Circuit Court for Caroline County
Case No. C-05-JV-19-000003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1360

September Term, 2020

IN RE: D. T.-O.

Nazarian,
Arthur,
Ripken,

JJ.

Opinion by Nazarian, J.

Filed: September 3, 2021

B. B.-O. ("Mother") and J. T.-O. ("Father") appeal the order of the Circuit Court for Caroline County, sitting as a juvenile court, terminating their parental rights to their daughter, D. T.-O. The court held a ten-day trial spread over October 2019, November 2019, and January 2020, and the court issued its memorandum opinion and order in January 2021. The court relied primarily on its findings that, when she was seven years old, D witnessed Father sexually abusing her older half-sister, R, on more than one occasion, that Mother did not believe that the abuse happened, and that Mother was unable and unwilling to protect D from any such potential abuse. The juvenile court also relied on its findings that Mother and Father exposed D to domestic violence and Father's alcoholism, and that D, who is now twelve years old, has spent over half her life in foster care and no longer has any significant emotional ties with her biological parents. To the contrary, the court found that she long has viewed her foster family as her parents and wishes to be adopted by them.

Mother argues that the juvenile court erred by violating her due process rights and by admitting and relying on hearsay evidence. Mother and Father both argue that the court erred in terminating their parental rights. We affirm.

I. BACKGROUND

This case has a lengthy factual and procedural background. The story begins with the first removal of D (and her sister R and brother C, who both have different fathers) from the family home in 2011, when D was about two years old. D was found to be a child in need of assistance ("CINA") in connection with that removal, but that case was closed

and ended in reunification of the family in 2013, when D was about four. The family's involvement with the Caroline County Department of Social Services ("Department") resumed in August 2016, when D was about seven years old, when R reported to a social worker that Father sexually abused her. The Department entered into a safety plan with Father and Mother in which Father moved to a different residence and agreed to have no contact with the children. But in January 2017, the Department removed D and C from the home on the ground that Mother violated the safety plan when she brought R a letter from Father and took R to Father's residence (albeit when Father was not present). (R had already left the family home to stay with friends by that time.)

From there, this case has a complicated four-and-a-half-year history. During this time, the parents have been offered and participated in a variety of services; the U.S. Immigration and Customs Enforcement Service ("ICE") detained Mother for several months; D's, Mother's, and Father's attorneys all were forced to withdraw from the case shortly before the then-scheduled trial; and D shifted from wanting to be reunited with her parents to expressing the desire to be adopted by her foster family. As of the date of this opinion, D has had a relationship with her foster family for about four years and has lived with them for more than two.

Before getting into more detail, we start at 30,000 feet with a timeline that will provide context for the very different pictures of this case the parties have painted in their briefs. The facts are undisputed unless otherwise indicated.[1]

[1] In setting forth the factual background, we rely on the juvenile court's factual findings,

May 2009	D is born
Feb. 2011	D, R, and C first removed from home
Apr. 2011	D found a CINA for the first time
Aug. 2013	First CINA case closed; family reunited
Aug. 2016	Department receives report of sex abuse of D's older sister R and initiates investigation
	Father and Mother agree to a safety plan under which Father has no contact with children; Father moves to separate residence
Sept. 2016	R moves out to live with family friends
Oct. 2016	Department concludes investigation and makes finding against Mother of indicated neglect of R and finding against Father of indicated sexual abuse of R
Jan. 2017	Department removes D and C from family home and places them in shelter care in the home of Ms. A
Feb. 2017	Court finds D to be a CINA
	Permanency plan is reunification
June 2017	Mother placed in ICE detention
July 2017	Department recommends that permanency plan be changed to relative placement.
Aug. 2017	Magistrate holds permanency plan review hearing and recommends permanency plan changed to relative placement (adopting Recommendations in Department's July 27, 2017 report)
Sept. 2017	Juvenile court adopts magistrate's recommendation and changes permanency plan to relative placement
	Mother released from ICE detention

the facts set forth in the parties' briefs, and our own independent review of the trial testimony, trial exhibits, and pre-trial pleadings and briefs in both the TPR proceeding and the associated CINA case (Case No. 05-I-11-003469).

May 2018	Department files report recommending permanency plan change to adoption
Jan. 2018	Court orders therapeutic visitation between Father and D to begin (although they do not begin until May 2018)
July 2018	Magistrate recommends adoption by non-relative
	Mother files exceptions to magistrate's recommendation; juvenile court hears exceptions
Dec. 2018	Juvenile court denies exceptions and changes permanency plan to adoption by non-relative
Jan. 2019	Department files Petition for Guardianship
Mar. 2019	D's last in-person visit with Father
May 2019	D's last in-person visit with Mother
	Attorneys for D, Mother, and Father withdraw from case
	D placed with pre-adoptive family (Ms. A's grandson, E.A., and his wife, N.A.)
Oct. 2019	Trial (3 days)
Nov. 2019	Trial, continued (2 days)
Jan. 2020	Trial, continued (5 days)
Apr. 2020	On Department's motion, juvenile court cancels scheduled hearing date set for April and continued trial date set for May and orders parties to submit written closing arguments
April 2020	Mother files motion for reconsideration, requesting the court reopen the case to finish presenting her evidence
June 2020	Parties file closing arguments
	Court denies Mother's motion for reconsideration
Jan. 2021	Court issues memorandum and order terminating Mother's and Father's parental rights

D was born in May 2009. In May 2011, when she was about two years old, the

juvenile court found her a CINA and awarded her continued custody to the Department. The grounds for the CINA finding included Mother's poor supervision of D and her siblings, ongoing concerns about Father's alcoholism, six safety plan violations, and an unsubstantiated allegation of sexual abuse of D's older sister, R. D was placed in foster care. According to the State, both parents engaged in services for more than a year, including completing parenting classes and attending mental health therapy. The 2011 CINA proceeding ended in reunification in or about August 2013, when D was approximately four years old.[2]

In August 2016, the Department received a report that D's older sister, R, who has a different father, accused Father of sexual abuse. The Department initiated an investigation, some aspects of which we detail below. The investigation concluded in October 2016 when the Department made a finding of indicated sexual abuse of R against Father and a finding of indicated neglect of R against Mother.[3] The finding of neglect stemmed from Mother's failure to protect R from Father's sex abuse, including her failure

[2] On page four of its memorandum opinion, the juvenile court suggested that the first CINA case included a "recommendation that [D's] permanency plan be changed from reunification to adoption in February of 2013." We did not find that recommendation in our review of the record in the CINA case. Instead, we found a February 5, 2013 Court Report in which the Department recommended that the permanency plan remain reunification and a February 26, 2013 order adopting the Master's Report and Recommendation that the permanency plan should be "Reunification and concurrent plan of relative placement."

[3] An "indicated" finding means "that there is credible evidence, which has not been satisfactorily refuted, that abuse, neglect, or sexual abuse did occur." Maryland Code (1984, 2019 Repl. Vol.) § 5-701(m) of the Family Law Article.

to acknowledge it and her encouraging R to lie about it.

On August 18, 2016, the Department's investigator, Sarah Lepore, initiated an investigation into R's report of sexual abuse. Ms. Lepore found D at a relative's home, where she interviewed D, R, and C. Later the same day, Ms. Lepore also conducted a videotaped interview of all three children at the Department's offices. The juvenile court admitted those videotapes into evidence; Mother argues on appeal that the tape of D's interview contains hearsay and that the juvenile court relied on it improperly.

The juvenile court recounted what D reported to Ms. Lepore during the initial interview, the videotaped interview, and at trial, and observed that D's descriptions of events were consistent.[4] The court noted that in the videotaped interview, D gave "a graphic description of the abuse that she witnessed." The court observed as well that "[D] was able to recall the events clearly years later when she testified at trial" and that it "found her testimony to be extremely credible." On the day the investigation began (August 18, 2016), the Department developed a safety plan for D, R, and C. Under that and later plans, Father agreed that he would not live in the home and that he would have "no contact" with the children during the investigation. The parents do not dispute that an interpreter rewrote the first safety plan in Spanish or that an interpreter assisted with the preparation of all of the safety plans that were prepared and entered,[5] all of which required no contact between

[4] The juvenile court referred to Ms. Lepore's initial in-person interview of D as the "CPS investigative interview"; that interview was memorialized in a CPS Child Abuse Report that was admitted into evidence (also referred to as "Pet. Ex. 6"). The juvenile court also referred to Ms. Lepore's videotaped interview of D as the "recorded forensic interview."

[5] The Department issued a total of five safety plans, dated August 18, September 21,

Father and the children. But the parents dispute that they fully understood what "no contact" meant, as we discuss further below.

In October 2016, the Department held a Family Involvement Meeting ("FIM") with Mother and Father. At that meeting, Ms. Lepore introduced the family to interagency family preservation services worker Erika Fenske, who would provide them in-home intensive family preservation services. Several service plans were prepared and signed, and the Department offered and the parents engaged in those services.

Father was diagnosed with Alcohol Use Disorder, Moderate on October 26, 2016. He underwent and completed individual outpatient substance abuse treatment in early 2017. The Department also referred him for a psychosexual evaluation and on November 22, 2016, he underwent an evaluation by Pius O. Ojevwe, a clinical psychologist. Dr. Ojevwe evaluated Father by interviewing him with the help of a Spanish clinician, interviewing Department personnel, reviewing Department records, and conducting standardized risk assessments. He concluded "that [Father] presents with several risk factors associated with sexual reoffending." Dr. Ojevwe recommended that Father "participate in psychosexual therapy weekly for no less than 6 months specifically geared toward reducing any possibility of sexual reoffending." He recommended that Father "should have no contact with his children at this time, but may have supervised contact with them only after he has shown progress in treatment."

Ms. Fenske testified that in December 2016, the Department had decided that R

October 13, November 30, and December 28, 2016.

would not be returning to the home if Father eventually would return there, although "a decision about the two younger children [D and C] had not been made."

On or about January 5, 2017, the Department discovered that the safety plan had been violated after Mother had granted Father access to the children, although that access does not appear to have been in person—it instead involved Mother providing a letter from Father to R and Mother taking R along to pick up Father's laundry at his residence (although he was not present at the time). Mother and Father characterize the safety plan violation as Mother providing R a Christmas card from Father, and maintain that they did not understand at the time that "no contact" forbade letters. The Department adds more detailed assertions based on its reports of the incident—it asserts that the Department learned of the violation when R informed Ms. Fenske that in December, Mother had given R a letter from Father in which he "discussed the sexual abuse allegations, said that he loved her and missed his family, and encouraged her to talk to the caseworker so he could be reunited with them." Ms. Fenske testified that R "indicated that the letter made her feel very uncomfortable and after reading the letter she had been so upset that she had ripped it up and thrown it away."

The same day, the Department forcibly removed the children from the home with help of the police, an event that appears to have been very traumatic for the children. Ms. Fenske went to Mother's residence with an interpreter. She communicated to Mother that unless she agreed to a "heightened" safety plan, which included placing her children in respite care, the children would be removed from the home. Mother refused to enter into

the new safety plan and resisted the removal. Ms. Fenske called the police, who, according to the Department's notes of the incident, ultimately broke down a bedroom door where Mother had locked herself in with the children. Eventually, Mother calmed down, helped the children pack some items, and the children were removed. D and C were placed in foster care together with Ms. A, who is the grandmother of E.A., D's eventual foster parent and the prospective adoptive father.

The children were placed in emergency shelter care after a hearing on January 6, 2017 at which Mother asserts she was not represented by counsel. The Department held another "Family Involvement Meeting" on January 30, 2017, at which the Department obtained Mother's and Father's agreement to D's CINA adjudication. The parties do not dispute that neither Mother's nor Father's attorney was present at that meeting, although Mother and Father were represented by counsel at the hearing on February 28, 2017, at which the juvenile court found D to be a CINA and awarded custody to the Department.[6]

On February 24, 2017, Mother was evaluated by Dr. Ojevwe. Dr. Ojevwe interviewed Mother and Department personnel and reviewed the psychological evaluation of Mother that had been conducted in connection with the 2011-2013 CINA proceeding. He made the following observations about her psychological state and ultimately recommended that Mother participate in individual therapy, a domestic violence group for

[6] According to the State, C also was found to be a CINA and was placed in the custody of his undocumented father in September 2017. By Mother's agreement in one of the safety plans, R had been staying with friends of the family, the E.'s. R eventually was placed in North Carolina with her father.

Latina women, and couples therapy with Father (when clinically indicated):

> Conceptually, [Mother's] current clinical functioning was gleaned from the clinical interview and collateral information. [Mother] emerged as an individual who may be currently experiencing psychosocial stressors which appear to be somewhat chronic in nature. She and her partner have been repeatedly subject to CPS investigation and ongoing monitoring/oversight by DSS secondary to child abuse and neglect since 2009. Although she currently denied acute symptoms of psychological distress, she endorsed transient feelings of sadness and helplessness due to her familial problems. Her personal history is remarkable for psychological trauma punctuated by repeated physical, sexual, and emotional abuse by her partners. However, she denied symptoms associated with acute anxiety or posttraumatic stress disorder, which again may be related to her impaired insight into her emotional difficulties and strong desire to maintain a façade of psychological equanimity/stability. [Mother's] difficulty with recognizing her emotional difficulties and the problems within her family appear to be culturally rooted. Research suggests that it is not uncommon for Hispanics to dismiss the need for professional help even when such help may be needed. [footnote omitted] Driven by her wish to maintain her status quo or to ward off intrusion by external parties (e.g., government agencies), [Mother] is likely to either portray herself as free of troublesome symptoms or dismiss psychological difficulties. Her inability to accept or acknowledge her difficulties was documented in previous evaluations and was evident during the present assessment.
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> Additionally, [Mother] exhibits notable cognitive limitations (per current intellectual testing and data from previous evaluations) which in part may be related to her inability to recognize her emotional and psychological challenges. We believe that there are also cultural components which do not only impinge on her appreciation of her emotional difficulties, but also interfere with her ability to accept the fact that her current partner ([Father]) ever sexually abused her daughter, [R], as well as his history of alcoholism (and DUI) and domestic violence despite evidence from the investigation to

> the contrary. She described [Father] as a "perfect" man who is caring and hardworking. She is very invested in maintaining her "status quo," that is, maintaining the relationship with [Father] because he is the sole provider for the household and she is understandably fearful of compromising this living arrangement. . . .
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> Most notable is [Mother's] lack of capacity to appreciate the risk that [Father] still poses to her children. Her gross lack of insight into her own psychological difficulties and the risk that [Father] presents are worrisome, especially since he has yet participated in psychosexual treatment. This factor coupled with their chronic history of involvement with CPS and DSS monitoring suggest that [Mother] continues to present sufficient risk that impinge on her ability to recognize harm, ensure her children's safety and/or protect them from potential harm.

On March 21, 2017, Father was evaluated by the psychosexual therapist to whom the Department had referred him, Christina Acree, and he began meeting with her. As the Department acknowledges in its brief, Ms. Acree "disagreed with Dr. Ojevwe's assessments that Father was at high risk for reoffending and that he required weekly therapy sessions for six months before having contact with the children." According to a July 2017 Court Report filed by the Department, Ms. Acree sent the Department an email as early as April 2017 requesting supervised visits for Father with D and C. But what followed was an extended back-and-forth during which the Department asserts that Ms. Acree did not respond to the Department's satisfaction to questions about Father's progress. The Department eventually reached Ms. Acree by phone, and represented the following about that conversation in its report:

> The Department attempted to schedule face to face meetings with Ms. Acree and her forensic team to discuss [Father's] progress in treatment and some concerns about their request for

> visitation between him and [C] and [D] but those attempts were unsuccessful due to scheduling conflicts. The Department, including the Out of Home Worker and supervisor did, however, participate in a phone conference with Ms. Acree and her forensic team on June 20th. During this phone conversation, Ms. Acree advised that her initial risk assessment of [Father] at intake was low, despite Dr. Ojevwe's evaluation assessing him at high risk. She stated that [Father] was exhibiting symptoms of depression and that she believed his ability to see his children will change that and will help him to continue through therapy on a positive note. During the phone conversation, the Department referred back to the email sent on May 19th, and again asked for something written specific to [Father's] progress in treatment as previously requested by the Department. Ms. Acree agreed to send this to the Department within the next few days. The Department has not received anything specific to [Father's] progress in treatment, to this day.

Ultimately, though, Father attended approximately twenty-seven sessions over the course of the next fourteen months and Ms. Acree successfully discharged him from the program in May 2018, as we discuss further below.

In the meantime, on April 29, 2017, Dr. Ojevwe completed his report on Mother's evaluation and the Department arranged and paid for Mother to receive therapy from licensed therapist Barbara Young, who is proficient in Spanish. Mother's first intake session occurred on May 25, 2017, and her first therapy session occurred on June 7, 2017. But therapy was interrupted the following week when Mother was detained by ICE after serving fifteen weekends in jail for a driving-without-a-license conviction.

The initial permanency plan for D was reunification. But after Mother's detention by ICE, the Department recommended in a July 2017 Court Report that the permanency plan change to placement with a relative. The Report recounted that D had participated in

supervised weekly visits with her mother and her brother [C], and that "[t]he visits were going well, with no concerns." The Report noted that Mother "often brought food and snacks for the kids during the visits, and sometimes gifts, like new shoes and clothes. [Mother] was very affectionate towards her children and often verbally expressed her love for them." The Report related the Department's communications with Mother's immigration attorney, who had communicated to the Department the following about her expected release from detention:

> [Mother] is scheduled to appear again for court on August 14th, 2017 at 8am, for an appeal hearing to request a lower bond and to submit a cancellation of removal application to the court which states/verifies that she has been in this country (USA) for more than 10 years. Mr. Dunbar advises that the decision to lower or keep the bond will be made that same day but the decision in reference to the application for cancellation of removal could take up to three weeks.

The Report also stated that "[D's] older sister, [R] visits [D] and her brother [C] once a month. These sibling visits will continue on a regular basis. The next sibling visit will be in North Carolina on August 16th/August 17th, 2017" (by that point R had been placed with her biological father in North Carolina). The Report continued that the visits ceased when Mother was detained by ICE, and that there had been no visits between Father, D, and C because of the no contact order. The Report acknowledged Ms. Acree's recommendation that Father have supervised visits with the children, but that no visits had been scheduled "due to the 'No Contact' order and safety concerns expressed by the Department" and Ms. Acree's "non-compliance" in providing more information regarding Father's progress in treatment.

The Report went on to recount Dr. Ojevwe's findings and the challenges the Department had experienced in its attempts to communicate with Ms. Acree about Father's progress in therapy. It listed the Department's efforts in referring and facilitating services for the parents, and ultimately recommended that "[t]he permanency plan be relative placement or other permanent placement that ensures safety and stability for [D]." On August 8, 2017, the juvenile court held a permanency review hearing before a magistrate, and the magistrate adopted that recommendation. No exceptions were filed to the magistrate's recommendation, and the juvenile court approved the magistrate's recommendation on September 18, 2017. Mother was released from ICE detention shortly after, in late September 2017.

The Department then explored two possible relative placements: (1) a paternal uncle who lives in Pennsylvania (J. T.-V.) and (2) R's father in North Carolina (even though he is not D's blood relative). The Department asked each state to conduct a home study, but both states rejected the requests on the ground that the Interstate Compact on the Placement of Children ("ICPC") did not permit them to conduct home studies of undocumented immigrants. *See* Maryland Code (1984, 2019 Repl. Vol.), §§ 5-601, *et seq.* of the Family Law Article ("FL"). The paternal uncle, Mr. T.-V., traveled to Caroline County in January 2020 to testify at the trial. In its memorandum opinion, the juvenile court observed that the uncle testified that he was willing and able to provide food and shelter for D, but "also expressed some hesitation on denying access to his brother [*i.e.*, Father] if so ordered."

On or about September 2, 2017, Dr. Ojevwe updated his evaluation of Father. That

report apparently was not entered into evidence, although the Department agrees that Dr. Ojevwe revised his assessment and placed Father's risk of reoffending as low. Still, the Department's November 1, 2017 Report recounts that Dr. Ojevwe continued to have concerns about Father's "maladaptive alcohol use, which [Father] continues to minimize." Dr. Ojevwe also observed that Father continued to "steadfastly maintain his innocence, and deny the sexual abuse against [R]," but also observed that because Father "was not formally prosecuted or convicted of the sexual abuse, it is difficult to ascertain whether or not his longstanding denial of the sexual abuse constitutes significant risk at this time." Nevertheless, Dr. Ojevwe said that "the circumstances related to the sexual abuse allegations coupled with his history of previous sexual abuse allegations by the same victim are worrisome," and although he acknowledged the progress observed and documented by Ms. Acree in Father's therapy sessions, he concluded that Father was still not ready for reunification with his family and children: "Based on qualitative behavioral observations and available records, [Father] presents no evidence of major psychiatric symptomology or gross cognitive impairment. however, there is evidence of longstanding problem with maladaptive alcohol use, which [Father] continues to minimize." Dr. Ojevwe continued: "[t]aken together, While [Father's] risk of sexual-reoffending appears to be low and he has been cooperative with sex offender therapy, he has not demonstrated significant progress or appreciation of risk management, as well as insight into his longstanding alcohol problem to be ready for reunification with his family/children at this time."

Again, Ms. Acree's updated assessment of Father at around the same time (October

31, 2017) expressed a contrasting perspective:

> [Father] has continued to attend his individual therapy sessions. He continues to work on increasing his knowledge about cognitive distortions and how to avoid them. He is actively working on identifying ways to avoid risky situations. He continues to progress while in treatment and will continue to do so if he continues to apply himself as he has. He is also utilizing his family for support more than he has in the past. He is less guarded and more open about ways to move forward. He is very distraught about being away from his children and is willing to work towards supervised visitations with them. In a therapeutic setting this should be beneficial to all parties involved. Any concerns that may arise can be addressed in therapy with the children and in his individual therapy.

The Department's November 1, 2017 Court Report also observed that Mother had been released from ICE detention on September 29, 2017, and that her weekly supervised visits with D had resumed. The Report noted that D was doing well in foster care. It documented the Department's request to Father's brother, Mr. T.-V., to become a licensed foster care provider. And finally, it observed that the children were still to have no visitation with Father and that Father had been arrested for driving under the influence on October 16, 2017.

The November 20, 2017 report of D's Court-Appointed Special Advocate ("CASA"), Jeanne Scott, documented that C had been "abruptly removed" from Ms. A's foster care home and placed with his biological father on or about September 1, 2017 "at the discretion of DSS and against Court Order." The CASA "expresse[d] concern for [D's] physical and mental well-being in light of the continued and repeated traumatic separation from her family members." She continued that "[t]his CASA believes that while DSS

believed they acted in the best interest of [C] in his relocation with [his biological father], the well-being and best interests of [D] were blatantly disregarded by DSS." That said, the CASA also observed that Mother "self-reports [] that she plans to continue in the relationship with [Father] caus[ing] great concern to this CASA" and "[d]ue to these circumstances, reunification with the mother is not appropriate at this time." Finally, she expressed her concerns about DSS's "efforts for [Father's] relative in Pennsylvania to be considered as a placement resource for [D]."

The Department's March 6, 2018 Court Report indicated that the Department "may need to recommend changing D's permanency plan to adoption unless additional relative resources can be identified" because, it had learned, "relative resources for [D] will need to be able to provide and document their legal immigration status for the ICPC request to have the ability to be completed." That March 2018 report preceded an apparent shift in D's feelings about being reunited with her family, a shift that is a subject of dispute among the parties.

The State agrees that D's desire at the time of the January 2017 removal was to be reunited with her family, which then included her older siblings. And based on her therapists' contact notes, D was confused at first about why she had been removed and she expressed a consistent and strong desire in 2017 to be reunited with her family. It is not clear from the record exactly when the shift occurred, but Father and Mother link it to an April 2018 meeting between Department social worker Christina Russell, D's therapist Ms. Kirby, and D, at which Ms. Russell told D that she couldn't go home with her parents. As

noted, this meeting is the subject of some contention—Father and Mother argued at various stages in the proceedings that it serves as evidence that the Department influenced D's feelings about reuniting with her family improperly and before the court had ordered a change in the permanency plan. Mother argued as much in her July 23, 2019 Motion For Reconsideration Of Permanency Plan Of Adoption Because Of Coaching Of Respondent:

> [O]n April 16, 2018, CCDSS's records indicate that a two hour and thirty minute therapy session was conducted between the CCDSS social worker, [D], and [D's] therapist (Ms. Kirby). [A]t this meeting the DSS social worker told [D] that there would be a meeting to discuss who she would be living with permanently and asked her "who she would like to be able to go live with (since it can't be mom/dad, paternal uncle, and sister's dad)." [] It was only after having her options improperly limited (her half-brother's father [] was also excluded by CCDSS) that [D] stated that she wanted to live with her foster mother's son and his wife.
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> [] CCDSS's statements to [D] that she can't live with her Mom or Dad, her paternal uncle, her sister's Dad, or her brother's Dad are not accurate as those issues had not been determined by this Court and remained unresolved and contested.

And Father made a similar argument in his closing argument at trial:

> The significance of this sequence of events cannot be understated. Up until April 2018, [D's] clear and consistent expression was to resume a life with her family. At the 4-16-18 meeting she is told by her therapist and caseworker that what she has wanted most is not possible and she should start thinking about a new and different future. The explanation for the subsequent change in [D's] statements about what she hopes for her future is not hard to figure out. With due respect to [D], she may be expressing her true wishes; the problem is, her wishes are based on what she has been told to believe is possible. When that belief has been manipulated to achieve a certain result, those wishes should not be given weight by this Court.

By May 2018, Father had successfully completed treatment with Ms. Acree. As represented in the report of Father's expert, Dr. Lane, Ms. Acree opined on May 1, 2018 that Father had completed treatment and that reunification would be beneficial:

> [Father] shows the readiness to meet with his children in a therapeutic setting. In a supervised setting he doesn't present a danger to himself or his children. [Father] has completed the necessary material of the behavioral accountability program including relapse prevention, triggers, ways to avoid risky situations, family unification, cognitive distortions, victim awareness, being a support to others, and stress/anger management skills. No additional sex offender specific treatment is recommended at this time. Family reunification in a structured setting would be beneficial to all parties involved.

The Department's November 20, 2017, Court Report had already recommended that Father have supervised one-hour visits with D on a monthly basis. In January 2018, the Court ordered supervised therapeutic visitation, although the visits did not start until May 24, 2018, due to the Department's apparent delay in finding an appropriate therapist to supervise the visits. By May 2018, D had not seen her father in twenty-one months. Eleven supervised visits facilitated by therapist Christina Morris followed, and weekly phone calls between Father and D began at some point as well. The notes of Lauren Kirby, D's therapist, indicate that the visits were positive and that D enjoyed them. Ms. Morris's notes confirm that, as the Department acknowledged in a November 8, 2018 report that it filed with the court. D's last in-person visit with Father was in March 2019, although she continued to have weekly telephone calls with Father until the end of 2019. Her last visit with Mother was in May 2019.

On May 10, 2018, the Department filed a report recommending that D's

permanency plan be changed to adoption by a non-relative. The Department indicated that it "has exhausted relative resources that have been provided." It acknowledged Father's compliance in attending therapy, but expressed continued concerns over his lack of insight outside the therapeutic setting about why the children were removed. It observed that Mother continued therapy, and included some notes about the status of her immigration case: "[Ms. B's] immigration attorney has stated he expects another hearing to be scheduled for sometime in 2021 or 2022 and the process of her obtaining citizenship would take 10 years from the next court hearing. He also reported that any additional charges [Ms. B] receives would change this process and put her in jeopardy of being deported."

Father also obtained his own psychosexual evaluation from Eric J. Lane, a psychologist. Dr. Lane evaluated Father on December 20, 2017 and June 22, 2018, after he had completed treatment with Ms. Acree. Dr. Lane also testified in the CINA matter on November 19, 2018, and his testimony was entered into evidence in the TPR proceeding. He concluded at that time that Father presented a low risk of sexual offense against minors or adults and a low risk of violence in the community.[7] Dr. Lane agreed with the diagnosis

[7] In his testimony, Dr. Lane also criticized one of the screens employed by Dr. Ojevwe, the ABEL Screen, which he described as "a measure of sexual interest whereby the client is shown imagery of children, adults, pubescent, pre-pubescent children, and it is a visual response time test. The hypothesis is that we are, when we look at something longer we're more attracted to it." He observed that there was no indication that Dr. Ojevwe had used the Spanish version of that test. And he went on to state that he did not employ that test, that "[a] sexual interest is different [than] sexual behavior," and that "in reviewing psychosexual evaluations [] on a very consistent basis, I conduct probably two or three psychosexual evaluations a week," and "I run across the ABEL screen once or twice a year. It's not as widely used as it once was."

of Alcohol Use Disorder, although it was in remission, and observed that Father had completed a substance abuse treatment program in January 2017. However, a November 8, 2018 Court Report filed by the Department also indicates that Father began a second substance abuse program in January 2018 and was discharged successfully in May 2018.

In July 2018, the magistrate adopted the Department's recommendations in a written order, in which she aptly described the balancing of competitive interests in this case:

> [D's] family has been involved with the Caroline County Department of Social Services for several years. Over this period of involvement, [D] has found herself in foster care with two siblings, then one sibling, and now she is alone. It is no wonder that her beautiful smile is over shadowed by the sadness in her eyes. **She wants nothing more than to be with her whole family again under one roof. Sadly, this is not possible, her oldest sibling is now living with her father in North Carolina and her brother is living with his father in Caroline County.** Fortunately, she still has contact with her siblings but it is not the same as living together. One can only imagine that this nine-year-old conjures up visions of happier times when she and siblings laughed and played together and that she blocks out what caused them to be in foster care. The record reflects that as far back as 2009 [D's] older sister accused her father of sexual misconduct. Once the Department of Social Services became involved and over a period of years, the allegations continued. [D's] father has never acknowledged that he acted inappropriately with his daughter's sibling. However, [D] and her brother reportedly confirmed the inappropriate behavior further implicating their mother by revealing that she told them the behavior was okay.
>
> In any conversation with [D], it is clear that she loves her family and would go to great lengths to keep them together, so it is extremely unlikely given her tender age, that any statement she made about her parents had some nefarious purpose. **However, it must be noted that her father has attended therapy and cooperated with the Department while maintaining his innocence. [D's] dad is likely aware that the fact that he has not been prosecuted means that any**

confession of wrong doing could result in him being formally charged, although the likelihood of that happening dwindles as the years pass. It is also possible that he simply loves his daughter and will do whatever it takes to get to see her regularly. In a Confidential Psycho sexual update on [D's] father, Dr. Pius O. Ojevwe, a Licensed Clinical Psychologist concluded that [D's] father has a low risk of reoffending however, it was not recommended that he be reunited with his daughter now, instead the recommendation was that he participate in reunification therapy to determine if he was ready for reunification. There isn't a finite time line for said therapy so that could continue ad-infinitum. Supervised visitation was recommended with certain qualifiers. It is impossible to project where this would lead given the fact that so much therapy has occurred to date and [D's] father according to the aforementioned report, still does not appreciate the impact the behavior he is accused of could have on a young child.

This is crucial because even while maintaining your innocence you should be able to understand the impact of a sexual assault on a child. Conversely, it is not clear that [D's] mother understands the latter as well. She has told her daughter that she lied and in effect accused all of the children of lying and has chosen to stay with and believe her significant other. Unfortunately even if she develops or has developed some basic understanding of the negative ramifications of sexual assaults, she is facing possible deportation and may well not be a resource for her children. **This situation cannot [] be left to languish to see if this happens or doesn't happen. [D] needs to know which direction she is headed with some idea of when this all ends. She cannot have resolution without a plan that leads her to a family and hopefully allows her to eventually have some access to her parents.** This is not a game of Russian roulette we cannot spin the cartridge hoping that a bullet isn't in the chamber when the spinning stops. Accordingly, it is recommended that the Court find that reasonable efforts have been made to finalize the existing permanency plan as set forth in the Caroline County Department of Social Services Report dated May 10, 2018 and filed in the captioned matter on May 11, 2018. The recommendations contained in the report are adopted and incorporated herein by reference.

(Emphasis added.)

On July 21, 2018, Mother filed exceptions to the magistrate's recommendation. She observed that reunification was the initial permanency plan, that it had been changed to relative placement because of Mother's detention by ICE, and that the magistrate erred in relying on Mother's immigration status in changing the permanency plan to adoption. Mother also argued that the magistrate erred in failing to give due consideration to D's desire to be reunited with her family and in failing, through limited visitation and inadequate services, to allow the family a legitimate chance at reunification.

In December 2018, the juvenile court denied Mother's exceptions, adopted the recommendation of the magistrate, and changed the permanency plan to adoption by a non-relative. In January 2019, the Department filed its Petition for Guardianship. On January 16, 2019, the Department filed a petition for guardianship with right to consent to D's adoption. In May 2019, the Department placed D with her putative adoptive parents, E.A. (the grandson of D's initial foster parent Ms. A) and his wife, N.A.

The same month, the attorneys who had been representing D, Mother, and Father all withdrew their appearances. The record is not clear as to the reasons for this withdrawal, but it appears to relate to a conflict of interest stemming from D's former attorney, Sharon Jennings, simultaneously representing the putative foster parent, E.A., in a custody proceeding involving one of his own children.[8]

[8] Mother characterized the case as a "domestic violence" case, although a printout of a CaseSearch page attached to a motion in the CINA case lists the case type as "Custody (Versus)."

The original trial had been scheduled for July 2019, but due at least in part to the withdrawal of the attorneys, the trial was postponed. Ultimately, the juvenile court conducted hearings and/or a trial for eleven days between September 2019 and January 2020. It accepted written closing arguments in June 2020 (more on that below), and issued its decision about six months later, on January 21, 2021. As noted above, the order terminated the parental rights of Mother and Father with respect to D and awarded custody of D to the Department with the right to consent to adoption.

Mother and Father appealed. We supply additional facts as needed below.

II. DISCUSSION

The parties raise various questions[9] that we restate as follows: (1) Should the TPR

[9] Mother phrases the Questions Presented as follows:

> 1. Were the mother's due process protections rendered nugatory where:
>
> a. the lower court abused its discretion by prematurely closing her case and not allowing her to enter further evidence or complete arguments; and
>
> b. the combination of ineffective assistance of counsel and pervasive other infirmities precluded the mother from protecting her rights?
>
> 2. Did the court err terminating her parental rights where clear and convincing evidence showed DSS didn't engage in reasonable efforts at reunification, neglected to pursue relative placement, and other findings were not supported by the available evidence?
>
> 3. Did the court's reliance upon hearsay admitted without formally addressing trustworthiness and other extrinsic evidence called its veracity into question, prejudice findings?

Father phrases the Questions Presented as follows:

> I. Did the juvenile court clearly err in finding that the

order be reversed or vacated due to violations of Mother's due process rights? (2) Did the juvenile court err in terminating Mother's and Father's parental rights as to D? and (3) Did the juvenile court err in admitting into evidence the 2016 video depicting the Department's interview of D? We hold that Mother has not established due process grounds for reversing or vacating the TPR order, that the juvenile court did not err in terminating Mother's and

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> Department made reasonable efforts towards reunification with Father?
>
> II. Did the juvenile court abuse its discretion in finding clear and convincing evidence that there were exceptional circumstances to terminate Father's parental rights[?]

The Department states the Questions Presented this way:

> 1. Did the juvenile court properly find both parents unfit to remain in a parental relationship with D.T.-O. where they continued to deny any responsibility for the circumstances resulting in D.T.-O.'s removal from their home and could not provide for her safety now or in the foreseeable future?
>
> 2. Has mother failed to demonstrate that the guardianship proceedings deprived her of due process?
>
> 3. Was it harmless error to admit the videotape of D.T.-O.'s forensic interview without articulating assessment of the statutory factors given that it was cumulative of other admitted evidence?

D states a single Question Presented: "Did the juvenile court err by terminating Mother and Father's parental rights?"

Finally, the National Immigrant Women's Advocacy Project, as *amicus curiae,* filed a brief that phrased the Questions Presented as follows:

> First, can a state agency rely upon a parent's immigration status as a factor when electing to terminate parental rights despite clear federal preemption in the field of immigration law?
>
> Second, is the failure to provide a Limited English Proficient ("LEP") party consistent access to qualified interpreters and translation services violative of due process rights?

Father's parental rights, and that any error in admitting the 2016 video was harmless.

"In reviewing a juvenile court's decision with regard to termination of parental rights, we utilize three different but interrelated 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)). We review the juvenile court's factual findings for clear error, its errors of law *de novo*, and its ultimate conclusion for abuse of discretion:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of Rule 8-131(c) applies. Second, if it appears that the court erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the court founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the court's decision should be disturbed only if there has been a clear abuse of discretion.

Id. (cleaned up).

A. Due Process Rights

Mother argues that, among other things, the court violated her due process rights by ending the trial before she had the opportunity to present all of her evidence, that she received ineffective assistance of counsel, and that she received inadequate translation and interpretation services throughout the CINA proceeding.

"A parent possesses a constitutionally protected fundamental right to raise his or her child." *In re Adoption/Guardianship No.6Z000045*, 372 Md. 104, 115 (2002) ("*Adoption 0045*") (*citing In re Mark M.*, 365 Md. 687, 705 (2001)). And a parent is afforded "due process protections afforded a parent when the State attempts to abrogate parental rights."

Id. at 116 (*citing Lehr v. Robertson*, 463 U.S. 248 (1983), *Santosky v. Kramer*, 455 U.S. 745 (1982), and *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981)). Determining whether a parent's due process rights were abrogated in connection with a termination of parental rights proceeding "turns on a balancing of the three factors specified in *Mathews v. Eldridge*, 424 U.S. 319 (1976), *i.e.*, the private interests affected by the proceeding, the risk of error created by the State's chosen procedure, and the countervailing governmental interest supporting the use of the challenged procedure." *Id.* (*quoting In re Adoption/Guardianship No. 93321055*, 344 Md. 458, 491 (1997) ("*Adoption 1055*")). We review a parent's asserted denial of due process "by an appraisal of the totality of the facts of the case." *In re Maria P.*, 393 Md. 661, 676 (2006).

1. Due Process Background.

As noted, the trial was held on eleven days over the course of several months. On January 23, 2020, the next-to-last day of trial, and January 24, 2020, the last day of trial, the court stated that it wanted to set a date for a status conference and directed counsel to discuss scheduling and what else remained to be done in the case. The parties dispute, to some degree, exactly what remained to be done. They agree at least that Mother's expert report(s) remained outstanding and that they had agreed to submit any reports by March 17, 2020. The Department asserts that Mother concluded with her fact-witnesses by early afternoon on January 24; Mother contends that she planned to call additional fact witnesses, although she does not dispute that she did not identify any additional fact witnesses in open court on January 24.

We will return to the fact witnesses issue shortly, but first we continue with a chronology of events after the trial. On January 29, 2020, the court set two additional dates: April 17, 2020 for a "Hearing-Status" and May 15, 2020 for "Trial - TPR Continued." Mother failed to submit her expert's report by the agreed March 17 deadline. On March 19, 2020, the Department and D filed a joint motion to conclude discovery and proceed with written closing arguments. The following day, March 20, 2020, Mother and Father jointly opposed the motion and Mother shared with the parties the (supplemental) report of her expert, Beverli Mormile, Psy.D. The report expressed Dr. Mormile's opinions that D's therapist Lauren Kirby and Mother's therapist Barbara Young had compromised their ethical obligations during their involvement in this case. Dr. Mormile opined that Ms. Kirby had focused on counseling D in connection with possible adoption rather than on counseling her in connection with reunification. She asserted that Ms. Kirby had worked closely with Department caseworker Christina Russell to "convey[] information related to a change in the permanency plan prior to any actual changes implemented by the Court," *i.e.*, that they attempted to improperly influence D's feelings about reunification. Dr. Mormile also opined that Ms. Young compromised her ethical obligations by, among other things, communicating improperly with the Department about Mother's therapy goals. Mother and Father's opposition stated that "at the January 24, 2020 hearing, Mother did not rest her case and it was known by all parties that she intended to call Dr. Mormile as her witness. To proceed to closing argument prior to Mother having completed her case would be a denial of Mother's due process rights." The opposition did not state that Mother

also wished to call additional fact witnesses.

On April 15, 2020, the court granted the Department and D's motion, without explanation, in a form order. The court vacated the April 17 status hearing and May 15 trial date, ordered "that all forms of discovery are concluded, except that the written report by Respondent-mother's expert will be admitted when filed with the Court," and ordered that all parties submit written closing arguments.

On April 27, 2020, Mother filed Dr. Mormile's supplemental report and a motion for reconsideration with the court. Mother argued that the court's decision to grant the Department's motion to close discovery was an unwarranted discovery sanction for Mother's two-day delay in serving Dr. Mormile's report. She also indicated that in addition to calling the expert to testify so that, among other things, the expert could have the opportunity "to explain nuances to her opinion," she had intended to call Sharon Jennings, D's former attorney, and Jeanne Scott, D's CASA, when trial resumed. Mother said that she intended to question Ms. Jennings about her alleged dual representation of D and of Mr. A (D's foster parent and prospective adoptive parent) in another matter, and to question Ms. Scott concerning her alleged "bias towards adoption" and her allegedly improper conversations with D about adoption.

Mother also argued that she intended to present evidence about the ineffective assistance of counsel she had received during the CINA proceeding. Her motion included a "Proffer and Request for Judicial Notice" that included a list of thirteen items relating to the ineffective assistance claim, including:

- Mother not being represented by counsel at the January 6, 2017, shelter care hearing (this hearing was conducted in connection with the children's January 5, 2017 removal from the home);
- Mother not being represented by counsel at a January 20, 2017 Family Involvement Meeting at which her consent to D's CINA adjudication was obtained;
- Mother absence from the August 2017 permanency plan hearing (she was in ICE detention at the time) at which the plan was changed to placement with relatives; and
- Mother's counsel's failure to file any of the following: exceptions to the August 2017 permanency plan change to relative placement, exceptions to the court's denial of Mother's subsequent motion to change the permanency plan back to reunification, and an appeal of the court's November 19, 2018 order denying Mother's exceptions to the court's change of the permanency plan to adoption by a non-relative.

On May 6, 2020, the Department opposed Mother's motion for reconsideration. It argued that Mother's due process rights had not been violated because the expert's report was allowed into evidence. It argued that the court previously had considered Ms. Jennings's testimony and had heard from Ms. Scott during the November 2018 CINA hearing. It contended that Mother "had representation through" the corresponding CINA proceedings. And the Department asserted that Mother's counsel had raised her ineffective assistance arguments in "multiple Motion filings in July 2019 that were later dismissed by this Honorable Court."[10]

On May 12, 2020, D opposed Mother's motion for reconsideration. She asserted

[10] We have reviewed all of the court filings from July 2019 on and did not find any relating to ineffective assistance of counsel.

that at the beginning of trial, the parties, counsel, and the court agreed "that more leeway would [be] given in direct/cross of the witnesses" because the Department, D, Mother, and Father would call most of the same witnesses, and she represented that Mother's attorney subjected the majority of those witnesses to three to four hours of questioning.

D also asserted that while Mother had subpoenaed Dr. Mormile to testify during the week of October 7, she did not call her to testify at the January 2020 proceedings, and she attacked the merits of the expert's opinion. D argued that Mother had already (improperly) subpoenaed Ms. Jennings, and that the court already ruled against her on that issue, and that in any event, Ms. Jennings couldn't testify because she was D's former attorney. She noted that Ms. Scott was in the courtroom for testimony "throughout this entire TPR trial" and Mother had never called her to testify. And D claimed that Mother had been provided with counsel who "have all been active in both the CINA and TPR matters over several years."

2. Mother has not established that her due process rights were violated such that reversal or vacating the TPR order is warranted.

When determining whether a parent's due process rights were violated in a TPR proceeding, we consider and balance the three *Mathews* factors against the record as a whole. *Adoption 0045*, 372 Md. at 115; *In re Maria P.*, 393 Md. at 676. "[T]he first and the third [] factors are obviously important ones in a termination of parental rights action." *Adoption 1055*, 344 Md. at 491. The first factor—the private interests affected by the TPR proceeding—involves "the parent's fundamental right to raise his or her children." *Id.* The third—the government's interest in the TPR proceeding—involves the state's duty to care

for children whose parents are unable or unwilling to care for them, which is a "strong and vital" interest. *Id.* at 492. Whether a parent's due process rights were violated therefore often hinges on the second factor, "the risk of error created by the challenged procedure." *Id.*

Mother does not frame her argument in terms of the three-factor *Mathews* standard (nor does she, for that matter, set forth the standard at all). As best we can discern, she argues that multiple due process violations in both the CINA and TPR proceedings, considered collectively, have tainted the TPR order and require reversal:

> Mother's argument regarding due process is simply the combination of multiple violations combined to render whatever due process protections she was accorded nugatory. Those violations included both the inadequate assistance of counsel, the lack of counsel and translation services at key junctures, and the premature curtailment of trial before she had an opportunity to introduce additional evidence and witnesses and arguments.

We acknowledge that procedurally this case was a mess. Even so, we hold that Mother has not established that the TPR order should be reversed or vacated on the grounds that her due process rights were violated.

First, the juvenile court did not abuse its discretion in concluding the trial as it did. Family Law Article § 5-318 requires the juvenile court to hold a trial on the merits of a guardianship petition, and when conducting trials, the court has discretion in managing the presentation of evidence. *See* Maryland Rule 5-611(a).[11] Although that discretion is not

[11] Maryland Rule 5-611(a) provides:

> The court shall exercise reasonable control over the mode and

unbounded, the juvenile court here did not abuse its discretion in managing the trial as it did. Over the course of ten court days, Mother was provided latitude in cross-examining witnesses. Discussion among the court and counsel on the last two days of trial support the State's representation that all understood that the fact witnesses had all testified and that the only remaining witnesses were the parties' experts. Mother submitted Dr. Mormile's supplemental report, if late, and the court admitted it into evidence. It was within the court's discretion to decline to hear the expert's live testimony. And while the court didn't address Dr. Mormile's testimony about Ms. Kirby's and Ms. Young's asserted ethical violations or the alleged coaching of D in its memorandum opinion, it expressly credited D's own testimony about the sexual abuse and domestic violence that she experienced in her home. This case is not, as Mother contends, like *In re Damien F.*, 182 Md. App. 546 (2008), in which a juvenile court abused its discretion in receiving only proffers and declining to receive witness testimony in connection with an emergency shelter care proceeding. *Id.* at 570–71, 584. This was not a shelter care proceeding—it was a full-blown trial, and Mother has not established that she wasn't accorded the opportunity to present her case.

Second, Mother asserts that she had the right to the assistance of counsel in the CINA and TPR proceedings, and that implicit in that right is that counsel be effective, and that her counsel has been ineffective throughout. She's right on the first two points. A

> order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

parent does have the right to assistance of counsel in a CINA proceeding. Maryland Code (1973, 2020 Repl. Vol.), § 3-813(a) of the Courts and Judicial Proceedings Article ("CJ"). In addition, an indigent party shall be provided assistance of counsel in a TPR proceeding. Md. Code (2001, 2018 Repl. Vol., 2020 Supp.), § 16-204(b) of the Criminal Procedure Article ("CP"). And a parent with a disability, whether or not indigent, shall likewise be appointed an attorney in a guardianship proceeding. FL § 5-307(a). And when a party has the right to assistance of counsel in a TPR case, that right includes the right to effective assistance of counsel. *In re Adoption/Guardianship of Chaden M.*, 189 Md. App. 411, 431 (2009), *aff'd*, 422 Md. 498 (2011).

As in criminal proceedings, we analyze whether a parent received ineffective assistance of counsel in a TPR proceeding using the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the complainant must demonstrate (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced his defense. *In re Chaden M.*, 189 Md. App. at 431–32 (*citing Strickland*, 466 U.S. at 687). That inquiry may be conducted on direct appeal when the trial record illuminates the basis for the challenged acts or omissions of counsel. *Id.* at 434.

The Department argues in the first instance that this TPR proceeding is not the proper forum to raise an ineffective assistance claim relating to Mother's representation in the CINA proceeding. The Department also contends that Mother waived any ineffective assistance claim relating to the TPR by not raising the argument on the last day of the trial in open court on January 24, 2020, or in her April 1, 2020 response to the Department and

D's joint motion to submit the case (she only raised it in her motion for reconsideration of the court's granting of that motion). Mother responds that CINA and TPR proceedings are often interrelated, even if different legal standards apply in each, but offers no argument about the appropriate procedure for raising an ineffective assistance claim in a TPR proceeding where many of the allegations relate to counsel's actions in the CINA proceeding.

But even if we assume that it is appropriate procedurally for Mother to raise her ineffective assistance claim *and* that Mother has established that her former counsel rendered ineffective assistance, her claim fails because she neither establishes nor explains how the failures she identifies prejudiced her case. *Strickland*, 466 U.S. at 694 (to establish prejudice prong, party must show that counsel's failures created "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). This case is not like *Chaden M.*, in which counsel failed to file a timely notice of objection to the Department's petition and show cause order that effectively deemed consent to the guardianship. 189 Md. App. at 436. But for counsel's admitted failure in filing a timely objection, the mother in *Chaden M.* could have contested the petition for guardianship; because of the failure, she couldn't. In contrast, Mother identifies a number of failures of her counsel in the CINA case, but does not explain, let alone establish, how the outcome of the TPR case would have been different but for the failures:

- Mother's lack of representation at the January 6, 2017 shelter care hearing and the consequential failure to argue absence of imminent harm;
- Mother's lack of representation at the January 20, 2017

FIM, at which she provided her consent to the CINA adjudication;

- Counsel's failure to arrange for Mother's participation in hearings while she was detained by ICE;
- Counsel's failure to participate in interviews of D in May and November 2018;
- Counsel's failure (until her trial counsel) to file discovery requests or any interlocutory appeals;
- D's May 2019 placement with E.A. and N.A. the day after Mother's counsel struck her appearance; and
- Failure of counsel to challenge the Department's decision to suspend visitation at D's election without "endorsement" of court.

It's impossible to know whether any of these things would, or even could, have made a difference in the life of this case, either individually or collectively, and any attempt to assess prejudice on the merits would be pure speculation. In short, Mother has not established that ineffective assistance of counsel provides grounds for vacating (or reversing) the TPR order.

Third, Mother argues that she was not provided with sufficient translation services. But as the State points out, and as the juvenile court found, the record supports that she was provided with interpreters or translations at most if not all stages of the CINA proceeding. Based on our independent review of the record, we do not see a basis on which we could conclude that the court's finding was clearly erroneous.

B. The Juvenile Court Did Not Err In Terminating Mother's And Father's Parental Rights.

Mother and Father both argue that the juvenile court erred in terminating their rights. Both argue that the Department failed to engage in reasonable efforts at reunification and

that the Department's efforts at relative placement were insufficient, and Father argues that the court placed too much emphasis on D's relationship with her foster parents. We hold that the juvenile court did not abuse its discretion in terminating Mother's and Father's parental rights.

We begin with an outline of the standards associated with terminating the fundamental constitutional right to parent one's own children. "[U]nless the parents consent to the adoption of their child, the [local social services] department is required to petition the circuit court for guardianship . . . ." *In re Adoption of Jayden G.*, 433 Md. 50, 56 (2013) (brackets in original) (*quoting In re Adoption/Guardianship No. 10941*, 335 Md. 99, 106 (1994)). The aim of such a petition is "to terminate the existing parental relationship and transfer to [the department], hopefully for re-transfer to an adoptive family, the parental rights that emanate from that relationship." *Id.* (*quoting In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 496 (2007)). Although there is a presumption that "a continuation of the parental relationship is in a child's best interests," *Id.* at 53, that presumption is weighed "against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect." *Rashawn H.*, 402 Md. at 497. In short, it is not the *parents'* rights that drive a TPR decision—it is the *child's* best interests that are the court's "paramount consideration" in TPR proceedings. *In re Jayden G.*, 433 Md. at 82; *see In re Adoption of K'Amora K.*, 218 Md. App. 287, 302 (2014) (*citing Ta'Niya C.*, 417 Md. at 111–12).

The Family Law Article authorizes courts to terminate parental rights without

consent only under specific, narrow circumstances—the court must make specific factual findings and determine whether they suffice to establish, by clear and convincing evidence, *either* that the parents are unfit *or* that exceptional circumstances exist:

> If, after consideration of factors as required in this section, a juvenile court finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in a child's best interests, the juvenile court may grant guardianship of the child without consent otherwise required under this subtitle and over the child's objection.

FL § 5-323(b). The statute goes on to list factors that the juvenile court must consider in determining whether the parents are unfit or that exceptional circumstances exist (or both):

> (d) Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:
>
> (1)(i) all services offered to the parent before the child's placement, whether offered by a local department, another agency, or a professional;
>
> (ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and
>
> (iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any;
>
> (2) the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including:
>
> (i) the extent to which the parent has maintained regular

contact with:

1. the child;

2. the local department to which the child is committed; and

3. if feasible, the child's caregiver;

(ii) the parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so;

(iii) the existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time; and

(iv) whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interests to extend the time for a specified period;

(3) whether:

(i) the parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect;

(ii) 1. A. on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidenced by a positive toxicology test; or B. upon the birth of the child, the child tested positive for a drug as evidenced by a positive toxicology test; and

2. the mother refused the level of drug treatment recommended by a qualified addictions specialist, as defined in § 5-1201 of this title, or by a physician or psychologist, as defined in the Health Occupations Article;

(iii) the parent subjected the child to:

1. chronic abuse;

2. chronic and life-threatening neglect;

3. sexual abuse; or

4. torture;

(iv) the parent has been convicted, in any state or any court of the United States, of:

1. a crime of violence against:

A. a minor offspring of the parent;

B. the child; or

C. another parent of the child; or

2. aiding or abetting, conspiring, or soliciting to commit a crime described in item 1 of this item; and

(v) the parent has involuntarily lost parental rights to a sibling of the child; and

(4)(i) the child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly;

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

(iii) the child's feelings about severance of the parent-child relationship; and

(iv) the likely impact of terminating parental rights on the child's well-being.

FL § 5-323(d). "[T]he court must work through the statutory factors in detail . . . and explain with particularity how the evidence satisfied them and how the court weighed them," although the overarching consideration is the health and safety of the child. *K'Amora K.*, 218 Md. App. at 304.

We are mindful that when reviewing a TPR order, "our function, in reviewing [the trial court's] findings, is not to determine whether, on the evidence, we might have reached a different conclusion." *In re Adoption No. 09598*, 77 Md. App. 511, 518 (1989) (*citing*

Pahanish v. Western Trails, Inc., 69 Md. App. 342 (1986)). Instead, we decide whether there was sufficient evidence to support the termination of parental rights, drawing all inferences in favor of the court's findings:

> [Our function] is to decide only whether there was sufficient evidence—by a clear and convincing standard—to support the [trial court's] determination that it would be in the best interest of [the child] to terminate the parental rights of his natural [parent]. In making this decision, we must assume the truth of all the evidence, and of all the favorable inferences fairly deducible therefrom, tending to support the factual conclusion of the trial court.

Id.

As an initial matter, there is some dispute about whether the juvenile court found the parents to be unfit or that exceptional circumstances existed such that terminating their parental rights would be in D's best interest. The Department's position is that the court found the parents to be unfit. Father's position is that the court found that exceptional circumstances existed, and Mother's brief acknowledges that the juvenile court used both terms. For example, while the court referenced the parents' "unfitness and inability" to parent D in the TPR order itself, it also referenced "exceptional circumstances" in its memorandum opinion. We find that the court did not err regardless of whether its decision is read to have found unfitness or exceptional circumstances.

The court's primary factual findings related to D witnessing Father's sexual abuse of R and domestic violence between Mother and Father, Mother's and Father's domestic violence against D and the other children, and the dangers to which Father subjected the family, exacerbated by his alcoholism:

At trial, and as previously mentioned, there was clear and convincing evidence that the father sexually abused [D's] sister and [D] testified to having witnessed her older sister getting sexually abused by her father on more than one occasion. [D] also testified that her mother did nothing upon being informed about the abuse. [Transcript 10/8/19 p. 62] [D's] recorded forensic interview as well as the CPS Child Abuse Report corroborated [D's] traumatic childhood filled with chronic abuse from her parents. [Ct Exhibit 2.] During the CPS investigative interview with Sarah Lepore, [D] was able to identify body parts on an anatomical diagram and later describe the touches she does not like after witnessing her father sexually abuse her sister. [D] was able to demonstrate the abuse she witnessed using dolls. [Pet. Ex. 6 and Transcript 10/9/19 p. 131] It should be noted that [D's] CPS interview was conducted on August 18th, 2016 and [D] was interviewed for these TPR proceedings by this Court on October 8th, 2019. Despite the passage of more than 3 years, [D's] detailed account of the abuse remained consistent.

[D] also mentioned being physically abused in the home as well as witnessing domestic violence between her parents. During the CPS investigative interview, [D] disclosed having been "exposed to domestic violence in talking about her parents['] fighting and how "they hit each other with shoes, belts, and their hands." Pet. Ex. 6

Further, [D] had been able to recall being exposed to alcoholism. During both the CPS investigation as well as during the trial, [D] disclosed her father's alcohol use and how the alcoholism transitioned to physical abuse and domestic violence. [D] stated, "Daddy gets drunk a lot and he is mean but only when he drinks." [D] described times in which the father, [J], hits [her] mother with a belt and hits the children with a belt on the arms and in the middle of their backs. She talked about a time in which the father got so drunk while driving the family to Dover and that he began to swerve all over the road scaring them all. She reported that her sister, [R], threatened to call the police but her mom wouldn't let her."

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And lastly, and most importantly, when asked by the Court during the trial as to how she felt when she last lived with her parents, [D] replied, "not safe." [Transcript 10/8/19 p. 72]

> [D's] exposure to physical abuse, domestic violence and alcoholism within the parental home is detrimental to [D's] best interests.

(Citation brackets in original.)

Mother and Father do not challenge the substance of these findings. Instead, Mother and Father argue that the Department failed to engage in reasonable efforts at reunification, which is a factor the court is required to consider. FL § 5-323(d)(1). We agree that there are troubling aspects of the court's changes to the permanency plans in the CINA case. The record suggests that the permanency plan was changed to relative placement because Mother was detained by ICE in 2017, but there is not really a satisfactory explanation for why the plan was not changed back to reunification when she was released, notwithstanding a motion by Mother to do so. And there is at least some support in the record for Mother's contention that the shift in D's indisputably strong initial desire to be reunited with her family to a desire to be adopted was influenced in part by the Department's communications with her and her therapist Ms. Kirby. The Department also does not explain why family reunification therapy was never offered despite the recommendations of several of the therapists and the Department itself. It also is not clear why there were no supervised visits between D and Father until almost two years after their separation, especially considering the comments of both Dr. Ojevwe and Ms. Acree far earlier that Father's risk of reoffending was low and, in the case of Ms. Acree, that supervised visits would be beneficial.

But none of those concerns form a sufficient basis for us to conclude that the

juvenile court abused its discretion in finding that the services offered were sufficient. The juvenile court did not err in describing the Department's efforts with respect to the parents as a "mountain of services" and observing that the parents had "some measure of compliance" with them "by showing up when directed," but ultimately that they "failed to engage" or demonstrate any progress:

> Countless orders and prior court reports document the mountain of services provided and extensive reasonable efforts made on behalf of the parents. The parents have been represented at every hearing throughout the CINA and TPR cases and this Court has found that reasonable efforts had been made by the Department at every proceeding. CCDSS supervisor Heather Ruark testified that the Department provided service agreements, completed home assessments, paid for psycho-sexual evaluations for the father as well as substance abuse treatment, a psychological evaluation for the mother referred both parents for mental health treatment and provided payment and transportation, referred the Respondent for individual therapy, arranged supervised and therapeutic-supervised visits for the family, reached out to family therapists and offered housing assistance to the parents. (Transcript 1/21/20 p. 191-192) Despite the fact that the mother and father, who have lived in the United States for about two decades, have some fluency in English (for example they appeared to be able to communicate in English with their attorneys throughout the proceedings) nearly every DSS interaction with the parents was facilitated by an interpreter at the Department's expense.
>
> The parents had some measure of compliance in the aforementioned services by showing up when directed, however the parents have failed to engage those services, i.e.: demonstrate any insight or understanding of what they've learned from those services and be able to provide a safe and appropriate environment for [D]. The mother and father have never demonstrated any progress with their ability to have insight about the CINA matter and the reasons [D] was removed. Thus, there would have been no time in the past or in the foreseeable future when the services offered to the parents

> could have been productive in developing any real change in the parents' insight and orientation towards their child.

The juvenile court also found that Father failed to acknowledge that he sexually abused R, informed the Department that "only 'half of him' saw the sex abuse as wrong as he was not related" to R, and uses alcohol excessively when he is under distress, which use makes him "prone to becoming aggressive and violent . . . ." In short, we cannot say on this record that the juvenile court abused its discretion in finding that the services the Department offered and delivered were sufficient.

Mother and Father also argue that the Department's efforts at relative placements were insufficient. The State responds that relative placements are not the proper focus of a guardianship proceeding, and we agree. *See In re Adoption/Guardianship of Cross H.*, 200 Md. App. 142, 151–52 (2011) (holding that proper focus of guardianship proceeding was fitness of child's parents, and not the potential suitability of the grandmother as a placement for the child, which had been considered and addressed in the associated CINA proceeding). The juvenile court did allow evidence about a relative placement—D's paternal uncle Mr. T.-V.—and he testified at trial, but the trial court found that he "expressed some hesitation on denying access to his brother if so ordered." Ultimately, the juvenile court focused its analysis properly on the fitness of the parents, and the Department's asserted failings regarding relative placements are not grounds to reverse the trial court's finding of unfitness or exceptional circumstances.[12]

[12] Mother raises concerns about the Department's reliance on ICPC to conclude that relative placements with D's uncle and R's father could not be pursued. She points to our

Father also argues that the juvenile court relied too heavily on D's bond with her foster family. Again, we recognize that some parts of the record support the view that the Department sought to influence D's connection with her foster family at the expense of pursuing reunification with her parents. But viewing the record as a whole, we cannot say that the juvenile court abused its discretion. This is not a situation in which the court overrelied on the bond and time spent with the prospective adoptive family and ignored that the parents or parent were otherwise fit. *Cf. In re Adoption of Jayden G.*, 433 Md. 50 (2013) (affirming termination of mother's rights and holding that the juvenile court did not err in taking into account the child's attachment to his foster parents).

Finally, Mother argues that the juvenile court erred in improperly relying on Mother's immigration status in making its decision. We agree, but find the error harmless on this record. Although the parents' immigration status was not the focus of the court's analysis, it did consider and discuss certain aspects of Mother's immigration status in its memorandum opinion. For instance, the court observed that Mother's "ongoing status concerns with ICE" combined with the parents' "lack of diligence . . . proves reunification is not a viable option." The court concluded that it would be contrary to D's well-being to

decision in *In re R.S.*, which was affirmed by the Court of Appeals, in which we held that the ICPC did not apply to the juvenile court's out-of-state placement of the child with a noncustodial, biological parent. 242 Md. App. 338, 356 (2019), *aff'd*, 470 Md. 380 (2020). We reasoned that placement with a parent could never be "a placement in foster care or as preliminary to possible adoption," citing the statutory language. *Id.* As an initial matter, R's father is not a relative to D, and we are not convinced this argument would apply to him. Regardless, this issue is not before us and we decline to address whether the holding of *In re R.S.* can be extended to placement with a relative.

be returned to her parents where, among other things "the mother testified that she would take [D], a thriving American child, to Guatemala if necessary where gang violence and sexual violence are coupled with extreme poverty and nearly non-existent educational opportunities . . . ." And with respect to relative placements, the court observed that it would not be in D's best interest to live with any undocumented relative who might be "subject to being deported to a country where the child has never lived and where by all accounts poverty and severe crime are rampant and education[al] opportunities beyond elementary school are very limited."

Mother acknowledges that the juvenile court did not make its decision based solely on Mother's immigrant status, but she argues that the juvenile court erred to the extent that it did: "Mother . . . does not argue that a trial court may not consider *any* factors associated with a parent's immigration status, but more so that in doing so, reliance upon rote recitations of the 'dangers of deportation' or the dangers of another country are impermissible shortcuts that are discriminatory." (Emphasis in original.)

Mother represents that there do not appear to be any Maryland cases that directly address the "use of undocumented immigration status as a factor in determining whether to terminate parental rights," and cites a case decided by the Nebraska Supreme Court. *In re Interest of Angelica L.*, 277 Neb. 984, 767 N.W.2d 74 (2009). In that case, the court held that the trial court erred in terminating the parental rights of the mother, who had been deported to Guatemala. The court observed that the record supported that the State didn't make efforts to reunify the mother and her children because the department thought the

children would be better off in the United States. *Id.* at 95. But the court maintained that "whether living in Guatemala or the United States is more comfortable for the children is not determinative of the children's best interests." *Id.* at 94. Instead, the court considered that the evidence did not support a finding that the mother was unfit, and considered evidence supporting that she had done her best to maintain her parental connection to her children from afar and had established a stable living environment in Guatemala. *Id.* at 93.

In another case on which Mother relies, *In the Interest of E.N.C., J.A.C., S.A.L., N.A.G., and C.G.L.*, the Supreme Court of Texas held similarly that the trial court erred in terminating the father's rights where he had been deported to Mexico. 384 S.W.3d 796, 809–10 (2012). The court likened deportation to incarceration, and observed that although "deportation, like incarceration, is a factor that may be considered" in a termination case, it is "an insufficient one in and of itself to establish endangerment . . . ." *Id.* at 805. The court also observed that, "unlike an incarcerated individual, a person who is deported is able to work, have a home, and support a family" and "[m]ore importantly, it is possible for the person's children to live with him." *Id.* at 806. The court remanded the case for the trial court to determine whether it was in the children's best interest to remain in the United States or to join their father in Mexico. *Id.* at 809.

We did find one Maryland case that touches on this issue. In *In re Adoption/Guardianship of C.A. and D.A.*, we held that a juvenile court determined properly that terminating the father's parental rights was in the children's best interests where the father was incarcerated and was subject to deportation upon his release. 234 Md. App. 30,

52 (2017). We gave weight to the fact that the father had made little to no effort in adjusting his circumstances to make the lives of his children better and that he had maintained little contact with them while incarcerated. *Id.* at 51. And the father had provided no explanation for how he was planning to sustain a relationship with the children, let alone provide them with a safe and healthy environment, after he would be released from prison and deported. *Id.* at 53. In a footnote, however, we made a point to observe that although deportation status is one factor in the best interests' analysis because, under the facts of the case, it affected the father's ability to care for his children, "deportation of an undocumented parent in and of itself is not a basis for termination of parental rights of otherwise fit parents." *Id.* at 53 n.6.

We agree with that statement. We are troubled by the juvenile court's reliance in places on its assumptions that Mother might get deported and that, if she did, she will subject D to potential exposure to gang violence, sexual violence, extreme poverty, and non-existent educational opportunities in Guatemala. There does not appear to be much if any evidence in the record supporting those assumptions. But nevertheless, Mother's immigrant or deportation status was not a focus of or a significant component of the court's analysis. The court relied more on Mother's failure to gain insight into the risks posed to D and her other children by the sexual abuse they witnessed (and in R's case, experienced), and her apparent lack of willingness to protect D and her other children from such abuse or other domestic violence.[13] We find, therefore, that the court erred in considering the

[13] The National Immigrant Women's Advocacy Project, Inc. filed an Amicus brief in

parents' immigrant status on this record, but that the error was harmless in the face of the rest of the evidence before the court and the analysis on which it relied in deciding to terminate their parental rights.

C. Any Error In Admitting The Video Was Harmless.

Finally, Mother argues that the juvenile court erred in admitting the video of the Department's August 2016 interview of D. The Department responds that it was not error for the court to admit the video, and to the extent it did err, that error was harmless because the video contained statements that were cumulative of other evidence. We agree. An appellate court will not reverse the decision of a lower court based on an erroneous admission of evidence unless the error was "'both manifestly wrong and substantially injurious.'" *In re Yve S.*, 373 Md. 551, 617 (2003) (*quoting Rotwein v. Bogart*, 227 Md. 434, 437 (1962)). An error that does not affect the outcome of the case is harmless. *Id.* In this case, to the extent the video duplicates other, properly admitted evidence or testimony, any error in admitting it is harmless. We hold that the testimony on the video duplicated D's own in-court testimony, the Department's Exhibits 6 and 7, which contained a

support of Mother in which it argues that federal immigration law preempts a state from depriving a parent of her rights because of her undocumented immigration status. We decline to address that argument. *See R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 382 Md. 589, 694 n.3 (2004) (observing that an amicus ordinarily cannot raise an issue which is not raised by the parties, with the exception of an issue that the appellate court would address *sua sponte* or an issue on which the appellate court requests oral argument).

summary of Ms. Lepore's investigation, and Ms. Lepore's testimony.[14]

JUDGMENT OF THE CIRCUIT COURT FOR CAROLINE COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

[14] We decline to address the parties' arguments about the applicability of § 11-304 of the Criminal Procedure Article. That section permits the introduction of an out-of-court statement of a child who is under 13 and the victim of abuse or neglect in a juvenile court proceeding. The juvenile court stated that it admitted the video as a hearsay exception pursuant to that statute. Although it is not clear that the statute applies, or if it does, that the juvenile court followed the procedures outlined in it, we need not reach that question in light of our finding that any error in admitting the video was harmless.