Circuit Court for Montgomery County
Case Nos. 06-I-19-000043 & 06-I-19-000044

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1462

September Term, 2021

IN RE: Z.B., Z.I.

Kehoe,
Beachley,
Zic,

JJ.

Opinion by Zic, J.

Filed: May 27, 2022

The appellant, S.B. ("Mother"), is the mother of Z.B. (born in 2014) and Z.I. (born in 2018) (collectively "children").[1] In a child in need of assistance ("CINA")[2] proceeding, the Circuit Court for Montgomery County, sitting as a juvenile court, awarded custody and guardianship of the children to their maternal aunt and uncle,[3] who live in Houston, Texas. The court ordered visitation between the children and Mother to "be under the direction of" the children's aunt and uncle. The court rescinded the commitment of the children to the Montgomery County Department of Health and Human Services ("Department"), closed the CINA case, and terminated the jurisdiction of the juvenile court.

BACKGROUND

Mother and the Children's History with the Department

Mother resides in Silver Spring, Maryland. On May 19, 2017, the Prince George's County Department of Social Services ("PGDSS") expressed concerns about two-year-old Z.B.'s whereabouts upon receiving a report that Mother was on a psychiatric hold at Washington Adventist Hospital. PGDSS contacted Z.B.'s father, K.B.[4] K.B. reported an

[1] At the time of the court's final order in this case, Mother had three children and was expecting her fourth child.

[2] A "[c]hild in need of assistance" is defined as a child who requires court intervention because "[t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder" and "[t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." Md. Code Ann., Cts. & Jud. Proc. § 3-801(f).

[3] The children's maternal uncle is Mother's brother.

[4] K.B. "reported having [Z.B.] for three months as [Mother] didn't pick her up." K.B. is not a party in this appeal.

incident that occurred at Z.B.'s maternal grandparent's home on May 18, 2017 that involved Mother attempting to throw Z.B. into the street. The police took Mother to the hospital, and Z.B. was left with her maternal grandparents.

On May 31, 2017, PGDSS received a report that Mother, after running through traffic, swung two-year-old Z.B. "like a rag doll" and screamed "come save me!" Mother was admitted to a hospital and tested positive for marijuana. When she was admitted, Mother screamed that Z.B.'s paternal grandfather was in a gang and that her ex-husband was after her because Z.B. is a "special seed." The hospital found Z.B.'s father and returned Z.B. to his care. On June 7, 2017, PGDSS received a report that Z.B. sustained bruises while at her father's house. At the time, Mother was reportedly living with gang members and, according to a social worker's previous assessment, appeared to be engaged in substance use and had mental health issues.

On January 11, 2018, the Department received a report concerning three-year-old Z.B. The report stated that Z.B. was returned to Mother and that Z.B. was dirty, wore the same clothing for weeks, and had several small bruises on her right hand. The report expressed concerns about Mother's history of marijuana and PCP use, that her apartment reportedly smelled of marijuana, and that she was allegedly high while caring for Z.B. The allegations resulted in opening a risk of harm assessment due to suspected caregiver impairment.

A few days after Z.I.'s birth,[5] Z.I. tested positive for marijuana and the Department opened a subsequent risk of harm assessment. Beginning in August 2018, Mother stopped responding to the Department's attempts to meet with her.

On February 15, 2019, the Montgomery County Police Department responded to Mother's apartment complex and found Mother swinging Z.I. around at the top of a concrete stairwell, yelling, "the evil is coming to get me but I'm strong!" Mother was also holding Z.B. by her neck. When police entered the home, they discovered that the home was filled with clothing and jars of urine, and hair was taped to the ceiling. An emergency petition was filed due to Mother suffering a "manic and paranoid psychotic break" and the children were removed from the home. The police interviewed neighbors, who reported that Mother began acting "paranoid" at around 3 a.m. on February 15, 2019. The neighbors indicated that Mother knocked Z.I. into a banister and was screaming about "the evil." In the hospital where the children were medically cleared, the Department found that the children were in dirty clothes. Z.I.'s snowsuit was covered in about 100 pellets of mouse feces, and she drank from a bottle "like she's never eaten before in her life."

On February 19, 2019, the Department filed a CINA petition. The juvenile court entered a shelter order, finding it "contrary to the [children's] welfare to remain in . . . Mother's home." The children were placed in the temporary care and custody of the Department. The court suspended visitation until Mother's condition stabilized and the

[5] Z.I.'s putative father, C.S., is not a party in this appeal.

Department deemed it safe for visitation to occur. At the Department's recommendation, the court also ordered Mother to undergo twice weekly drug urinalysis testing.

Adjudication and Disposition of the CINA Petition

An adjudication and disposition hearing was held on March 20, 2019. The court determined that the allegations in the Department's CINA petition were sustained by a preponderance of the evidence. Accordingly, the court found the children to be CINA because (1) the children were "neglected" and (2) Mother was "unable" and each of the children's fathers were "unable and unwilling" to give proper care and attention to the children. The court ordered:

> Supervised visitation by the Department for the first four weeks, minimum once weekly; then if successful, the next four weeks shall be supervised by the Department and a vetted family member minimum once weekly[;] then if successful, remaining supervised visitations shall be supervised by a vetted family member. No overnight visitation or unsupervised visitation shall occur at any time[.]

The children were later placed together in kinship care with their maternal grandparents and maternal aunt, A.A., in Severn, Maryland.

The court also ordered Mother to: (1) have "[a] psychological evaluation and follow all treatment recommendations"; (2) "[t]ake her psychotropic medications as prescribed by medical doctors"; (3) undergo "[a] substance abuse evaluation and follow all treatment recommendations"; (4) engage in "[t]wice weekly urinalysis"; (5) participate in "[p]arenting coaching"; and (6) "[a]ssist the Department to identify and locate the fathers of the children."

The Department's Initial Report and Mother's Psychological Evaluation

The Department's June 12, 2019 court report indicated that Mother visited the children on March 29, April 5 and 12, May 3, and July 8, 2019 with the Department and maternal aunt, A.A. During some of the visits, the Department heard Mother telling Z.B. that she was hyper and needed to calm down. During the July 8, 2019 visit, Mother lost her phone. She then became "extremely preoccupied trying to locate it" and "indicat[ed] that [Z.B.] caused the phone to be lost." Nonetheless, the Department reported that Mother "does show the [children] love and affection during her visits, and [the children] are excited to see their mother." There were visits scheduled for May 10 and 24, 2019, but they were canceled because Mother did not call by 5 p.m. the day before to confirm her visits. On May 31, 2019, A.A. met Mother for an early dinner visit with the children and then they went to the family's residence. A.A. did not realize how late it was and the family permitted Mother to stay overnight. A.A. reported that everything was going well the next day until "out of nowhere [Mother] star[ted] verbally attacking [A.A.'s] 14-year-old sister, E.A., accusing her of dragging and hitting [Z.B.]" The family reported that Mother became "very angry, yelling, stomping[,] and making allegations that no one understood where they were coming from."

A.A. reported the overnight stay and promised that it would never happen again. On July 2, 2019, the Department discussed Mother's violation of the court order that prohibited overnight visits with the children. During the discussion, Mother made "all kinds of allegations against her family and their treatment of [the children] and towards

her." The Department reported that it was "unable to follow all [of Mother's] complaints and allegations as she became [increasingly] upset and started rambling in an incoherent way."

Mother reported to the Department that she was receiving individual therapy and medication management at Vesta, the clinic to which she was referred, but Vesta's Clinic Director reported that Mother failed to schedule and attend appointments. After the Department had a discussion with Mother regarding her failure to comply with the court's order requiring mental health treatment, Vesta's Clinic Director reported that Mother attended a medication management appointment with a nurse practitioner on June 12, 2019 and was prescribed Gabapentin, Seroquel, and Hydroxyzine to treat her mental health. Mother, however, was not provided refills because she was possibly pregnant.[6] The Department also reported that Mother tested positive for marijuana on several dates in March, April, and May 2019 and that she "sporadically participated in twice weekly urinalysis."

Mother began a psychological evaluation with Dr. Katherine Martin in June 2019. The evaluation was completed over the course of three appointments. The evaluation stated that Mother was diagnosed with Schizoaffective Bipolar Disorder. Mother acknowledged that she "has anxiety attacks and every now and then [she] ha[s] depression." She also admitted that she stopped taking her prescribed medications

[6] At this time, Mother was pregnant with her third child and she gave birth to this child on January 8, 2020. This child was removed from Mother's care on January 27, 2021.

several weeks earlier. Results of the tests Mother participated in indicated that she had mild to moderate symptoms of depression and anxiety.

Dr. Martin provided an evaluation of Mother's behavior:

> [Mother] fails to take personal responsibility for the problems she faces. She views herself as being punished without cause. While [Mother] may tr[y] to control her emotions, her thin façade of emotional control quickly gives way to anger and suspiciousness. She relies on rationalization, blame, and denial, unwilling to take personal responsibility for her behaviors, to cope with uncomfortable feelings when she feels criticized or rebuked.

Additionally, Dr. Martin commented on Mother's relationship with her children and how mental health treatment could benefit Mother:

> It is clear that [Mother] cares deeply for her children. Themes about her affection for her children were overarching on the Sentence Completion Technique. . . . It is very important that [Mother] receive[s] mental health treatment to stabilize her mood, address her quality of thought, and improve her coping skills in order to provide her two children with a stable environment.

Accordingly, Dr. Martin recommended: (1) that Mother's "quality of thought be . . . closely monitored" and to "participate consistently in at least weekly ongoing psychotherapy"; (2) that Mother should "receive a psychiatric evaluation" once she is postpartum; (3) that Mother should engage in parenting education; (4) that Mother should "complete her substance abuse treatment program"; and (5) that Mother may need "added supervision and support . . . to maintain stability."

Review Hearing (July 23, 2019)

At the review hearing on July 23, 2019, the court noted that the children were placed in kinship care with their grandparents and A.A. and that it would not be safe for the children to return to Mother. The court found that, although "she is working towards compliance," Mother had not been fully compliant with her court-ordered services. Mother indicated that she was pregnant, which would have some impact on the medication she could take. The court stated that she needs to complete her psychological evaluation with Dr. Martin and to "show consistent commitment to services and follow all recommendations regarding her medication management, therapy[,] and psychological evaluation." The permanency plan was reunification with Mother, with a projected achievement date of February 2020. Mother was required to "actively participate in all services and understand the need for her mental health to be stabilized in order for reunification to be a valid plan in the future."

The court ordered that the children continue to be CINA and committed to the Department for placement in kinship care with their maternal grandparents and A.A. It also ordered Mother to participate in weekly therapy, monthly medication management, substance abuse treatment, and, once she consistently complies with the Department's medication and therapy requirements, parenting education. Further, it ordered that visits between the children and Mother be supervised once weekly under the direction of the Department or a family member.

First Permanency Planning Hearing (January 22, 2020)

At the first permanency planning hearing on January 22, 2020, the court considered a variety of factors related to the best interests of the children and changed the permanency plan to a concurrent plan of reunification and custody and guardianship to a relative.[7] The court found that it would not be safe for the children to return to Mother and noted that Mother had been unable to comply with her required medications while being pregnant. The court also noted that the children had a strong bond with Mother because she was consistent with visitation. The court highlighted that the children were "happy and animated" with their maternal grandparents and A.A. during the 11-month

[7] Pursuant to Courts and Judicial Proceedings § 3-823(e)(1) and Family Law § 5-525(f), the court considered the factors listed below to develop a permanency plan for the children:

A. The Children's Ability to be Safe and Healthy in the Home of the Children's Parents

B. The Children's Attachment and Emotional Ties to the Children's Natural Parents and Siblings

C. The Children's Emotional Attachment to the Children's Current Caregiver and the Caregiver's Family

D. The Length of Time the Children have Resided with the Current Caregiver

E. The Potential Emotional, Developmental and Educational Harm to the Children if Moved from Current Placement

F. The Potential Harm to the Children by Remaining in the State Custody for an Excessive Period of Time

See Md. Code Ann., Fam. Law § 5-525(f)(1) (listing the factors to "determin[e] the permanency plan that is in the best interests of the child"); Md. Code Ann., Cts. & Jud. Proc. § 3-823(e)(2) (directing the court to consider the factors listed in Family Law § 5-525(f)(1) to determine a child's permanency plan).

placement. The court deemed the potential harm of moving the children as high. Although Mother had "made progress," the court explained that she needs to show that she "can continue to make progress and take her mental health needs extremely seriously by participating in medication management and consistent weekly therapy for unsupervised visits to begin and work towards reunification."

Accordingly, the court ordered that the children continue to be CINA. It also ordered Mother to participate in weekly therapy, psychiatric assessments, monthly random urinalysis, monthly medication management and level testing of medications, and parenting education once she is consistent with her psychotropic medication and therapy.

Second Permanency Planning Review Hearing (June 30, 2020)

At the second permanency planning review hearing on June 30, 2020, the Department noted that there had been some conflicts between Mother and the children's maternal grandparents, who were the children's caregivers at the time. The Department claimed that Mother made some "unfounded accusations" when the caregivers tried to contact her to facilitate visits and said "inappropriate things" during video visits.[8] As a result, the maternal grandparents proposed to place the children with another relative in Texas.

[8] The Department's November 13, 2020 court report indicated that there was a verbal altercation between the children's maternal grandparents and Mother in June 2020. The grandparents reported that they had dealt with Mother's "incoherent rants and explosive anger towards each of them at different times" and "[t]hey no longer want to deal with [Mother's] emotional retaliation behavior of accusations."

At the end of the hearing, the court decided not to commence termination of parental rights because "Mother was doing well with engaging in services during her pregnancy, and the Department is hopeful that over the next few months, and after she completes a psychiatric evaluation, she will be able to reengage." The court also found that the concurrent permanency plan of reunification and custody and guardianship to a relative was in the best interests of the children. It maintained the out-of-home placement and stated that Mother still needed to make "significant efforts with her mental health treatment." Accordingly, the court ordered that the children continue to be CINA and ordered Mother to continue engaging in all treatment and parenting education under the direction of the Department.

On August 7, 2020, the Department filed a Motion for Issuance of Interstate Compact on the Placement of Children Regulation 7 Order, requesting the court to issue an order for an expedited home study of the children's uncle in Texas. The placement was also chosen by Mother. The court granted the motion on September 30, 2020 and ordered an expedited home study.

Third Permanency Planning Review Hearing (November 24, 2020)

At the third permanency planning review hearing on November 24, 2020, the court found that the children continued to be CINA and ordered them to be placed in kinship care with their aunt and uncle in Texas. The children's aunt and uncle were granted limited guardianship for medical needs, including authorization for treatment and

emergency surgery, hospitalizations, mental health treatment, and educational or travel purposes.

The court ordered weekly visitation to be supervised under the direction of the Department. Visitation was to be for a minimum of one hour, either in person or virtual, and could include overnights. Mother was ordered to complete substance abuse treatment before she could visit the children in Texas and to abstain from the use of marijuana and all illegal substances or narcotics unless prescribed by a medical doctor.

Fourth Permanency Planning Review Hearing (April 27, 2021)

At the fourth permanency planning review hearing on April 27, 2021, the court noted that the children had been placed in kinship care with their aunt and uncle in Texas since January 2, 2021. During a bench conference, Mother's counsel expressed Mother's concern that the children were told to call the aunt "mom." Mother was also concerned that she would not be able to access the children after the case is closed. The court explained that the aunt and uncle are "more stable than [Mother,]" but it emphasized that the aunt and uncle are not the children's parents and they cannot determine "what's going to happen with these kids."

The court further noted that Mother's third child was removed and placed in foster care. Subsequently, Mother successfully completed a substance abuse treatment program and consistently attended therapy and parenting education classes in February and March 2021. The court found that the children were "doing remarkably well" and reaffirmed the concurrent plan of custody to a relative and reunification with Mother. The court stated

that "Mother has only recently started to re-engag[e] with services" since the removal of her third child and concluded that Mother "made some progress," but she should "consistently demonstrate a long-term commitment" to reunifying with her children. The court ordered that the children continue to be CINA and maintained the virtual visitation arrangement from the previous hearing.

Final Permanency Planning Review Hearing (October 7 and 19, 2021)

At the fifth permanency planning review hearing on October 7, 2021, the Department and the children's counsel requested the court to close the CINA case and change the permanency plan to custody and guardianship to a relative. Mother objected to the request as well as the case being closed with her having supervised visitation with the children. She requested that the court keep the case open with a concurrent permanency plan of reunification and custody and guardianship to a relative. Mother also requested that, regardless of whether the CINA case remains open, the court make a finding pursuant to Family Law § 9-101 to allow for unsupervised visitation. The court heard arguments from the parties regarding the children's best interests and Mother's progress. The hearing was then scheduled to continue on October 19, 2021 for the court to issue its decision.

On October 19, 2021, the court reiterated the history of Mother's mental health and substance abuse issues and her treatment as well as the permanency plan for the children's placement. Regarding the current placement of the children, the court cited the report from the Texas Department of Family and Protective Services, which found that

the aunt and uncle were "very accommodating and love the [children]." Regarding the continuing necessity for the placement out of the home, the court reasoned that Mother showed progress but that her progress was "spurred on by the removal of [her] third child and did not apply to the two [children]." Mother's progress only occurred in an eight-month period, which was not enough to convince the court that the children would be safe living with Mother. Additionally, the court considered the stress that Mother's third and fourth[9] children may bring and remained uncertain about whether Mother could safely care for all her children in the long-term. The court further considered that it had been 31 months since the children's initial placement, which was longer than the 24-month timeframe specified in Courts and Judicial Proceedings § 3-823(h)(4). The court concluded that the children needed permanency and should not be moved from their aunt and uncle.

The court found that the children were no longer CINA and rescinded their commitment to the Department. The court found it in the children's best interests to be placed in the custody and guardianship of the aunt and uncle. It reasoned that "there is not a foreseeable time when [M]other would be able to provide a safe and stable home for the two [children]," and it changed the permanency plan from a concurrent plan to one of custody and guardianship to relatives. With regard to Mother's request for a finding

[9] At the time of the last permanency planning hearing, Mother was pregnant with her fourth child.

pursuant to Family Law § 9-101 to allow for unsupervised visitation, the court stated that it was "not prepared to do that."[10]

The court subsequently entered two written orders: A Permanency Planning Review Hearing Closure Order and a Custody and Guardianship Order. In the Permanency Planning Review Hearing Closure Order, the court ordered "that visitation between [the children] and . . . [M]other . . . shall be under the direction of [the children's] maternal uncle . . . and aunt." The court "decline[d] to make a Family Law § 9-101 finding with regard to visits by [Mother]."

The Custody and Guardianship Order awarded physical and legal custody and guardianship of the children to the aunt and uncle. The order also stated "that visitation between the [children] and [Mother] shall be by agreement between Mother and the guardians, under the direction of [the children's aunt and uncle]."

This appeal followed.

[10] The aunt and uncle attended the portion of the October 19, 2021 hearing when the court issued its ruling. The court explained its visitation order to them as follows:

> [T]he [c]ourt is basically allowing you as the legal custodians and guardians of [the children] to determine what would be appropriate visitation. . . . I'm leaving it up to you whether you believe that the visitation needs to be supervised; that whether one of you needs to be present; or whether there needs to be certain time limits or restrictions. That's up to you as any legal custodian would have the right to do, so I'm just letting you be aware of that.

QUESTIONS PRESENTED

Mother raises two questions for our review,[11] which we have recast as follows:

1. Did the court abuse its discretion in awarding custody and guardianship of the children to the maternal aunt and uncle?

2. Did the court err in ordering that visitation "be by agreement between Mother and guardians, under the direction of [the aunt and uncle]"?

For the reasons stated below, the court did not abuse its discretion in awarding custody and guardianship of the children to the maternal aunt and uncle, but it did err when it ordered that visitation "be by agreement between Mother and guardians, under the direction of [the aunt and uncle]." We affirm in part, vacate in part, and remand for further proceedings not inconsistent with this opinion.

DISCUSSION

I. STANDARD OF REVIEW

It is well established that "[i]n child custody disputes, [including CINA proceedings,] Maryland appellate courts simultaneously apply three different levels of review." *In re Shirley B.*, 419 Md. 1, 18 (2011). We review the juvenile court's factual findings for clear error. *In re J.R.*, 246 Md. App. 707, 730 (2020). And we "do not disturb the juvenile court's findings of fact unless they are clearly erroneous." *In re C.E.*,

[11] Mother phrased her questions presented as follows:

1. Was the court's ruling on visitation clear error in delegating its judicial authority to a third-party?
2. Was the court's decision to grant custody and guardianship of the children an abuse of discretion?

456 Md. 209, 216 (2017). "Whether the juvenile court erred as a matter of law is determined 'without deference[.]'" *In re J.R.*, 246 Md. App. at 730-31. "[I]f an error is found, we then assess whether the error was harmless or if further proceedings are required to correct the mistake[.]" *Id.* at 731. "Finally, we give deference to the juvenile court's ultimate decision in finding a child in need of assistance," *id.*, and the "conclusion of the juvenile court . . . will stand unless the decision is a clear abuse of discretion." *In re Ashley S.*, 431 Md. 678, 704 (2013).

"A [juvenile] court's findings are 'not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion.'" *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019) (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)). "In determining whether the [juvenile] court was clearly erroneous, this Court must 'give due regard to [the juvenile court's] opportunity to judge the credibility of the witnesses.'" *In re Joseph G.*, 94 Md. App. 343, 347 (1993) (quoting *In re Appeal No. 504*, 24 Md. App. 715, 723 (1975)). "[A]n abuse of discretion exists 'where no reasonable person would take the view adopted by the [juvenile] court, or when the court acts without reference to any guiding rules or principles.'" *In re Andre J.*, 223 Md. App. 305, 323 (2015) (quoting *In re Yve S.*, 373 Md. 551, 583 (2003)).

II. ANALYSIS

A. The Court Did Not Abuse Its Discretion When It Awarded Custody and Guardianship to the Children's Aunt and Uncle.

Mother contends that the court abused its discretion by changing the permanency plan and awarding custody and guardianship of the children to the aunt and uncle in

Texas. Mother argues that a parent's fundamental right to raise a child cannot be taken away unless clearly justified and that it is not in the best interests of the children to close the case and award custody and guardianship to the aunt and uncle. Mother contends that she "was fully compliant with the Department's proposed service plan and prior court order." Additionally, she posits that the children "deserve permanency" and "a meaningful relationship with their mother." She avers that the court's assumption—that her engagement and compliance with the services was only directed towards her third child but not towards reunification with Z.B. and Z.I.—was "unsubstantiated."

The Department, however, contends that the court "properly exercised its broad discretion" by awarding custody and guardianship to the aunt and uncle. The Department also argues that the CINA statute requires permanent placement for a child adjudicated CINA within 24 months, but, in the present case, the children had been adjudicated CINA for more than two and a half years. The children agree with the Department. The Department also argues that a parent's fundamental right to raise a child is not absolute. The Department contends that the record, as well as Mother's failure to demonstrate her progress to long-term mental stability, evidences her current inability to maintain the stability required to care for four young children.

The Courts and Judicial Proceedings Article sets forth the procedures governing the designation of a child as CINA. *See* Md. Code Ann., Cts. & Jud. Proc. §§ 3-801–3-837.1. The Family Law Article contains "provisions concerning out-of-home placement and foster care." *In re Ashley S.*, 431 Md. at 685; *see* Md. Code Ann., Fam. Law §§ 5-

524–5-534. The purpose of CINA proceedings is "[t]o provide for the care, protection, safety, and mental and physical development of [the] child." Cts. & Jud. Proc. § 3-802(a)(1). CINA proceedings were created "[t]o conserve and strengthen the child's family ties and to separate a child from the child's parents only when necessary for the child's welfare." *Id.* § 3-802(a)(3).

Once a child is found CINA and is committed to the Department for out-of-home placement, the court must "hold a permanency planning hearing" within 11 months "to determine the permanency plan for a child." *Id.* § 3-823(b)(1). "Every reasonable effort shall be made to effectuate a permanent placement for the child within 24 months after the date of initial placement." *Id.* § 3-823(h)(4). "It is an integral part of 'the statutory scheme designed to expedite the movement of Maryland's children from foster care to [a] permanent living, and hopefully, family arrangement.'" *In re Ashley S.*, 431 Md. at 686 (quoting *In re Damon M.*, 362 Md. 429, 436 (2001)).

When a child found CINA is "placed outside of the family home, the juvenile court must determine a permanency plan consistent with the child's best interests." *In re Andre J.*, 223 Md. App. at 320 (citing Cts. & Jud. Proc. § 3-823(b)). To determine the permanency plan for the child, the court must weigh the factors specified in § 5-525(f)(1) of the Family Law Article. Cts. & Jud. Proc. § 3-823(e)(2). The factors are as follows:

> (i) the child's ability to be safe and healthy in the home of the child's parent;
> (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
> (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;

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

Fam. Law § 5-525(f)(1). "[T]o the extent consistent with the best interests of the child," the court should prioritize reunification with the parent over awarding custody and guardianship to a relative. Cts. & Jud. Proc. § 3-823(e)(1)(i). Further, absent a finding of good cause, "a case shall be terminated after the court grants custody and guardianship of the child to a relative or other individual." *Id.* § 3-823(h)(1)(iii).

In the instant case, the court's findings reflect that the court considered the factors listed in § 5-525(f)(1). In its oral ruling, the court reviewed the history of the case, which was comprised of the sustained CINA petition, prior permanency hearings and the Department's court reports, and Mother's psychological evaluation. The court's findings were supported by the record and are not clearly erroneous. The court did not abuse its discretion because it reasonably concluded "that there is not a foreseeable time when [M]other would be able to provide a safe and stable home for the two children" and that it was "in the best interests of the [children]" to change the permanency plan to award custody and guardianship to the children's aunt and uncle.

The court found it appropriate to continue placement out of the home because it was not convinced that the children would be safe in Mother's home. This was based on the Department's reports and Mother's psychological evaluation documenting Mother's

long history of mental health issues and noncompliance. For instance, the Department's report on June 12, 2019 reported that during a visit with the children, Mother "became very angry, yelling, stomping and making allegations that no one understood where they were coming from." She also failed to show up for two medication management appointments and one therapy appointment. Mother only "sporadically participated in twice weekly urinalysis," and the results of the urinalysis she participated in showed that she tested positive for marijuana on several dates in March, April, and May 2019.

The Department's January 12, 2020 report indicated that Mother was diagnosed with Schizoaffective Bipolar Disorder and she was "unable to recognize that she has mental health instability and her need for medication management." In Mother's psychological evaluation, Dr. Martin observed that Mother's "thinking was suspicious and mildly paranoid" and noted that Mother stopped taking her prescribed medications for several weeks. The Department's May 31, 2020 report indicated that Mother failed to consistently participate in weekly therapy and that there was a history of domestic violence between her and C.S., Z.I.'s putative father.

The Department's November 13, 2020 report relayed that Mother tested positive or "behavioral positive" for drugs for 11 weeks in a six-month period and that she missed roughly half of her therapy appointments over a five-month period. Further, the Department's April 19, 2021 report indicated that Mother, after delivering her third child, tested positive for marijuana and alcohol and failed to attend therapy, substance abuse treatment, parenting classes, and other "important appointments." The noncompliance

and positive test results caused the third child to be removed from Mother's care and placed in foster care.

The Department's most recent report on September 17, 2021 showed that Mother began to consistently participate in substance abuse treatment, parenting education, therapy, and psychiatric services. Mother's improvement, however, occurred only after the removal of her third child from the home; this supports the court's conclusion that her compliance was "spurred on by the removal of [the] third child."

The court also focused on Dr. Martin's conclusion that Mother "is at a considerable risk for struggling to maintain improved functioning, particularly when faced with significant stressors." The court noted the potential stressors created by Mother's fourth child, reasoning that Mother's recent compliance was not enough:

> In terms of the continuing necessity for the placement out of the home, the [c]ourt believes that it is appropriate to continue placement out of the home in that there is a long history of noncompliance by the mother. Although she is showing compliance now and that is wonderful, somehow that has just been spurred on by the removal of this third child and did not apply to the two children, who are now living in Houston. Further, she now has in addition to this third child, there is now a fourth child, and that would create a lot more of those stressors that we talked about in the context of the psychological evaluation [by] Dr. Martin. The extent of the progress she has shown has been essentially in an eight-month period. The [c]ourt believes that that is not enough to convince the [c]ourt that, in fact, these children would be safe in the home with the mother. She still needs to show maintenance of mental health stability for a longer period of time and sobriety, and who knows how she's going to be able to deal with the fourth child in this case. . . . [Z.B.] and [Z.I.] do have some needs that need to be attended to. For example, [Z.I.] is behind grade level in reading and math. In the home

> that she's in right now, she gets extra support both in the classroom and at home. This [c]ourt cannot make a finding that that would happen in the home with the mother.

Due to Mother's "long history of noncompliance," the court remained unconvinced about Mother's ability to offer a stable and safe home for the children. *See In re J.R.*, 246 Md. App. at 752 (explaining that "[t]o the extent that inaction repeats itself, courts can appropriately view that pattern of omission as a predictor of future behavior, active or passive" (quoting *In re Priscilla B.*, 214 Md. App. 600, 625 (2013))); *see also In re Adriana T.*, 208 Md. App. 545, 570 (2012) (stating that "[i]t has long been established that a parent's past conduct is relevant to a consideration of the parent's future conduct").

The court also noted that it had been 31 months since the children's initial placement, which is beyond the 24-month timeframe prescribed by the CINA statute. The court determined that the children needed permanency, which is "a goal of the Child Welfare System."

The court acknowledged that the children "have a bond" with Mother, but not with their fathers. It also recognized that the children developed strong "parental[-]child bonds" with their aunt and uncle and that the children's "attachment to their current caregiver is enormous." This was based on a report from the Texas Department of Family and Protective Services:

> The [children] have been in placement since January 2nd, [2021]. During this time I have watched them grow and blossom. . . . They, meaning the [children], feel safe in the home. Both [children] call the caregivers Mom and Dad. The caregiver[s] ha[ve] also been very accommodating in that the [children] have phone visits with their mother as well as

> facilitated visits between Mom and the [children] when she came to Houston. The [children] are both happy and healthy. The caregivers have lots of activities planned for the [children] weekly. The caregivers[] [have] been very accommodating and love the [children]. The structure in the home is what any child would need. The balance they've been able to provide has been heartwarming. They not only have time for the [children], but have two children of their own. They're very supportive as well. The children get along so well that you would think that they were birth siblings with the other children.

There was also evidence from the Department's September 17, 2021 report, which stated that the children are "doing incredibly well in kinship placement and see[m] very bonded to [their] maternal [aunt and uncle]."

The court noted that while the children have been with their aunt and uncle for only nine months, they "have already suffered a removal from their prior placement" with their grandparents. The court stated that that removal "had to be traumatic enough," but they are now settled in with their aunt and uncle where "[t]hey're clearly accepted as members of the family" and are safe and healthy. To be removed from their aunt and uncle's home "would be catastrophic," and the court concluded "that there would be a high risk of emotional, developmental, and educational harm" if the children were moved from their aunt and uncle's home.

The court adequately considered and weighed the factors in § 5-525(f)(1). Accordingly, the court acted in the children's best interests and did not err or abuse its discretion in awarding custody and guardianship of the children to the aunt and uncle. We affirm that portion of the court's order.

B. The Court Erred By Not Ordering Supervised Visitation Pursuant to Family Law § 9-101 and By Delegating Its Judicial Authority to the Aunt and Uncle.

Section 9-101 of the Family Law Article provides:

> (a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.
>
> (b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

This statute instructs Maryland judges on when they may appropriately order visitation. *In re G.T.*, 250 Md. App. 679, 693 (2021). "[W]hen a court has reasonable grounds to believe that neglect or abuse has occurred[,] . . . custody or visitation must be denied, except for supervised visitation, unless the court makes a specific finding that there is no likelihood of further abuse or neglect." *Id.* (quoting *In re Billy W.*, 387 Md. 405, 447-48 (2005)). Further, if the court deems supervised visitation appropriate, it "must assure, at a minimum, that such visitation will not jeopardize the safety and well-being of the child." *In re G.T.*, 250 Md. App. at 693 (quoting *In re Billy W.*, 387 Md. at 448). Absent a specific finding by the court that "there is no likelihood of further abuse or neglect by that party, it must deny custody or visitation rights to that party except for a supervised visitation arrangement that assures the safety and the physiological,

psychological, and emotional well-being of the child." *In re G.T.*, 250 Md. App. at 693 (quoting *In re Adoption No. 12612*, 353 Md. 209, 234 (1999)).

At the October 7, 2021 hearing, Mother asked "the [c]ourt [to] make a [§] 9-101 finding to allow her to have unsupervised contact with the [children]." The court declined to make that finding and explained as follows at the October 19, 2021 hearing:

> [M]other has asked for a finding under 9-101 if, in fact, the permanency plan is changed[,] and the case is closed. Family Law Section 9-101 says unless the [c]ourt specifically finds that there is no likelihood of further child abuse or neglect by the party, the [c]ourt shall deny custody or visitation rights to that party except that the [c]ourt may approve a supervised visitation arrangement that assures the safety and emotional wellbeing of the child. This [c]ourt is not prepared to do that. This [c]ourt does not believe that eight months or nine months of apparent consistency is, in fact, enough for the [c]ourt to find that there is no further likelihood of abuse or neglect.
>
> * * *
>
> [V]isitation between [Z.B.] and [Z.I.] and their mother shall be determined whether supervised or unsupervised and at the appropriate times and places by the now guardians and legal custodians of the child.

In its written order, the court granted Mother visitation with the children but declined to make a Family Law § 9-101 finding that there is no likelihood of further abuse or neglect by Mother with regard to visits by Mother. When it made the decision to allow for visitation but declined to make a § 9-101 finding to allow for unsupervised visitation, the court's only option was to order supervised visitation pursuant to § 9-101(b). We hold that the court erred in not ordering supervised visitation.

Mother further avers, and we agree, that the court "erred as a matter of law in delegating its judicial authority with respect to Mother's visitation" to the aunt and uncle. She argues that Maryland caselaw establishes that courts should make determinations pursuant to Family Law § 9-101(b) regarding visitation arrangements and cannot delegate this authority to a third party. Specifically, she claims that the court erred as a matter of law in ordering her visits to be at the discretion[12] of the aunt and uncle.

The Department and the children's counsel contend that the court properly exercised its discretion when it declined to make a specific visitation arrangement. The Department argues that the court has substantial flexibility in ordering visitation and that it is within the court's discretion to allow the aunt and uncle to determine visitation arrangements. The children's counsel argues that it is impermissible for a court to delegate its judicial authority only in an ongoing child welfare matter; however, where the court has ordered the CINA case to be closed, it may delegate its authority relating to visitation.

In CINA cases, a juvenile court "may not delegate judicial authority to determine the visitation rights of parents to a non-judicial agency or person." *In re Mark M.*, 365 Md. 687, 704 (2001) (citing *In re Justin D.*, 357 Md. 431, 447 (2000)); *see also In re Caya B.*, 153 Md. App. 63, 81 (2003). "[W]here a trial court's order constitutes an improper delegation of judicial authority to a non-judicial agency or person, the trial

[12] We note that, in her brief, Mother used the term "discretion," as did the court in its oral ruling. The court used the term "direction" in its written orders.

court has committed an error of law, to be reviewed by appellate courts de novo." *In re Mark M.*, 365 Md. at 704-05.

For instance, in *In re Justin D.*, 357 Md. 431 (2000), the juvenile court directed the Department of Social Services to determine the appropriate number of additional visitations and the conditions for those visitations. *Id.* at 443. The Court of Appeals noted that "[w]hen there is evidence that the child has been abused or neglected, or is in some danger of abuse or neglect, . . . the court's role is 'necessarily more pro-active'" and has "a clear and continuous supervisory role to play." *Id.* at 448-49. The Court held that the court's order was too broad, explaining that "the court may not delegate its responsibility to determine the minimal level of appropriate contact between the child and his or her parent or other guardian" and that the court must determine, "at least, the minimal amount of visitation that is appropriate . . . as well as any basic conditions that it believes, as a minimum, should be imposed." *Id.* at 449-50.

Similarly, in *In re Mark M.*, 365 Md. 687 (2001), a juvenile court declared in a CINA proceeding that "[v]isitation will not occur until [the child's] therapist recommends it." *Id.* at 703. The Court of Appeals reaffirmed that where prior abuse or neglect is evidenced, § 9-101(b) requires the court to find whether "there is no likelihood of further child abuse or neglect by the party" before granting visitation and that "[t]he court cannot delegate this determination to a non-judicial agency or an independent party." *Id.* at 708. The Court thus held that the juvenile court improperly delegated its statutory obligation. *Id.*

In *In re Caya B.*, 153 Md. App. 63 (2003), a juvenile court granted custody and guardianship to the child's maternal aunt and uncle and closed the case. *Id.* at 73. Regarding visitation, the juvenile court stated that "visitation could 'be done in some unofficial way,'" *id.*, which essentially left the matter of visitation to the aunt and uncle. *See id.* at 81. Applying the principles established in *In re Justin D.* and *In re Mark M.*, this Court held that the juvenile court erred, reasoning:

> Although the [juvenile] court was authorized to close the case absent a finding of good cause not to do so, the closure did not affect [the mother]'s parental rights. The [juvenile] court had discretion either to order formal visitation or to deny visitation as no longer appropriate. It did not have discretion to leave the matter in the hands of [the aunt and uncle].

In re Caya B., 153 Md. App. at 81-82 (citation omitted).[13]

[13] The Department argues that courts have "a great deal of flexibility," *In re Justin D.*, 357 Md. at 447, when ordering visitation and it is well within the court's discretion to allow the aunt and uncle to determine the visitation arrangements. We reject this argument. Although the Court of Appeals in *In re Justin D.* recognized that courts have flexibility in crafting visitation orders and may often defer to the parties, it also reasoned that such flexibility exists only when there is no "evidence of past or potential abuse or neglect" and "there is . . . no real concern about the child's safety." 357 Md. at 447-48. As previously explained, when there is evidence of abuse or neglect, "the court has a clear and continuous supervisory role to play." *Id.* at 449. In this setting, "the court may not delegate its [judicial authority] to determine the minimal level of appropriate contact between the child and his or her parent." *Id.*

The children's counsel argues that the principle established in *In re Justin D.* and *In re Mark M.* only concerns ongoing cases, whereas the court in the instant case ordered the CINA case to be closed. We do not find this argument persuasive. In *In re Caya B.*, where the juvenile court closed a CINA case, this Court explained that the court had discretion to order or deny visitation, but it did not have the discretion to delegate its judicial authority to a non-judicial person; a juvenile court does not have the discretion to delegate its judicial authority merely because a child's CINA case is closed. *See* 153 Md. App. at 81. In the instant case, the children's counsel does not present any legal basis or compelling reason to deviate from *In re Caya B.*

In accord with the above-discussed cases,[14] we hold that the court improperly delegated its authority to the aunt and uncle.

In sum, we affirm the court's award of custody and guardianship to the children's maternal aunt and uncle and vacate the portions of the court's Permanency Planning Review Hearing Closure Order and Custody and Guardianship Order that ordered visitation to be by agreement between Mother and the aunt and uncle and under the direction of the aunt and uncle. We remand the case for the court to order supervised visitation and other conditions of visitation the juvenile court finds appropriate not inconsistent with this opinion.

THE JUVENILE COURT FOR MONTGOMERY COUNTY'S AWARD OF CUSTODY AND GUARDIANSHIP TO THE CHILDREN'S AUNT AND UNCLE IS AFFIRMED;

THE PORTIONS OF THE JUVENILE COURT'S PERMANENCY PLANNING REVIEW HEARING CLOSURE ORDER AND CUSTODY AND GUARDIANSHIP ORDER THAT ORDERED THE VISITATION TO BE BY AGREEMENT BETWEEN MOTHER AND THE AUNT AND UNCLE AND UNDER THE DIRECTION OF THE AUNT AND UNCLE ARE VACATED;

CASE REMANDED FOR FURTHER PROCEEDINGS FOR THE JUVENILE

[14] Based on our review of the record, it does not appear that the parties brought the caselaw discussed in their briefs and this opinion to the attention of the juvenile court.

COURT TO ORDER SUPERVISED VISITATION AND OTHER CONDITIONS OF VISITATION THE JUVENILE COURT FINDS APPROPRIATE NOT INCONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY MONTGOMERY COUNTY.