Circuit Court for Baltimore County
Case No. 03-I-17-000084

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 382

September Term, 2019

IN RE: K.W., JR.

Fader, C.J.,
Beachley,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: December 16, 2019

Sitting as a juvenile court, the Circuit Court for Baltimore County ordered custody and guardianship of K.W., Jr. ("K.W.")—who had previously been found to be a Child in Need of Assistance ("CINA")—to K.W.'s maternal grandparents ("Grandparents"). K.W.'s mother, A.S. ("Mother"), contends that the juvenile court erred in (1) failing to make certain factual findings and (2) awarding guardianship and custody to Grandparents even though Mother had complied with the requirements of the Baltimore County Department of Social Services (the "Department") and successfully reunited with her other children. We will affirm the judgment of the circuit court.

BACKGROUND

Mother and K.W., Sr. ("Father") have six children together, the oldest of whom is 12-year-old K.W.[1] K.W.'s siblings include 11-year-old M.W., nine-year-old S.W., and three other siblings aged seven, five, and three years old. Over the course of the past two-and-a-half years, all six children: (1) were sheltered by, and then committed to, the Department; (2) found to be children in need of assistance by the juvenile court; (3) placed temporarily with Grandparents; and (4) with the exception of K.W., transitioned back to Mother and Father.

Events Leading to the Department's Intervention

On March 16, 2017, the Department received a report that Mother abused K.W.'s then-eight-year-old brother, M.W., by burning him with a lighter. During an interview either that day or the following day, M.W. told the Department that Mother had burned

[1] Father is not a party to this appeal.

him for having laughed at his sister. In their own interviews, K.W. and S.W. each reported that Father was physically abusive and bit them and their siblings, and that Mother and Father packaged and sold drugs in their presence. The day following the initial report, Baltimore County police officers executed a search and seizure warrant at the family residence and found "[n]umerous items consistent with the children's disclosures."[2] That same day, the Department placed the children in emergency shelter care and sent them to live with Grandparents.

Relocation and CINA Finding

On March 20, 2017, the Department filed its CINA Petition with Request for Shelter Care. On March 21, the juvenile court granted continued shelter care and placed the children in the custody of Grandparents. After an ensuing CINA hearing, the court issued an adjudication and disposition order in which it: (1) sustained the allegations of the CINA petition; (2) found that continuation of the children in their parents' home was contrary to their welfare because the parents were "unwilling/unable to provide proper care and attention due to the children's knowledge of and physical proximity to illegal distribution of illegal narcotics and physical abuse"; (3) found all six children to be children in need of assistance, for the same reasons; (4) committed the children to the custody of the Department; (5) allowed both parents liberal, supervised visitation with all of the children;

[2] In addition to drugs and drug paraphernalia, the police also found a handgun and "live ammunition in a location where . . . an unsupervised minor under the age of 16 years old could gain access to [them]." Mother later entered a guilty plea and received a sentence of three years, suspend all but one year of probation, which she has since completed.

(6) ordered both parents, among other things, to complete discipline and anger management classes, attend therapy, provide proof of stable employment, be actively involved in the children's medical care and educational needs, maintain stable housing, maintain contact with the Department, and submit to random urinalysis; and (7) established a permanency plan of reunification.[3] The Department continued the children's placement with Grandparents.

Permanency Planning and Review Hearings

As required, the juvenile court held regular hearings to review the permanency plan and the parents' progress. Through that process, the court has reunified five of the six children with their parents; only K.W. remains separated. The two youngest children were reunified on a trial basis on April 2, 2018, two more on August 23, 2018, and the fifth on December 3, 2018. During the trial periods, all of the children remained committed to the Department to ensure that Mother and Father were supervising them adequately and progressing in their care. Satisfied with positive results from the trial placements, the court terminated the commitments of those five children in April 2019.

K.W.'s Plan Change to Reunification Concurrent with Custody and Guardianship by a Relative

In each of the periodic review hearings, the court heard testimony and received reports detailing K.W.'s circumstances, and in particular how those circumstances differed

[3] Because the court's determination that K.W. and his siblings were children in need of assistance is not at issue on this appeal, we will not review in detail the evidence that was submitted or the court's findings.

from those of his siblings. Unlike his siblings, K.W. has repeatedly and consistently expressed that he does not wish to return permanently to his parents. At the December 2018 review hearing, for example, K.W.'s counsel reported that K.W. did not "feel that there's been any significant changes [at home]," which, she stated, "is common in the older children of sibling groups, as they are usually the ones that have the most memories of the times at home and have a hard time moving past that." She also reported that K.W. had been struggling in family therapy. Conversely, the Department stated in its prehearing report that K.W. "continued to thrive" and "is very bonded with his grandparents." In December 2018, in light of K.W.'s circumstances, as well as its "concern[] about the number of children and the transition for the parents into this number," the court changed K.W.'s permanency plan from solely reunification to reunification with a concurrent plan of custody and guardianship with Grandparents. Neither parent appealed from this change in K.W.'s permanency plan.

On April 15 and 29, 2019, the court conducted a contested hearing to finalize K.W.'s permanency plan. In its April 10, 2019 prehearing report, the Department detailed that "[K.W.] has continued to thrive in the home of his maternal grandparents," and that he "is very bonded with [them]." In addition, the Department reported that although K.W. did not report any safety concerns at his parents' house, even after increased visits with Mother and Father, K.W. "d[id] not wish to reside in their home." The report also stated that K.W. was "a stellar student" at school and that his caregivers reported "positive

change" in his individual therapy, though he refused at the time to attend family therapy with Mother and Father.[4]

At the hearing, K.W.'s counsel argued that K.W. had "considered judgment" and advocated his desire for permanent placement with Grandparents. Paulette Smith, a Department social worker assigned to K.W.'s case, testified that in Grandparents' home, "[K.W.] is thriving, he has consistently maintained his feelings about his parents, as well as his grandparents, that he loves both sets but that he wants to be at his grandparents' home." Ms. Smith explained that "[K.W.] does not feel that his father has love for him and he does not feel comfortable with his father and his siblings in the home, given that feeling of unlove." Ms. Smith further opined that closing the CINA case and awarding custody and guardianship to Grandparents would ameliorate K.W.'s anxiety disorder, which had manifested after this case began and which had worsened as a result of going repeatedly to court. In his interview with the trial judge, K.W. described how Grandparents took care of him, as well as the commotion and discomfort of living with his parents.

Although the court acknowledged and commended Mother and Father for the progress they had made in caring for K.W.'s siblings and complying with the Department's demands, the court expressed concern that, with respect to K.W., "the damage has been done." Although the court believed that K.W. loved both his parents and Grandparents, it explained that "clearly there's some history, obviously, from the facts and what arose in

[4] In its April 10, 2019 prehearing report, the Department reported that K.W.'s therapist agreed with K.W.'s decision not to attend family therapy until K.W. became "more comfortable with the treatment goals."

this case. My concern here is, well, with the anxiety levels, I mean, a child of this age on medication and everything else, I'm concerned that forcing the issue could cause even more damage." The court concluded, that "it is in the best interest of [K.W.] that he remain with his grandparents at the present time." The court then encouraged the family "to keep moving forward" so that someday K.W. could return to his parents.

Following the hearing, the court issued a written order committing K.W. to the "sole care and custody" of Grandparents, rescinding his commitment to the Department, and terminating the CINA case. Mother timely appealed.

DISCUSSION

We apply three "distinct, but interrelated" standards of review in CINA cases: (1) we review factual findings of the juvenile court for clear error; (2) we determine, "without deference," whether the juvenile court erred as a matter of law, and if so, whether the error requires further proceedings or, instead, is harmless; and (3) we evaluate the juvenile court's final decision for abuse of discretion. *In re Adoption/Guardianship of H.W.*, 460 Md. 201, 214 (2018). In evaluating the juvenile court's findings of fact, we must give "the greatest respect" to the court's opportunity to view and assess the witnesses' testimony and evidence. *In re Adoption/Guardianship of Amber R.*, 417 Md. 701, 719 (2011).

We review a juvenile court's "ultimate decision" regarding a CINA permanency plan for an abuse of discretion. *In re Ashley S.*, 431 Md. 678, 704 (2013). "In this context, an abuse of discretion exists 'where no reasonable person would take the view adopted by

the [trial] court, or when the court acts without reference to any guiding rules or principles.'" *In re Andre J.*, 223 Md. App. 305, 323 (2015) (quoting *In re Yve S.*, 373 Md. 551, 583 (2003)). "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 Ashley S.*, 431 Md. at 704 (quoting *In re Yve S.*, 373 Md. at 583-84).

I. THE JUVENILE COURT DID NOT COMMIT REVERSIBLE ERROR IN GRANTING CUSTODY AND GUARDIANSHIP OF K.W. TO GRANDPARENTS.

Mother argues that before the juvenile court could award custody and guardianship to Grandparents, it was first required to make factual findings that Mother was either an unfit parent or that exceptional circumstances existed that overcame the presumption that remaining in Mother's custody was in K.W.'s best interest. We agree with the Department and K.W. that Mother's argument misunderstands the applicable legal framework. Because the juvenile court was not required to find unfitness or exceptional circumstances to award custody to a relative as part of a CINA disposition, the court did not commit legal error in awarding custody to Grandparents without doing so.

A. The Applicable Legal Framework Is Provided in §§ 3-819.2 and 3-823 of the Courts & Judicial Proceedings Article and § 5-525 of the Family Law Article.

A parent has a constitutionally protected "liberty interest in raising his or her children as he or she sees fit, without undue interference by the State." *In re Yve S.*, 373 Md. at 565. As venerated as this right is, however, it is not absolute—it "must be balanced against the fundamental right and responsibility of the State to protect children, who cannot

protect themselves, from abuse and neglect." *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 497 (2007). "The purpose of CINA proceedings is 'to protect children and promote their best interests.'" *In re Priscilla B.*, 214 Md. App. 600, 622 (2013) (quoting *In re Rachel T.*, 77 Md. App. 20, 28 (1988)); *see also* Md. Code Ann., Cts. & Jud. Proc. § 3-802(a) (Repl. 2013; Supp. 2019).

To find that a child is in need of assistance, a juvenile court must find, by a preponderance of the evidence, that the child "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."[5] Cts. & Jud. Proc. §§ 3-801(f), 3-817(c).

[5] "'Abuse' means:

> (1) Sexual abuse of a child, whether a physical injury is sustained or not; or
>
> (2) Physical or mental injury of a child under circumstances that indicate that the child's health or welfare is harmed or is at substantial risk of being harmed by:
>
> > (i) A parent or other individual who has permanent or temporary care or custody or responsibility for supervision of the child; or
> >
> > (ii) A household or family member."

Cts. & Jud. Proc. § 3-801(b).

"'Neglect' means 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

"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) (citing Cts. & Jud. Proc. § 3-823(b)). In selecting the plan, "the court shall consider the factors specified in § 5-525(f)(1) of the Family Law Article." Cts. & Jud. Proc. § 3-823(e)(2). Those factors are:

> (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;
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> (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;
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> (v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and
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> (vi) the potential harm to the child by remaining in State custody for an excessive period of time.

Md. Code Ann., Fam. Law § 5-525(f)(1) (Repl. 2019).

The CINA statute strives to "conserve and strengthen the child's family ties and to separate a child from the child's parents only when necessary for the child's welfare." Cts. & Jud. Proc. § 3-802(a)(3). "The statute presumes that, unless there are compelling circumstances to the contrary, the plan should be to work toward reunification, as it is presumed that it is in the best interest of a child to be returned to his or her natural parent."

harm; or (2) That the child has suffered mental injury or been placed at substantial risk of mental injury." Cts. & Jud. Proc. § 3-801(s).

In re Yve S., 373 Md. at 582. Thus, in making its determination, the court shall, within a hierarchy of placement options, prioritize "[r]eunification with the parent or guardian" over other options, including "[p]lacement with a relative for[] . . . [c]ustody and guardianship under § 3-819.2 of this subtitle." Cts. & Jud. Proc. § 3-823(e)(1)(i)(1)-(2). Moreover, before a court may grant custody and guardianship to any non-parent, it is required to consider:

> (i) Any assurance by the local department that it will provide funds for necessary support and maintenance for the child;
>
> (ii) All factors necessary to determine the best interests of the child; and
>
> (iii) A report by a local department or a licensed child placement agency, completed in compliance with regulations adopted by the Department of Human Services, on the suitability of the individual to be the guardian of the child.

Cts. & Jud. Proc. § 3-819.2(f)(1).

"Once set initially, the goal of the permanency plan is re-visited periodically at hearings to determine progress and whether, [because of] historical and contemporary circumstances, that goal should be changed." *In re Andre J.*, 223 Md. App. at 322 (quoting *In re Yve S.*, 373 Md. at 582); *see also* Cts. & Jud. Proc. § 3-823(h)(1)-(2). Upon review, the court must "[c]hange the permanency plan if a change . . . would be in the child's best interest." Cts. & Jud. Proc. § 3-823(h)(2)(vi). "[I]f 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).

B. The Court Was Not Required to Find Mother Unfit or to Find Exceptional Circumstances.

As the discussion above reflects, once a determination has been made that a child is in need of assistance, a juvenile court is not required to find separately that the child's parent is unfit or that exceptional circumstances exist before placing the child in the custody of a relative. To have found the child in need of assistance in the first place, the court must necessarily have determined that the child had been abused or neglected,[6] and that 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." Cts. & Jud. Proc. § 3-801(f)(2). It is that threshold determination that the child is in need of assistance that establishes the need for the court's intervention and its authority to engage in permanency planning based on its assessment of the best interests of the child.

The bedrock of permanency planning is the "best interests of the child" standard. *In re Andre J.*, 223 Md. App. at 321 (quoting *In re Ashley S.*, 431 Md. at 686). Although permanency planning begins with the presumption that reunification with parents is in the child's best interest, *see In re Yve S.*, 373 Md. at 582, that presumption may be rebutted if the court finds "weighty circumstances" that demonstrate a different plan is in the child's best interest, *In re Adoption of Cadence B.*, 417 Md. at 157. In making this inquiry, the

[6] A CINA finding may alternatively be made based on a child's developmental disability or mental disorder. Cts. & Jud. Proc. § 3-801(f)(1). Because that does not apply to K.W., we focus here only on the abuse or neglect provisions.

court must consider the factors found in § 5-525 of the Family Law Article. Cts. & Jud. Proc. § 3-823(e)(2).

Mother's contention that the court was required to find her unfit or that exceptional circumstances existed is based entirely on caselaw developed in two different contexts: third-party custody cases and termination of parental rights cases. Neither is applicable here. Although CINA cases can involve the termination of parental rights, neither the Department nor Grandparents have moved to terminate parental rights here, nor does the court's order contemplate an adoption. "If the permanency plan calls for custody and guardianship by a relative but does not contemplate adoption," then "[p]arental rights are not terminated" and "the parents are free at any time to petition an appropriate court of equity for a change in custody, guardianship, or visitation." *In re Caya B.*, 153 Md. App. 63, 78 (2003).

In both termination of parental rights cases and third-party custody cases, a determination of "unfitness" or "exceptional circumstances" is the threshold that must first be crossed to allow the court even to consider taking an action limiting a parent's custodial or parental rights. *In re H.W.*, 460 Md. at 216-17 (termination of parental rights); *Koshko v. Haining*, 398 Md. 404, 444-45 (2007) (third-party custody disputes). That threshold exists to protects parents' "fundamental right to raise their children and make decisions about their custody and care." *In re H.W.*, 460 Md. at 215-16; *see also Koshko*, 398 Md. at 423 (Parents have a fundamental liberty interest in raising their children that "looms over any judicial rumination on the question of custody or visitation"). In the termination of

parental rights context, that standard is established in statute. *See In re H.W.*, 460 Md. at 216 (citing Fam. Law § 5-323(b)). In the third-party custody context, it has been added by judicial "gloss." *See, e.g.*, *Koshko*, 398 Md. at 441; *Ross v. Hoffman*, 280 Md. 172, 178-79 (1977) (looking to caselaw establishing that a parent's custody may only "be denied if (a) the parent is unfit to have custody, or (b) if there are such exceptional circumstances as make such custody detrimental to the best interest of the child").

It is thus the case in both termination of parental rights cases and third-party custody cases that a finding of unfitness or exceptional circumstances is an essential prerequisite before the court may consider whether the child's best interests merit either terminating parental rights or awarding custody to a non-parent. In the termination of parental rights context, "[u]nfitness or exceptional circumstances do not, by themselves, mandate a decision to terminate parental rights. Rather, they demonstrate that the presumption favoring the parent has been overcome. The decision to terminate parental rights must always revolve around the best interests of the child." *In re H.W.*, 460 Md. at 218-19 (internal citation omitted). Similarly, in the third-party custody context, parties challenging the custody of a parent "must come before our courts possessed of at least *prima facie* evidence that the parents are either unfit or that there are exceptional circumstances warranting the relief sought before the best interests standard is engaged." *Koshko*, 398 Md. at 440.

In a CINA case, by contrast, it is the CINA finding that serves as the threshold that must first be crossed to allow the court to consider the child's best interests, in compliance

with a statutory scheme that (1) maintains a presumption of reunification with parents, and (2) identifies the specific factors the court must consider in evaluating placement options other than reunification. *See* Cts. & Jud. Proc. §§ 3-819.2 & 3-823; Fam. Law § 5-525(f)(1);[7] *see also In re Caya B.*, 153 Md. App. at 76 (stating that the presumption that it is in a child's best interest to remain in parental custody "was rebutted . . . when the [juvenile] court declared [the child] to be a Child in Need of Assistance and [the child] was removed from [the mother's] care").[8] In other words, a parent's interests have been protected appropriately if the juvenile court: (1) makes the CINA finding that the child is need of assistance because she or he has been abused or neglected and his or her parents "are unable or unwilling to give proper care and attention to the child and the child's

[7] Notably, although the § 5-525(f)(1) factors that the court is required to consider before awarding custody to a non-parent are not identical to the *Ross* factors that Mother would require a juvenile court to consider, there is substantial overlap. The *Ross* factors include:

> the 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.

Ross, 280 Md. at 191.

[8] In *Caya B.*, a CINA case, this Court quoted *In re Adoption/Guardianship No. 3598*, 347 Md. 295 (1997), a termination of parental rights case, for the proposition that the presumption in favor of parental custody can be overcome by a finding "of unfitness or exceptional circumstances." 153 Md. App. at 76 (quoting *In re No. 3598*, 347 Md. at 325). This Court then stated expressly that the presumption was overcome in that case by the CINA finding. *Id.* In doing so, we implicitly recognized the equivalent roles played by the two determinations in overcoming the best interest presumption.

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 Cadence B.*, 417 Md. at 157 ("[I]f 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 Yve S.*, 373 Md. at 582 ("The [CINA] statute presumes that, unless there are compelling circumstances to the contrary, the [permanency] plan should be to work toward reunification, as it is presumed that it is in the best interest of a child to be returned to his or her natural parent.").

For these reasons, the trial court did not err when it followed the statutory scheme applicable to CINA cases and did not separately apply standards applicable to termination of parental rights or third-party custody cases.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING CUSTODY AND GUARDIANSHIP TO GRANDPARENTS.

Mother contends that the juvenile court erred when it failed to return K.W. to her custody even though she had complied with the Department's requirements and rectified its protective concerns, as demonstrated by the return of her five other children. Mother's contention that we should review this decision for legal error is premised on her argument that the court was required, but failed, to apply a third-party custody analysis to her case, and specifically to consider each of the *Ross* factors. For the reasons already stated, the court was not required to do so and, therefore, we find no legal error.

A challenge to the juvenile court's ultimate decision is reviewed under an abuse of discretion standard. *In re Ashley S.*, 431 Md. at 704. Mother does not argue that the juvenile court's ultimate decision constituted an abuse of discretion and, having reviewed that decision, we conclude that it did not.

The initial permanency plan for all six children was reunification. Over time, however, K.W.'s differing circumstances precipitated a modification to his individual plan. In December 2018, the court changed K.W.'s sole plan of reunification to a concurrent plan that included custody and guardianship with a relative. Mother did not seek appellate review of that change of plan. At the April 2019 hearing, the parties presented evidence concerning the "historical and contemporary circumstances" of the case to determine whether to alter the plan. The court heard testimony regarding Mother's progress, compliance with the Department, care of K.W.'s siblings, and how family therapy had stalled because K.W. did not feel comfortable with it. The court also heard testimony about (1) K.W.'s anxiety disorder and medication, which Mother had opposed in the first instance, and how coming to court had exacerbated his condition; (2) how K.W. felt uncomfortable living with his parents; and (3) how K.W. was "thriving" with Grandparents. The court also reported at length K.W.'s own considered judgment about his permanency and his desire to live with Grandparents. The court carefully considered

all of this testimony and found that it was in K.W.'s best interests to give custody to Grandparents. On this record, we cannot say that this decision was an abuse of discretion.

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