id.* Although neighboring jurisdictions are split on the matter, the Supreme Court of Maryland held that the ICPC applies to "foster or pre-adoption placements," and does not apply to placements with non-custodial biological

parents due to its legislative history and statutory language. *Id.* at 403-04.[8] Specifically, Fam. Law Section 5-609 indicates that the ICPC shall not apply to:

> (1) the sending or bringing of a child into a receiving state by the child's parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or guardian and leaving the child with any such relative or non-agency guardian in the receiving state.

Fam. Law § 5-609(1). Furthermore, "[I]n order for this exception to apply, 1) the child must be brought or sent to the receiving state by any of the aforementioned relatives or guardian; *and* 2) the child must be left with any such relative." *In re R.S.*, 470 Md. at 409; *Cadence B.*, 417 Md. at 158 n.11, 9 A.3d at 21 n.11 (internal citation omitted) (emphasis in original).

In the alternative, Maryland courts have held that in place of the ICPC process, DSS and juvenile courts could implement courtesy checks for out-of-state placements. *In re R.S.*, 470 Md. at 415. Specifically, "Maryland [ ] ha[s] the option of requesting a courtesy check of the out-of-state, noncustodial parent's home." *Id.* at 415; *R.S. II*, 242 Md. App. 338, 371 (2019). This investigatory process differs from the ICPC home study. *Id.* Like the

[8] We have defined placement as "the arrangement for the care of a child in a family free or boarding home or in a child-care agency or institution." *In re R.S.*, 470 Md. 380 at 400; *R.S. II*, 242 Md. App. 338, 359 (2019). While there is no universal definition for foster care, Section 5-501(c) of the Family Law Article defines "foster care" as "24-hour care and supportive services provided for a minor child placed by a child placement agency in an approved family home." Section 5-501(c) of the Family Law Article; *In re R.S.*, 470 Md. at 405. Maryland law generally interprets "foster care" as "out-of-home" placement, and out-of-home placement means placement in a home apart from biological parents. *Id.* at 406; *In re Yve S.*, 373 Md. at 574. Additionally, Fam. Law. Section 5-604 defines pre-adoptive placement as the placement in the home of an individual seeking adoption and that is distinctive from the biological parent. *In re R.S.*, 470 Md. at 407. The Niece in this case is not a non-custodial biological parent.

home study, the courtesy check is designed to verify the suitability of a potential home. *Id.* However, here, ICPC administrators have acknowledged that the courtesy check process is appropriate "[w]hen a sending court/agency seeks an independent (not ICPC related) courtesy check for placement with a parent from whom the child was not removed[.]" ICPC Reg. 3(b); *In re R.S.*, 470 Md. at 415-16.

In re R.S., after an exhaustive review of the ICPC's legislative scheme and history, the Supreme Court of Maryland concluded that the ICPC does not apply to placements with non-custodial biological parents. *In re R.S.*, 470 Md. at 416. There, a child's out-of-state, non-custodial biological father and paternal grandparents sought custody of the child in foster care. *Id.* at 388. To determine whether the child could be placed with her biological father, DSS sought the ICPC process to determine her paternal father's fitness and ability to parent the child. *In re R.S.*, 470 Md. 380 (2020). The Court ultimately held that DSS did not need to conduct an ICPC evaluation on a child's non-custodial, biological father because placement with parents do not constitute "foster care" nor adoption. *Id.* at 403-04.

In applying the *In re R.S.* to this case, DSS properly applied the ICPC for K.H.'s potential placement with Niece. Here, K.H.'s cousin, Niece, is an out-of-state relative who applied for K.H.'s placement as early as August 2, 2018, when she began participating in Family Involvement Meetings. Despite her status as a relative, Niece did not constitute the same non-biological custodial parent status as the child's father seeking custody, as seen in *In re R.S.*, nor does she satisfy the types of relatives listed in Fam. Law. Section 5-609. As such, DSS correctly sought to apply the ICPC process to determine whether Niece

would be a viable family member for out-of-state foster placement. Accordingly, DSS initially submitted to an ICPC home certification application to Nevada, Niece's residence at the time; however, Nevada denied DSS' request because DSS incorrectly stated that Niece's request was for adoption. DSS re-submitted the request for "foster care", and Nevada authorities approved DM's home certification on March 27, 2019, but the nature of DSS' request required full foster licensing. DSS' ICPC process continued until August 14, 2019, where Nevada granted DM a full license to operate a foster home in Nevada, specifically for K.H.'s placement.

In May 2020, Niece relocated to California and informed DSS. Prompted by Niece's initial contact, two months later, DSS emailed Niece to see if she was still willing to be a potential resource for placement and would be willing to conduct another ICPC home study in California. However, outside circumstances, such as Appellant's cocaine positive hair follicle test, prompted DSS to move towards adoption as opposed to continuing the ICPC process and relative placement. Although DSS chose not to move forward with the ICPC process for California, overall, DSS properly applied the ICPC process to K.H.'s potential relative placement because Niece did not qualify to ICPC exemption.

Alternatively, even if DSS did not properly apply the ICPC process to K.H.'s potential relative placement, as mentioned in *In Re Adoption/Guardianship No. 3598*, "a violation of the ICPC does not mandate dismissal of the adoption petition," but instead "indicates the need for a prompt determination of the best interest of [the] child." *In Re Adoption/Guardianship No. 3598*, 347 Md. 295, 321 (1997). In such instances, "the best

interest of the child remains the overarching consideration and the needs of the child should not be subordinate to the enforcement of the ICPC." *Id.* at 323. As such, it is in K.H.'s best interest to remain with her foster family because she has resided with them for four years and has great emotional attachment with her foster family.

Furthermore, throughout the ICPC process, Appellant was also opposed to K.H.'s out-of-state relative placement and asked the court and DSS to give her more time to work towards reunification, as of June 19, 2019. Additionally, regarding the CINA proceeding, on April 7, 2021, Appellant solely requested that DSS and the court continue the reunification permanency plan for three more months, as opposed to changing the plan to adoption. Appellant did not additionally request for DSS or the court to place K.H. with Niece, solely Father did. However, Father did not appeal the CINA proceeding, merely Appellant appealed and solely regarding K.H.'s permanency plan changing to adoption. Therefore, although DSS properly applied the ICPC to determine potential relative placement with Niece, Appellant waived the ability to raise this argument for appellate review.

III. Parental Rights Termination

Additionally, Appellant contends that the juvenile court improperly terminated her parental rights because DSS lacked clear and convincing evidence to support such termination. DSS contends that Appellant's "addiction, attempts to conceal relapses and the altering of drug tests connected to relapses, inability to comply with service agreements, inability to financially support herself," and her domestically violent relationship with Father all support the termination of parental rights**.**

Generally, parents have a constitutional right to raise their children free from undue and unwarranted interference from the State, including its courts. *In re Adoption/ Guardianship of Rashawn H.*, 402 Md. 477, 495 (2007); *McDermott v. Dougherty*, 385 Md. 320, 353–55 (2005). However, the State may interfere with this fundamental right if doing so is in the best interest of the child due to a parent being "unfit" to raise a child, or "exceptional circumstances" exist which would make continued custody with the parent detrimental to the child's best interest. *In re Adoption of Ta'Niya C.*, 417 Md. 90, 112. (2010); *In re Adoption/ Guardianship of Rashawn H.*, 402 Md. 477 at 495; *see also* Md. Fam. Law § 5-323(b). Particularly, a juvenile court must focus on the continued parental relationship and require that "facts . . . demonstrate an unfitness to have a continued parental relationship with the child, or exceptional circumstances that would make a continued parental relationship detrimental to the best interest of the child." *In re Adoption of Ta'Niya C.*, 417 Md. at 103. *In re Adoption of Ta'Niya C.* emphasizes the importance of the child's best interests and discusses that courts must not overshadow the child's best interest for the benefit of the parent's interests. *In re Adoption of Ta'Niya C.*, 417 Md. 90 at 115. Second, the State must show parental unfitness or exceptional circumstances by clear and convincing evidence. *Id.* Third, the trial court must consider the statutory factors listed Fam. Law § 5-323 (d) to determine whether exceptional circumstances warrant termination of parental rights exist. *Id.* at 104. Furthermore, the *Ross* Court listed certain factors to help determine whether there are exceptional circumstances that would make parental custody detrimental to the child's best interest. *Id.* at 106. Such factors include:

> [T]he length of time the child has been away from the biological parent, the age of the child when care was assumed by the third party, the possible emotional effect on the child of a change of custody, the period of time which elapsed before the parent sought to reclaim the child, the nature and strength of the ties between the child and the third party custodian, the intensity and genuineness of the parent's desire to have the child, the stability and certainty as to the child's future in the custody of the parent.

Id. at 106; *Ross v. Hoffman*, 280 Md. 172, 191 (1977).

In applying the law, the juvenile court appropriately terminated Appellant's parental rights due to clear and convincing evidence. Here, Appellant demonstrated inconsistent progress throughout her treatment plan. Many times, Appellant began treatments and discontinued them, or continued them inconsistently, such as when she went to New York to care for her parents, and solely completed five weeks out of the seventeen-week drug treatment plan between November 19, 2019 and March 20, 2020. After some months of consistency, on August 31, 2020, the court granted the Department's August 5, 2020 request for Appellant to submit a hair-follicle drug test to determine whether K.H. could begin overnight visits with Appellant, and ultimately reunification by January 2021. However, Appellant's hair-follicle drug test results, which Appellant submitted on November 16, 2021, came back positive for cocaine on December 21, 2021. Although Appellant states that this relapse was due to her losing her father, such inconsistency is not in the best interest of the child and is very close to the time in which the Department considered reunification.

Also, Appellant struggled to maintain an environment or visits for K.H. where K.H. would not be around Father. Specifically, one of the conditions DSS provided for Appellant's unsupervised day visits was for Appellant to not permit Father to be a part of

those visits. Father and Appellant have a long-demonstrated history of violence and abuse towards one another. In fact, as of April 2021, Appellant stated that she believed Father smashed the windows of her home. However, on multiple occasions, after unsupervised visits, K.H. would inform the Department that she enjoyed time with both parents. Appellant's continued abusive relationship with K.H.'s father is not in K.H.'s best interest, as K.H. should be reared in a violence-free environment.

As mentioned in *In re Adoption of Ta'Niya C.*, the primary focus should be K.H.'s best interest. She has resided continuously with her foster family for four years and has built strong emotional connections with her foster family. Removing her from such an environment could result in emotional, developmental, and educational harm. As such, for the following reasons, the juvenile court did not err in terminating Appellant's parental rights.

IV. CINA Appeal Mootness

Appellee contends that due to the juvenile court's termination of parental rights, Appellant's CINA Appeal is moot because there is no longer a remedy this Court can provide regarding the issue raised in the appeal. Generally, appellate courts do not decide academic or moot questions. *Attorney Gen. of Md. v. Anne Arundel County Sch. Bus. Contractors Ass'n, Inc.*, 286 Md. 324, 327 (1979). "A question is moot if at the time before the court, there is no longer any existing controversy between the parties, so there is no longer any effective remedy which this court can provide." *Id.* According to Md. Code. Ann., Fam. Law § 5-325(a)(1)-(4), a court's guardianship order terminates an individual's

CINA case.[9]

Here, pursuant to Md. Code. Ann., Fam. Law § 5-325(a), Appellant's CINA appeal is deemed moot because the termination of rights order supersedes or terminates Appellant's CINA case. As such, we can no longer provide relief regarding her CINA appeal.

V. Indian Child Welfare Act

Appellant contends that the juvenile court did not comply with the Indian Child Welfare Act ("ICWA") (25 U.S.C. § 1901 et seq.). Specifically, Appellant contends that DSS failed to conduct any fact-finding proceedings regarding Appellant's claimed Indian heritage; had actual knowledge from Appellant regarding her birth mother's name and birth father's affiliation to the Blackfoot and Micmac tribes; failed to inquire further regarding her Indian heritage; and requested that the juvenile court resolve the matter based on incomplete information. Alternatively, DSS contends that the juvenile court properly determined that ICWA does not apply to the guardianship proceedings because Appellant failed to show that she and K.H. are members of an Indian tribe.

[9] Md. Code. Ann., Fam. Law § 5-325(a)(1)-(4) states:

(a) An order for guardianship of an individual:
(1) Except as otherwise provided in his subtitle, § 4-414 of the Estates and Trusts Article, and § 2-123 of the Real Property Article, terminates a parent's duties, obligations, and rights toward the individual;
(2) eliminates the need for a further consent by a parent to adoption of the individual;
(3) grants a local department guardianship with the right to consent to the individual's adoption or other planned permanent living arrangement; and
(4) terminates the individual's CINA case.

ICWA provides that "any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." If a court "knows or has reason to know" that a case pertains to an "Indian child," the department seeking foster care placement must inform the Indian tribe of the proceeding and right to intervene. 25 U.S.C. § 1912(a). An "Indian child" constitutes a minor who is either a "member of an Indian tribe" or "eligible for membership . . . [and] the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4).

The ICWA issue presented in this case is generally a matter of first impression in Maryland. Nonetheless, in *In re Nicole B.*, the Supreme Court of Maryland addressed a similar issue. There, Wendy B., a Native American mother, who was a registered member of the Yankton Sioux Tribe of South Dakota, had two children, Max B. and Nicole B, with a non-Native American man. *In re Nicole B.*, 410 Md. 33, 39 (2009). Her son was a registered member of the tribe, and her daughter was eligible for membership. *Id.* Prior to the first review hearing, the Tribe filed a motion to intervene and a separate motion to transfer jurisdiction to the Yankton Sioux Tribal Court. *Id. Id.* at 44-55. A tribe can assist a child in finding a representative if the child is in fact of Indian descent. A tribe can intervene to insist that a case remain open until issues are dealt with and make appropriate motions.

Here, there are stark differences between *In re Nicole B.* and our present case, which demonstrate why the juvenile court correctly determined that ICWA did not apply. Here,

unlike in *In re Nicole B.*, neither Appellant nor K.H. were formally registered as a Native American of any tribe nor eligible for membership, as she first learned she may be of Native American heritage no later than August 21, 2018. Specifically, Appellant learned that she may be a part of the Micmac and Blackfoot tribe, based on the names of the tribes in the area where she was born. This is not proof of membership in a tribe. Afterwards, as the regulation requires, the Department provided the Department of the Interior and the Micmac tribe with information that the Appellant provided. Specifically, DSS informed the entities of the limited information that Appellant was born in Canada, was raised by non-Native American adoptive parents via closed adoption, and the names of her adoptive parents. After supplying this limited information, DSS received a response stating that Appellant nor K.H. were "enrolled members" of the tribe. For ICWA to apply, the parties must be a member of an Indian tribe or be eligible for membership. Here, DSS informed the necessary Native American entities of the matter to confirm Appellant's potential Indian heritage because Appellant provided DSS with that information, though limited. However, because the necessary parties stated that neither Appellant nor K.H. are not "enrolled members of the tribe, the ICWA does not apply. Unlike in *In re Nicole B.*, where the parties confirmed their heritage prior to the case, Appellant had never discovered such information about her potential Native American heritage, in over 49 years. As such, ICWA does not apply to this case. Even so, if ICWA did apply, DSS and the circuit court provided ample opportunities for reunification, however, Appellant was inconsistent with her treatments and fulfillment of permanency requirements, as seen in *In re Nicole B.* For these reasons, the juvenile court did not err in holding that ICWA does not apply to this

case.

CONCLUSION

Accordingly, we affirm the juvenile court's judgment for each of the questions presented. First, the juvenile court properly made reasonable efforts to determine that relative placement was not in K.H.'s best interest, due to her secure emotional attachment to and extended time spent with her foster family. Secondly, the juvenile court rightfully determined that DSS properly applied the ICPC to determine whether Niece's home would be suitable for K.H.'s potential foster placement. Although Niece is a relative, Niece does not constitute the same non-custodial biological relative seen in *In re R.S.*, and thus the ICPC evaluation properly applied. Furthermore, Appellant waived her right to appeal this question presented because she did not raise an issue with the ICPC process during the juvenile proceedings, nor did she request for K.H. to be placed with a relative to begin with. Additionally, the juvenile court properly found that Appellant's parental rights should be terminated. Throughout K.H.'s four years in foster care, Appellant failed to consistently remain substance free and demonstrated an inability to maintain a safe environment for her child. Most recently, during a hair-follicle drug test, Appellant tested positive for cocaine, particularly during a time when DSS granted her unsupervised visits. Accordingly, Appellant's inability to remain substance free demonstrates that it is in the child's best interest to remain with her foster family. As a result of us affirming the juvenile court's decision to terminate Appellant's parental rights, Appellant's CINA appeal is moot because there is no longer a remedy we can provide regarding the issue. Lastly, the juvenile court

properly determined that the ICWA did not apply because Appellant failed to show that she nor K.H. constitute "Indian Child[ren]," which is a prerequisite for ICWA application.

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

Circuit Court for Wicomico County
Case Nos. C-22-JV-18-000191
C-22-JV-000032

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

Consolidated Appeals

No. 0212
September Term, 2021

No. 0321
September Term, 2022

In re: K.H.

Graeff,
Reed,
Friedman,

JJ.

Concurring Opinion by Friedman, J.

Filed: December 16, 2022

I concur. I write separately because I do not join Section IV of the majority opinion. In my view, Mother's appeal of the CINA order is not moot and should be disposed of on the merits.

A parent has the right to immediately appeal an interlocutory order changing a permanency plan from reunification to adoption. MD. CODE, COURTS & JUDICIAL PROCEEDINGS ("CJ") § 12-303(3)(x); *In re Adoption/Guardianship of Jayden G.*, 433 Md. 50, 69-70 (2013); *In re Damon M*. 362 Md. 429, 438 (2001). Because this right to an interlocutory appeal does not include a corresponding right to stay any further proceedings, it is possible that, as happened here, parental rights could be terminated while the appeal of the change to the permanency plan is still pending. *See Jayden G.*, 433 Md. at 64-65, 78. If the proceedings have progressed independent of each other, it is also possible that the court ruling on the CINA appeal might not have jurisdiction over the order terminating parental rights. Under those circumstances, the appeal of the CINA order could indeed be moot if no effective relief can be provided. *In re Karl H*., 394 Md. 402, 410-11 (2006). That is not, however, the case here.

Mother's appeal of the CINA order changing the permanency plan has been consolidated with her appeal of the order terminating her parental rights. This Court has jurisdiction over *both* the order amending the permanency plan and the order terminating Mother's parental rights. As a result, we have the ability to provide relief—if it would be appropriate to do so—and the CINA appeal is, therefore, not moot.

On the merits, Mother challenges the order changing the permanency plan from reunification to adoption on the grounds that the juvenile court failed to give placement with a relative priority over adoption by a third party and erred in applying the ICPC to an out of state placement with a relative. As the majority opinion thoroughly explains, neither argument has any merit. I would, therefore, affirm on the merits.