UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1847

September Term, 2014

IN RE: JAZZLYNN L.

Meredith,
Berger,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: June 8, 2015

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Mark L. ("Mr. L."), appellant, and Jessica T. ("Ms. T.") are the natural parents of Jazzlynn L., born September 20, 2012. On December 6, 2013, Jazzlynn and her three older half-siblings[1] were removed from the custody of Mr. L. and Ms. T. after Jazzlynn's older sister disclosed that, for the past four years, she had been sexually abused by Mr. L. (who was a registered sex offender) and physically abused by Ms. T. Jazzlynn's sister also asserted that Mr. L. and Ms. T. regularly used illegal drugs in the motel room where the family resided and that Mr. L. and Ms. T. gave the children sleeping aids to make them sleep soundly.

On January 15, 2014, the Circuit Court for Cecil County, sitting as a Juvenile Court, determined that Jazzlynn and her siblings were Children in Need of Assistance ("CINA"), and assigned temporary care and custody of the children to the Cecil County Department of Social Services ("the Department").

Following a permanency planning hearing on October 1, 2014, the court determined that the most appropriate permanency plan for Jazzlynn would consist of a primary plan of adoption by a non-relative, and a secondary plan of guardianship by a relative. In his timely filed appeal of that permanency plan, Mr. L. presents three questions for our consideration:[2]

1. Did the juvenile court plainly err by failing to recuse?

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[1]Jazzlynn's half-siblings are: Madison (born September 16, 2008), Michael (born November 12, 2004), and Anna (born March 10, 2001). Jazzlynn's half-siblings are the natural children of Ms. T. and Burns F. ("Mr. F.").

[2]Ms. T. does not join in Mr. L's appeal of the juvenile court's order establishing Jazzlynn's permanency plan.

> 2. Did the juvenile court err by failing to consider on the record each factor set forth in Maryland Code, § 5-525 of the Family Law Article, in ruling on the child's permanency plan?
>
> 3. Did the juvenile court abuse its discretion by changing the permanency plan to adoption by a non-relative, as opposed to placement with a relative?

Because we conclude that Mr. L. acquiesced in the permanency plan adopted by the court, we shall decline to consider his arguments to the contrary on appeal. Moreover, we conclude that there is no merit to any of the questions raised by Mr. L. in his brief before this Court. We shall affirm the judgment of the circuit court.

ANALYSIS

Motion to Dismiss

At the permanency planning hearing on October 1, 2014, counsel for Mr. L. initially objected to the Department's recommendation that Jazzlynn's permanency plan reflect a primary goal of adoption by a non-relative. Mr. L. requested that the primary goal be adoption/guardianship by a relative, namely, his niece, Crystal N. ("Ms. N."), who resides in Connecticut. At the time of the hearing, the Department was in the process of obtaining an ICPC background check and home assessment of Ms. N. to determine whether she was an appropriate placement resource for Jazzlynn.[3] Mr. L.'s attorney asserted that "Maryland law is quite clear that relatives are given preference." Nevertheless, counsel indicated on the

[3] The ICPC is the Interstate Compact on the Placement of Children. *See In re Adoption/Guardianship No. 3598*, 347 Md. 295, 314-15 (1997) ("The primary purpose of the ICPC in Maryland is to assure that the child being placed receives 'the maximum opportunity to be placed in a suitable environment . . . with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirably degree and type of care.'" (quoting Fam. Law §5-602(1)) (footnote omitted)).

record that a permanency plan that included a concurrent plan of guardianship/adoption by a relative or non-relative, which would require the Department to continue the ICPC process to ensure that Mr. L.'s niece was fully considered as a potential placement resource for Jazzlynn, would be acceptable to Mr. L.

The juvenile court, in its oral comments and in its written order, required the Department to continue the ICPC process. Ultimately, the court ordered Jazzlynn's permanency plan to include a primary goal of adoption by a non-relative and a secondary goal of guardianship by a relative. In essence, the juvenile court adopted the concurrent goals that Mr. L. had requested through his attorney. As a consequence, the Department has moved to dismiss Mr. L.'s appeal. Although we agree that appellant's acquiescence in the relief granted may foreclose certain arguments on appeal, we do not agree that the right of appeal is foreclosed. Accordingly, we deny the Department's motion to dismiss.

I. Recusal

The Honorable Judge Jane Cairns Murray presided over Mr. L.'s violation of probation hearing on February 7, 2014. After finding Mr. L. guilty of violating the probation imposed upon him following his release from prison after a November 2008 sexual abuse conviction, Judge Murray sentenced Mr. L. to five years' incarceration. Judge Murray next presided over a review hearing in Jazzlynn's CINA case on April 2, 2014, at which time she determined that Jazzlynn and her siblings were still CINA. Judge Murray subsequently presided over Mr. L.'s plea hearing on June 10, 2014, where, pursuant to an *Alford* plea, Mr.

L. pled guilty to the second degree rape of Jazzlynn's oldest sister, Anna.[4] Judge Murray imposed a fifty-year sentence, all but twenty years suspended, for Mr. L.'s sexual abuse of Anna. Judge Murray also presided over the initial permanency planning hearing for Jazzlynn on October 1, 2014, at the conclusion of which she ordered the Department to pursue concurrent plans of guardianship by a relative, *i.e.,* Mr. L.'s niece, or adoption by a non-relative.

On appeal, Mr. L. contends that Judge Murray should have *sua sponte* recused herself from hearing Jazzlynn's CINA case because the judge had presided over Mr. L.'s criminal proceedings. Mr. L. does not contend that Judge Murray had any personal bias against him, or that she demonstrated any actual bias while presiding over Jazzlynn's CINA case. He asserts, however, that, by presiding over both appellant's criminal cases and Jazzlynn's CINA case, Judge Murray failed to maintain an "appearance of impartiality."

Mr. L. concedes in his brief that he never requested that Judge Murray recuse herself from Jazzlynn's CINA case. We conclude, therefore, that this issue was not properly preserved for appellate review. Md. Rule 8–131(a) ("Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *compare Traverso v. State*, 83 Md. App. 389, 394 (1990) (finding that "no issue concerning recusal [of the trial judge] has been preserved for [appellate] review"

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[4] *See Ward v. State*, 83 Md. App. 474, 478 (1990) ("[A]n *Alford* plea, [is] a specialized type of guilty plea where the defendant, although pleading guilty, continues to deny his or her guilt, but enters the plea to avoid the threat of greater punishment." (citing *North Carolina v. Alford*, 400 U.S. 25, 37 (1970))).

because the appellant "never asked the trial judge to recuse himself"), *with Miles v. State*, 88 Md. App. 360, 368 (1991) (finding the filing of an affidavit in the circuit court asserting bias and prejudice of a trial judge to be "sufficient to preserve the recusal issue").

Mr. L. requests that this Court undertake plain error review of Judge Murray's failure to recuse herself from Jazzlynn's CINA case. We note, however, that CINA actions "are non-punitive, civil actions[,]" with the purpose of "protect[ing] the best interest of the child in question." *In re Blessen H*., 163 Md. App. 1, 15 (2005), *aff'd*, 392 Md. 684 (2006). To our knowledge, no Maryland appellate court has ever undertaken plain error review in a civil case. *See, e.g., Walker v. State*, 343 Md. 629, 647 (1996) (recognizing that Md. Rule 8-131(a), authorizing a court to take cognizance of plain error despite the waiver of an issue, applies only to direct appellate review of a criminal judgment); *Gittin v. Haught Bingham*, 123 Md. App. 44, 50 (1998) (considering a party's claim that the civil court provided an allegedly erroneous jury instruction, the Court opined, "no Maryland court has adopted the 'plain error' approach urged by appellant and no Maryland procedural rule provides the relief appellant seeks"). We conclude that plain error review is not appropriate in the instant case. As we observed in *Karanikas v. Cartwright*, 209 Md. App. 571, 579-80 (2013), there is a strong presumption that a trial judge is impartial. Because of that strong presumption, we decline to consider appellant's unpreserved assertion that Judge Murray erred by failing to recuse herself. *See also In re Elrich S*., 416 Md. 15, 33-34 (2010) (articulating standard of review).

II. Consideration of Statutory Factors

Mr. L. contends that the juvenile court failed to make express findings of fact on the record, as required by Maryland Code (2001, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 3-823(e)(2), to support its determination regarding what placement was in Jazzlynn's best interest.[5] Suggesting that the court was "perhaps already influenced to rule against [him] because of its saturation-level exposure to his criminal cases," Mr. L. asserts that the court failed to consider any factor "other than Jazzlynn's attachment to her siblings in arriving at its decision." We disagree with his assessment of the court's ruling.

Section 5-525(f)(1) of the Family Law Article ("F.L.") sets forth the following factors to guide the court's determination of a child's best interest when creating a permanency plan:

> (i) the child's ability to be safe and healthy in the home of the child's parent;
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> (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
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> (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;
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> (iv) the length of time the child has resided with the current caregiver;
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> (v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and
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> (vi) the potential harm to the child by remaining in State custody for an excessive period of time.

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[5] CJP § 3-823(e)(2) requires that "[i]n determining the child's permanency plan, the court ***shall consider*** the factors specified in § 5-525(f)(1) of the Family Law Article." (Emphasis added.)

In its Permanency Planning Hearing Order, the juvenile court made the following findings of fact that are relevant to our analysis:

> 8. The court finds that the respondent minor child, Jazzlynn, age 2, has no ability to be safe in the home of her natural parents, as demonstrated by the facts which brought the child into care.
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> 9. The court finds that the respondent minor child, Jazzlynn, is attached to her siblings, and has emotional ties to her natural mother.
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> 10. The court finds that the respondent minor child, Jazzlynn, is doing well in her current foster care placement, and is described as a happy and healthy two year old, who is meeting all developmental milestones.
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> 11. The court finds that the respondent minor child, Jazzlynn, has been in her current placement for nine months. During this time she has also been in regular contact with another foster family that is a potential pre-adopt placement. She appears comfortable with this family, and the court finds that she could be moved to this pre-adopt home without being subjected to emotional, developmental or educational harm.
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> 12. The court finds that the respondent minor child, Jazzlynn, would be subjected to harm by remaining in state care for an excessive period of time.

Although the court's oral comments on the record at the conclusion of the permanency planning hearing focused on Jazzlynn's emotional attachment to her siblings, it is clear from the court's written order that the juvenile court properly "consider[ed] the factors specified in §5-525(f)(1) of the Family Law Article" in making its determination regarding the placement that would be in Jazzlynn's best interest. CJP § 3-823(e)(2). As the Court of Appeals has previously explained, a trial court's written order supersedes its oral ruling. *See Rohrbeck v. Rohrbeck*, 318 Md. 28, 42 (1989) ("Lest there be any lingering question about the matter, we now make clear that, whenever the court, whether in a written opinion or in

remarks from the bench, indicates that a written order embodying the decision is to follow, a final judgment does not arise prior to the signing and filing of the anticipated order . . . ."). We perceive no error in the court's explanation of its reasons for adopting the permanency planning order.

III. Goals of Jazzlynn's Permanency Plan

In Jazzlynn's permanency plan, the juvenile court ordered the Department to pursue a primary goal of adoption by a non-relative and a secondary goal of guardianship by a relative. Mr. L. contends that the juvenile court's order violates the statutorily established priority order for out-of-home placements of children who have been determined to be CINA.[6] Mr. L. argues that the court's failure to follow the priority listed in CJP § 3-823(e) constitutes an abuse of discretion.

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[6] CJP § 3-823(e) provides in pertinent part:

(1) At a permanency plan hearing, the court shall:

(i) Determine the child's permanency plan, which to the extent consistent with the best interests of the child, may be, in descending order of priority:

1. Reunification with the parent or guardian;

2. Placement with a relative for:

A. Adoption; or

B. Custody or guardianship under §3-819.2 of this subtitle;

3. Adoption by a non-relative . . .

As noted above, counsel for Mr. L. expressly stated on the record at the hearing that he was asking for "a concurrent plan" of "guardianship/adoption by a relative or non-relative." Having made that concession, appellant cannot now argue that the court erred by adopting a concurrent plan.

Moreover, in the instant case, the evidence presented to the court indicated that Jazzlynn has thrived in her foster care placement. She has bonded to her foster family and to the foster family who provides respite care for her foster family, who want to adopt her. Jazzlynn has also continued to have frequent contact with her siblings, with whom she has a very close bond. The Department argued that Jazzlynn's best interest would be best served by maintaining her family connections through regular visitation with her sisters and brother. Jazzlynn's mother, Ms. T., agreed to Jazzlynn's placement in a Maryland foster home under a permanency plan of adoption by a non-relative in the hope that Jazzlynn would remain near her three older half-siblings, who all live in Maryland foster homes, because Jazzlynn is strongly attached to her sisters and brother. Jazzlynn's attorney also supported such a placement.

Mr. L. alone requested that Jazzlynn be placed with his niece, Crystal N., at her home in Connecticut. Ms. N. did not attend the permanency planning hearing, but her mother testified as to her willingness to assume responsibility for raising Jazzlynn along with her own children in her "huge" home in Connecticut. After speaking with Ms. N., the Department had initiated the paperwork necessary to obtain a safety investigation of Ms. N. and her household under the ICPC. Although Ms. N. stated that she would not allow

Jazzlynn to see her parents, it was unclear whether she would be willing to maintain visitation between Jazzlynn and her siblings. There was also some evidence suggesting that Ms. N. had previously engaged in altercations with Ms. T. and Jazzlynn's sister, Anna, although Ms. N.'s mother denied knowledge of such history.

After hearing all the evidence and the arguments of counsel, the court stated that it was "somewhat troubled" by the lack of information about Ms. N. Nevertheless, the court ordered the Department to complete the ICPC process, as requested by Mr. L. The court observed the close bond between Jazzlynn and her half-siblings and opined that "[these] children have been through a lot. They need each other, the four of them do . . . . [They] need to see each other, and need to be part of one another's family." The court also adopted the Department's position that "it is [not] in the best interest of [Jazzlynn] to be separated from her siblings from far away." Ultimately, the court concluded that an initial permanency plan with the primary goal of adoption by a non-relative and a secondary plan of guardianship by a relative best served Jazzlynn's interests.

In reviewing a permanency plan established by the order of the juvenile court, this court utilizes a three-tiered, interrelated standard of review:

> "[First, w]hen the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. [Second, i]f it appears that the [juvenile 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 [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion."

In re Yve S., 373 Md. 551, 586 (2003) (quoting *Davis v. Davis*, 280 Md. 119, 126 (1977)); *see also In re Shirley B.*, 419 Md. 1, 19 (2011) (stating that to warrant reversal, the trial court's decision must "be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable" (quoting *In re Yve S.,* 373 Md. at 583-84)).

CJP § 3-823(e)(l)(i), provides that the priority in the statute is to be followed only to the extent that it is "consistent with the best interest of the child." Based on all the evidence presented at the hearing, we are persuaded that the juvenile court's determination that it was in Jazzlynn's best interest to remain in Maryland where she could continue to engage in regular visitation with her half-siblings would better serve Jazzlynn's interests than being placed with one of her father's relatives in Connecticut, was not clearly erroneous.[7]

We conclude that the juvenile court did not abuse its discretion by ordering a primary plan of adoption by a non-relative and a secondary plan of guardianship by a relative.

MOTION TO DISMISS DENIED. JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

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[7]In addition to the difficulties presented to maintaining regular visitation that would be posed by the distance between Maryland and Connecticut, we note that Ms. N. is not related in any way to Jazzlynn's half-siblings, and, consequently, might have little motivation to maintain contact with them and their extended family or to encourage Jazzlynn, who is not yet three-years-old, to do so.