

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1892

September Term, 2017

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IN RE: M.H. AND T.H.

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Berger,  
Reed,  
Zarnoch, Robert A.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Berger, J.

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Filed: May 11, 2018

This appeal arises from an order of the Circuit Court for Prince George’s County, sitting as a juvenile court, finding respondents M.H. and T.H. to be Children in Need of Assistance (“CINA”) and awarding custody to the Prince George’s County Department of Social Services (“the Department”).<sup>1</sup> Ms. H., mother of M.H. and T.H. (“Mother”), appealed the juvenile court’s order. Mr. H., both children’s father (“Father”), was also a party to the CINA proceeding below but did not appeal the juvenile court’s CINA determination. On appeal, Mother presents two questions for our consideration:

1. Did the court err by finding the mother was “unable” to provide proper care for her children thus rendering them to be CINA?
2. Assuming the finding of CINA was correct, did the court err by removing the children from the mother’s physical custody?

For the reasons explained herein, we shall answer the first question in the affirmative and hold that the circuit court erred by finding the children CINA. Accordingly, we shall not address the second question.

### **FACTS AND PROCEEDINGS**

Mother and Father are the parents of M.H., born July 30, 2014, and J.H., born November 2, 2015. The incident precipitating the filing of a CINA petition in this case occurred on May 3, 2017 when Father reportedly strangled M.H., who was approximately two years and 9 months old at the time.<sup>2</sup> At the time, Mother, Father, and the children

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<sup>1</sup> Out of respect for the privacy interests of the parties, we shall not refer to them by name.

<sup>2</sup> As we shall discuss *infra*, this was the second incidence of abuse by Father.

resided with the paternal grandparents in a home on Andrews Air Force Base in Prince George’s County, Maryland.

On the morning of May 3, 2017, the children woke up at approximately 9:30 a.m. Father took M.H. into the bathroom shortly thereafter to work on M.H.’s toilet training. A few minutes later, Father told Mother that he was going to shower with M.H. Mother was downstairs when she heard an “abnormal cry” from the bathroom upstairs. Mother explained that the cry was “choppy” and had a different pitch than M.H.’s typical cry. Mother, accompanied by T.H., went upstairs to the bathroom and observed Father standing outside of the bathtub while holding M.H. in the tub under the spray from the shower. M.H. was visibly upset and crying, and he vomited once. Mother asked Father to “give [M.H.] a break.”

Mother noticed that M.H. had some marks around his eyes and on his face and neck. Mother turned off the water and took M.H. out of the bathtub. She wrapped him in a towel and comforted him. Mother asked Father to take T.H. downstairs. After Father left with T.H., Mother asked M.H. whether Father had hurt him. M.H. did not provide a clear response.<sup>3</sup>

Mother brought M.H. downstairs and asked the paternal grandmother what she thought the marks on M.H. could be. The paternal grandmother thought that the marks

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<sup>3</sup> Mother testified that M.H. “either did not say anything or he did say no.”

could be an allergic reaction or petechiae caused by excessive coughing.<sup>4</sup> Mother went into a separate room and telephoned her father. Mother explained to her father what had happened and asked him for confirmation that she should take M.H. to the hospital. Mother’s father agreed with Mother that she should take M.H. to the hospital.

Mother and Father drove together to the hospital with M.H.<sup>5</sup> Mother explained that she did not want to leave Father alone with either of the children, so she determined that it was best to leave T.H. in the care of the paternal grandparents while both parents took M.H. to the hospital. After arriving at the hospital, Mother completed an intake form. On the intake form, Mother wrote “possible abuse (father)” in small letters. Mother explained that she did this in order to alert hospital staff that she suspected abuse by Father and to ensure that Father would “not come into the actual emergency department with” Mother and M.H.

Shortly thereafter, Mother and M.H. were called back into the emergency department. Mother thanked hospital staff “for making sure that [Father] did not come back.” After examining M.H., hospital staff concluded that M.H. had been strangled. While at the hospital, Mother was informally interviewed by a Family Advocacy<sup>6</sup> staff

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<sup>4</sup> Petechiae are “minute reddish or purplish spot[s] containing blood that appear[] in skin or mucous membrane as a result of localized hemorrhage.” Petechia, Merriam-Webster, <https://www.merriam-webster.com/dictionary/petechia>.

<sup>5</sup> Mother testified that she opted to drive M.H. to the hospital on base rather than telephoning 911 because 911 would direct to civilian police who were without jurisdiction on the military base where the family resided. Mother also testified that she did not want to call 911 and involve authorities because she feared that Father might harm M.H. again.

<sup>6</sup> Mother explained that Family Advocacy “is essentially the go-between for civilian and military personnel. It’s their job to report any suspected abuse to the necessary parties.”

member as well as by Robbie Barnes, a Child Protective Services worker from the Department. Later that day, Mother sought and obtained a protective order against Father. The Air Force assisted Mother with locating a hotel room in which she could stay with her children on the evening of May 3.

Ms. Barnes continued to investigate M.H.'s case and learned that this was not the first time that M.H. had been abused by Father. M.H. had previously been removed from his parents at the age of four months, after he was discovered to have four fractures in varying stages of healing. M.H. was placed in foster care in Virginia, where the family resided at the time. Father was charged with child abuse in a military proceeding. He was found guilty and sentenced to “between 120 and 150 days in a Naval brig.” In addition, Father received a “bad conduct discharge” from the Air Force “for conduct that’s unbecoming of a military member.” M.H. remained in foster care for four hundred thirty-four days before returning to the parents. During that time, T.H. was born. T.H. was placed in foster care for one week following his birth as a precaution against “potential for abuse.”

Only Father was found to have abused M.H. The record is silent as to why M.H. was removed from both parents for over eighteen months. Mother explained that during the pendency of the Virginia case, both parents were required to participate in evaluations, take parenting classes, and attend therapy. In addition, Father was diagnosed with depression and began taking medication. After the children were returned to the parents, Mother did not believe the children were in danger because Father was taking medication

and not showing any signs of aggression. The Virginia case ultimately was closed in January 2017, with full custody being returned to both Mother and Father.

On May 3, 2017, the Department initially entered into a safety plan with Mother that would allow the children to remain in Mother’s care. Subsequently, Ms. Barnes began to be concerned about certain inconsistencies between Mother’s version of events and the timeline provided by Father and the paternal grandmother. Ms. Barnes also learned about the prior removal of the children in Virginia. For these reasons, the children were placed in shelter care on May 4, 2017.<sup>7</sup> On May 5, the Department filed CINA petitions for both children. The petitions alleged that both M.H. and T.H. were CINA based upon the May 3, 2017 incident.

An adjudication hearing was held on May 22, 2017. The Department initially alleged abuse by Father but did not allege any wrongdoing on the part of Mother. On the day of the adjudication hearing, the Department amended its CINA petitions to include an allegation that Mother had failed to adequately protect the children. The juvenile court heard testimony from Detective James Sherman, a military police detective for the Security Forces Unit on Joint Base Andrews and the officer who initially investigated the incident; the Department’s Child Protective Services worker, Ms. Barnes; and Mother. The specific facts alleged regarding the May 3, 2017 incident were largely undisputed and consistent with the summary presented above. During the adjudication, in addition to the facts

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<sup>7</sup> Shelter care is “a temporary placement of a child outside of the home at any time before disposition.” Md. Code (2013 Repl. Vol.), § 3-801(aa) of the Courts and Judicial Proceedings Article.

discussed *supra*, evidence was presented demonstrating that Father had not been taking his medication for some period of time prior to the May 3, 2017 incident. Mother acknowledged that she knew Father had run out of medication and had not refilled his prescription. Mother also acknowledged that, as a child, she had been abused and spent a period of time in foster care.

In its closing argument, the Department argued that Mother failed to adequately protect the children due to the delay between when she suspected M.H. had been strangled and when Mother actually brought M.H. to the hospital. The Department emphasized that Mother “had time to get dressed, time to talk to her mother-in-law about what the problem could be, whether or not it was a reaction.” The Department further emphasized that Mother “called her father . . . [t]o find out if she should take [M.H.] to the hospital or to confirm that she should.” The Department argued that, given the family’s history, “there would have been no question” that abuse occurred and Mother had an obligation to seek medical attention immediately.

The juvenile court sustained the Department’s allegations as to Father, but not the allegation that Mother failed to protect the children. The court explained:

I sustain the petition as to the father, the allegations as to the father.

As to the mother’s failure to protect, it is complicated because I don’t find that the actions the mother took on May 3rd -- the 45 minutes it took her to get the child to the hospital and the actions she took were unreasonable. Even in light -- although, again, armchair quarter backing, I do agree with the Department that she, given the history of her husband and the minor child in this case, had enough notice, when she saw that

he wasn't on his medication, that it could possibly -- that a situation could possibly escalate.

That couple[d] with the fact that she still, this [c]ourt finds, is -- I didn't see it anywhere in the report that she herself was in foster care for a certain amount of time and she herself witnessed domestic violence in her own family.

So, to that extent, her delayed reaction, the [c]ourt is concerned about her not picking up on the fact that her husband wasn't taking the medication and that her history is kind of clouding her judgment to a certain extent. However, I don't find that the time that she took was unreasonable.

But I say that with a caution that the fact that I think she has some unresolved issues regarding her own witnessing domestic violence, being a victim of domestic violence herself or child abuse herself that she testified to, being in foster care herself. I think that does impact on her ability her minor child.

And I think -- maybe I am getting ahead of myself -- she needs some therapy as to that, because those are unresolved issues that are going to impact her ability to protect her children.

But I don't find the action that she took in this particular case to be unreasonable, because it was a short amount of time. It wasn't a couple of days. Even with the history I think that her -- when I say I think, I mean the [c]ourt feels that her history of witnessing domestic violence, her history of being a person of child abuse and her history of being in foster care does impact her ability.

So, to a certain extent, the [c]ourt is not finding that she failed to protect her children because it was a short window, but only because it was a short window. But I still think moving forward those issues need to be resolved.

The juvenile court subsequently issued a written order memorializing its oral ruling. The court sustained the allegations relating to Father's strangling of M.H. and expressly “**did not** find that the mother failed to adequately protect the child.” (Emphasis in original.)



The juvenile court found good cause to delay disposition “to allow time to determine if the mother is ready, willing, and able to provide for the needs” of the children. Mother was granted liberal, unsupervised, day visits in the community. The juvenile court further ordered Mother to undergo a psychological evaluation.

During the time period between the adjudication hearing and the disposition hearing, the children had various appointments with medical, vision, and dental providers.<sup>8</sup> M.H. was diagnosed with speech, motor, and developmental delays, as well as macrocephaly.<sup>9</sup> M.H. was referred to the Maryland Infants and Toddlers Program for further evaluation. The primary care physician also recommended that M.H. be evaluated by a neurologist and a developmental pediatrician, as well as participate in play therapy. Following a neurological examination, M.H. was diagnosed with low muscle tone, which causes him to fall frequently.<sup>10</sup>

The Infants and Toddlers evaluation similarly revealed delays in cognitive thinking, receptive and expressive language, social functioning, and motor skills. The evaluation demonstrated that M.H. functioned globally as a one-and-one-half to two-year-old child.

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<sup>8</sup> At the adjudication hearing, Mother testified that she could not recall whether the children were up to date on their yearly well-child appointments, nor was she certain whether the children’s immunizations were up to date. Mother attributed the uncertainty to complications from changing medical insurers and transferring locations within the military healthcare system.

<sup>9</sup> Macrocephaly is a larger than normal head circumference.

<sup>10</sup> M.H. wears a bicycle helmet while outdoors to protect his head from falls.

As a result, M.H. qualified for special education services and was scheduled to begin preschool in the fall of 2017.

Myra Macoy Cleary, a Certified Pediatric Nurse Practitioner at Children’s National Center of Neuroscience and Behavioral Medicine, recommended that “[d]ue to the profound nature of [M.H.]’s . . . global developmental delays, it is medically necessary that he stay in the stable environment that he is already in, until all medical subspecialists and consultations have been completed. Moving him again may not be in his best interests.” Ms. Cleary recommended that various additional medical consultations be completed prior to making any decision on M.H.’s placement.<sup>11</sup>

T.H. was also diagnosed with global developmental delays and was determined to be eligible for various early intervention services. T.H.’s delays are in the areas of cognitive thinking, receptive and expressive language, communication, self-care, and motor skills. T.H. also was discovered to have low muscle tone. Medical professionals recommended that T.H. receive speech therapy, occupational therapy, and physical therapy. Ms. Cleary made the same recommendation for T.H. as for M.H. with respect to stability, recommending that T.H. “stay in the stable environment that he is already in, until all medical subspecialists and consultations have been completed.” Ms. Cleary also opined that “[m]oving [T.H.] again may not be in his best interests.”

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<sup>11</sup> Ms. Cleary recommended M.H. receive medical consultations, evaluations, and/or services with the following providers: audiology, speech and language, genetics, physical medication and rehabilitation, occupational therapy, neuropsychological or autism, private speech therapy, follow up neurology, and a dental appointment.

Mother participated in a psychological evaluation administered by Catelyn Carpenter, M.A., a doctoral clinical psychology intern.<sup>12</sup> Mother obtained a full-scale IQ score within the average range of intellectual functioning. One of Mother’s sub-scale results fell within the low-average range, but most were in the average range. Ms. Carpenter concluded that Mother “appears to be experience moderate levels of depressive symptoms and severe levels of anxiety.” Ms. Carpenter explained her conclusions as follows:

[Mother’s] symptoms of anxiety and depression are likely trigger[ed] by her children being placed into foster care and her interpersonal conflicts with her husband. [Mother] often reported missing her children and feeling as though she has failed her children. She also appears to be experiencing some anxiety in regards to her ability to be autonomous and mature, likely triggered by her recent separation from her husband. She is likely to cope with her feelings of anxiety through withdrawing from others.

[Mother] meets criteria for a F43.23 Adjustment Disorder with mixed anxiety and depressed mood. [Mother] endorsed having difficulty sleeping, feeling agitated, and feeling sad since her children have been placed in foster care. Due to her children being placed into foster care, [Mother] would benefit from individual psychotherapy to further help her cope. [Mother] would benefit [from] independent living skills training which includes budgeting, home making, and other skill sets. [Mother] has the intellectual capacity and emotional stability to begin the process of reunification with her children with proper accommodations and supports. The process should be graduated.

Ms. Carpenter made the following two specific recommendations:

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<sup>12</sup> Ms. Carpenter was acting under the supervision of a licensed clinical psychologist.

1. [Mother] would benefit from individual psychotherapy to help her further develop effective coping skills.
2. [Mother] would benefit from independent living skills training.

During the time period between adjudication and disposition, Mother participated in unsupervised day visits with the children. On three occasions, Mother terminated the visits early “because on one occasion she felt that the children were becoming out of control at Barnes and Nob[le]” on another occasion “she felt the children were sleepy,” and a third time “because she felt [the children] were cranky and needed to nap.”<sup>13</sup> Mother attended certain of the children’s medical appointments, including M.H.’s IEP meeting, M.H.’s MRI appointment, T.H.’s infants and toddler’s assessment, and T.H.’s neurodevelopment appointment. Mother’s attendance was inconsistent with respect to other medical appointments. Although the social worker recommended that Mother attend all of the children’s appointments in order to learn about the children’s special needs, Mother did not attend all of the appointments. The Department’s social worker expressed concerns that Mother would “lack the ability to implement the required medical and educational requirements” for the children if she did not engage with their medical provides.

The parties appeared before the juvenile court on September 1, 2017 for disposition.<sup>14</sup> The parties did not present any testimony. Instead, the juvenile court

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<sup>13</sup> The descriptions of the reasons for the early termination of certain visits are taken from a report prepared by the Department’s social worker.

<sup>14</sup> The disposition was originally scheduled for June 27, 2017, but it was postponed because Mother’s psychological evaluation had not yet been completed.

considered various reports submitted by the Department, as well as Mother’s psychological evaluation report and the children’s medical records, the details of which are summarized *supra*. The juvenile court heard argument from counsel for the Department, counsel for the children, counsel for Mother, and counsel for Father.

The Department argued that M.H. and T.H. were CINA due to the history of M.H.’s abuse while Mother was home. The Department asked the court to implement the recommendations from Ms. Carpenter’s psychological evaluation report and require Mother to participate in individual psychotherapy and independent skills training. The Department asserted that the children were CINA because Mother was not able to care for the children. The Department argued:

[A]s to the mother, the Department believes **that although she is ready, she is willing, she is not able**, and we look at what is provided in her psychological. It really makes it clear that mother needs some help to get to the point whereby she would be a proper person for caring for the children.

(Emphasis supplied.)

Counsel for the respondent children agreed that M.H. and T.H. should be found CINA. Children’s counsel emphasized the children’s global developmental delays, relying upon Ms. Cleary’s determination that “it is medically necessary that [both children] stay in the stable environment that [they are] already in, until all medical subspecialists and consultations have been completed,” as well as Ms. Cleary’s comment that “[m]oving [the children] again may not be in [their] best interests.” Children’s counsel emphasized that the children’s developmental delays were not diagnosed until after they were brought into the care of the Department. Children’s counsel asked the court to require Mother to

participate in parenting training specifically tailored to how to work with children with special needs.

Mother, through counsel, argued that the children did not meet the statutory definition of CINA. Mother acknowledged that the psychological evaluation “does identify several issues that [Mother] has, [but] it does not note anything of significant concern with regard to her ability to care for the children, nor does it really pertain to anything that would indicate that she had any involvement in either the abuse or neglect of these children.” Mother emphasized that “the mixed anxiety and depression” identified in the evaluation “is due to the separation of [Mother] from her children and encountering this child welfare process yet again, in addition to the fact that she was herself once a foster child and suffered abuse.” Mother further emphasized that she had complied with everything that the court had asked her to do.

Mother had relocated to Virginia before the disposition hearing. With respect to the children’s diagnosed developmental delays, Mother argued that she “recognizes those issues and is absolutely willing to follow-up on those issues in the Commonwealth of Virginia where she would have available to her an array of services that are funded through the military’s medical insurance, TriCare. She can receive those services for the children and set them up in Hampton, Virginia where she resides.” Mother further argued:

[T]he demonstration in this case that [Mother] requires anything to ameliorate any of the concerns that were raised pursuant to the petition, there are no concerns, Your Honor. Any issues raised by the psychological are natural progression from the fact that [Mother] has been separated from her children.

So, Your Honor, we -- well, the law, Your Honor, is very clear; that in order for the Court to find these children in need of assistance they have to have been abused or neglected, and because of that, the mother, or parent, is not ready, willing and able to care for these children. But [Mother] is absolutely ready, willing and completely able to care for these children.

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So, Your Honor, I think all of the evidence supports that these children should not be found in need of assistance, and there are no significant concerns with regard to [Mother] or her ability to care for these children. So, I am asking for the [c]ourt to find these children are not in need of the [c]ourt's assistance.

Father, through counsel, also supported the children being placed with Mother.

The juvenile court ultimately determined that the children were CINA. The court “agree[d] with the Department that the mother, at this point in time, is not able to appropriately care for the minor children.” The court explained that “the reason, in part, is also because of the significant developmental delays and issues that are with the children. That, coupled with the fact that the mother still is suffering from anxiety [and] depression.”

The court continued:

And, yes, part of that is because of the situation. But when you have got two children who are extreme special needs children and you are dealing with a stressful situation, as she is now with her marriage to her husband, his impending criminal trial, and things of that nature, that creates stress. The [c]ourt just wants to make sure that the mother has the appropriate tools to care for the children, who have special needs.

I would say that the mother looks better than she has. Looks meaning not just what she is wearing, but her affect is much better than it has been the past two times the [c]ourt has seen her. The [c]ourt just wants to make sure that she is fully equipped with an arsenal, that when the time comes for her to have her children back, that she is able to deal with all of the

issues, because it is not easy, and she may not have the husband there.

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And so, for that reason, the [c]ourt is going to find that the children are CINA, because the [c]ourt finds that the mother is not yet, at this point in time, adequately able to care for the children in this case. There is no dispute that the children have been abused or neglected -- I mean, abused in this case. And so, the [c]ourt just has some concerns, and that is why the [c]ourt wanted to see the psychological.

The court continued the children’s custody with the Department.<sup>15</sup> Mother noted a timely appeal.<sup>16</sup>

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<sup>15</sup> The court emphasized that the Department needed to “ma[k]e efforts to get this case down to Virginia,” where Mother had relocated. The court requested that the Department offer “progress reports . . . as to what you are doing to make sure that Virginia can take over this case actively, they know everything about it and it doesn’t fall through the cracks.” The record is silent as to whether the children were actually relocated to Virginia at any point.

<sup>16</sup> The Department and the respondent children each submitted an appendix with their brief. The appendices included various pages reproduced from the record. Mother filed a motion to strike portions of the appendices, arguing that certain documents of the appendices were not permitted to be included pursuant to Maryland Rule 8-504(b) and *Eiland v. State*, 92 Md. App. 56 (1992), *reversed on other grounds by Tyler v. State*, 330 Md. 21 (1993). We are unpersuaded by Mother’s contention that portions of the appendices should be stricken. In *Eiland*, we construed an earlier version of a rule applicable to only criminal cases. Furthermore, the content included in the appendices is drawn from the record and was helpful to this Court in the evaluation of the issues presented on appeal. Accordingly, we deny Mother’s motion to strike portions of appellees’ appendices.



## STANDARD OF REVIEW

In child custody, CINA, and termination of parental rights cases, this court utilizes three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). The Court of Appeals described the three interrelated standards as follows:

We point out three distinct aspects of review in child custody disputes. 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.* at 586.

## DISCUSSION

As a parent of M.H. and T.H., Mother is vested with a constitutionally protected fundamental liberty interest in the care and custody of her children, without undue interference by the State. *Koshko v. Haining*, 398 Md. 404, 422 (2007) (explaining that parents “are invested with the fundamental right of parents generally to direct and control the upbringing of their children”); *In re Yve S.*, *supra*, 373 Md. at 565 (“Certain fundamental rights are protected under the U.S. Constitution, and among those rights are a parent’s Fourteenth Amendment liberty interest in raising his or her children as he or she sees fit, without undue interference by the State.”). Indeed, the United States Supreme Court has explained that “the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this

Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). “This liberty interest provides the constitutional context which looms over any judicial rumination on the question of custody or visitation.” *Koshko, supra*, 398 Md. at 423.

This liberty interest, though fundamental, is not absolute. *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 497 (2007). A parent’s liberty interest in the care and custody of her children “must be balanced against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect.” *Id.*

“The Maryland General Assembly has enacted a comprehensive statutory scheme to address those situations where a child is at risk because of his or her parents’ inability or unwillingness to care for him or her.” *In re Adoption/Guardianship No. 10941 in Circuit Court for Montgomery Cty.*, 335 Md. 99, 103 (1994). Pursuant to this statutory scheme, a child can be found to be a “child in need of assistance,” or “CINA.” A CINA is

[A] child who requires court intervention because:

- (1) [t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
- (2) [t]he child’s parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child’s needs.

Md. Code (2013 Repl. Vol.), § 3-901(f) of the Courts and Judicial Proceedings Article (“CJP”).

CINA cases involved a two-step process. At the adjudication hearing, the court determines whether the allegations raised in the CINA petition have been established by a

preponderance of the evidence. CJP § 3-817. “The rules of evidence under Title 5 of the Maryland Rules shall apply at an adjudicatory hearing.” CJP § 3-817(b).

Unless a CINA petition is dismissed, the court must subsequently hold a disposition hearing. CJP § 3-819. In making a disposition on a CINA petition, the court shall:

- (i) Find that the child is not in need of assistance and, except as provided in subsection (e) of this section, dismiss the case;
- (ii) Hold in abeyance a finding on whether a child with a developmental disability or a mental illness is a child in need of assistance . . . ; or,
- (iii) Subject to paragraph (2) of this subsection, find that the child is in need of assistance . . . .

CJP § 3-819(b)(1). “If the allegations in the petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may award custody to the other parent.” CJP § 3-819(e). In contrast to CINA adjudication hearings, which require strict application of the rules of evidence, the rules of evidence are discretionary in CINA disposition hearings. *In re Blessen H.*, 392 Md. 684, 690-91 (2006).

The record, summarized in detail above, reflects that evidence was adduced to demonstrate Father abused M.H. on multiple occasions. The specific allegations sustained by the juvenile court at adjudication support the inference that Father was unable to give proper care and attention to the children. Critically, however, as we shall explain, none of the factual allegations sustained by the juvenile court in any way support a finding that

Mother was unable to provide proper care and attention to the children. Indeed, the juvenile court expressly found that Mother had not failed to protect her children.

The Department and the respondent children assert that there is evidence to support the juvenile court's determination that Mother was unable to care for the children. They emphasize the children's special needs and assert that Mother, by failing to attend certain appointments or otherwise participate with the children's medical providers, failed to demonstrate that she would be able to adequately address the children's special needs.<sup>17</sup> Both the Department and the respondent children assert that Mother's psychological evaluation supports the juvenile court's determination, emphasizing Mother's anxiety and depression, particularly relating to her ability to be autonomous. The Department observes that the psychological evaluation report does not mention the children's developmental delays or address Mother's capacity to address them appropriately.

In this Court's view, keeping in mind the discretion owed to the juvenile court, the evidence fails to support the inferences urged by the Department and the respondent children. To be sure, we recognize that the children were not diagnosed with developmental delays before coming into the care of the Department. Nonetheless, there is no evidence in the record that indicates that Mother is somehow unable to address the children's special needs. Mother's psychological evaluation demonstrated that she is an

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<sup>17</sup> The Department urges this Court to infer from Mother's decision not to testify at disposition that she remains unprepared to provide for the children's special needs. It is the Department's burden to prove, by a preponderance of the evidence, that Mother is unable to care for her children. We will not infer, from Mother's silence, that she acknowledges any inability to care for her children. We further emphasize that no party presented testimony at the disposition hearing.

individual of normal intelligence suffering from situational anxiety and depression due to the removal of her children. The evaluation further recommended that Mother would benefit from certain types of life skills training.

Anxiety, depression, and a perceived need for Mother to develop budgeting, homemaking, and other life skills are not sufficient to justify the juvenile court’s conclusion that Mother is unable to care for her children. “The fact that [a parent] has a mental or emotional problem and is less than a perfect parent or that the children may be happier with their foster parents is not a legitimate reason to remove them from a natural parent competent to care for them in favor of a stranger.” *In re Barry E.*, 107 Md. App. 206, 220 (1995). Nor does the juvenile court’s stated desire to ensure that Mother “has the appropriate tools to care for the children” and “is able to deal with all of the [children’s] issues” justify the court’s CINA determination. “The fear of harm to the child or to society must be a real one predicated upon hard evidence; it may not be simply gut reaction or even a decision to err-if-at-all on the side of caution.” *In re Jertrude O.*, 56 Md. App. 83, 100 (1983).

A clearly erroneous factual finding is a finding that is not supported by competent evidence. *Spaw, LLC v. City of Annapolis*, 452 Md. 314, 339 (2017). In this case, there was competent evidence presented to support the juvenile court’s factual findings with respect to Father’s abuse. Furthermore, there was competent evidence to support the juvenile court’s conclusions that Mother suffered from anxiety and depression due to the removal of her children. We have scoured the record, however, and have found no competent evidence to support the juvenile court’s conclusion that Mother is unable to care

for her children. Absent competent evidence of Mother’s inability to care for her children, the juvenile court’s desire to err on the side of caution to protect the children’s interests is simply not sufficient to overcome Mother’s fundamental liberty interest in the care and custody of her children. Accordingly, the juvenile court’s CINA determination must be vacated.<sup>18</sup>

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE’S COUNTY, SITTING AS A JUVENILE COURT, VACATED. CASE REMANDED TO THE JUVENILE COURT FOR ENTRY OF AN ORDER FINDING THAT M.H. AND T.H. ARE NOT CHILDREN IN NEED OF ASSISTANCE. COSTS TO BE PAID BY THE PRINCE GEORGE’S COUNTY DEPARTMENT OF SOCIAL SERVICES.**

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<sup>18</sup> We are cognizant of the fact that circumstances may have changed in the lives of Mother and the children since the entry of the juvenile court’s disposition order on September 1, 2017. Our determination in this case is based only on the evidence in the appellate record. In this opinion, we do not intend to preclude the Department from taking any additional action at any future point based upon any facts that are absent from this record. Nor by this comment do we presume the presence of any additional facts. We merely note that we are cognizant of the fact that there may be facts pertinent to Mother’s ability to care for the children to which we, as an appellate court, are not privy in this appeal.