UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2099

September Term, 2015

IN RE: S.E. AND N.I.

Berger,
Arthur,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: May 19, 2016

S.E. and N.I., the minor children of appellant, Andrea L., were found to be Children In Need of Assistance ("CINA")[1] and committed to the Montgomery County Department of Health and Human Services ("Department") for placement in foster care by the Circuit Court for Montgomery County (Callahan, J.), on December 8, 2012. Permanency plan review hearings took place on September 29, 2015 and October 8, 2015, at the conclusion of which the juvenile court (Callahan, J.), pursuant to an Order issued on October 9, 2015, changed the permanency plan to custody and guardianship. From the Order entered on October 9, 2015, appellant filed the instant appeal in which she raises the following issues, which we quote, for our review:

1. Did the court err in admitting prejudicial hearsay evidence?

2. Did the court err in changing the permanency plan to custody and guardianship?

FACTS AND LEGAL PROCEEDINGS

S.E. (age 11) and N .I. (age 6), the children at issue, are the children of appellant, their biological mother. Their biological father, D.E, was incarcerated at the time of the hearings giving rise to this appeal. S.E. and N.I. reside in the same foster home, where they were placed September 2012. Their guardians and caretakers are the "F" family.

[1] MD. CODE ANN., CTS. & JUD. PROC. § 3-801(f). "'Child in need of assistance' means a child who requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs."

As we noted in *In re S.E. and N.I.*, No. 771, Sept. Term 2014 (Md. App. Dec. 8, 2014) ("*Appeal II*"), appellant's history with the Department, as it involves her children, spans eight years and informs the current appeal.

> The record reveals no fewer than three[2] Department investigations between 2008 and 2012 that grew out of reports that [appellant] had neglected or abused [S.E.]. The last of these began on September 6, 2012 after [S.E.] (then seven years old) arrived on the first day of school dirty and with multiple injuries. A teacher notified the Department and [S.E.] informed authorities in an interview that [appellant] had hit her with a belt and at least once tried to choke her, apparently because she wet herself and fought with her brother.

The October 23, 2012 CINA petition provides further background to the September 2012 child abuse incident:

> [Appellant] did not send [S.E.] to school at the beginning of the 2012–2013 school year, asserting that the child was being home-schooled. After being informed of the risk of truancy and loss of benefits, [appellant] sent [S.E.] to school on September 6, 2012. On that day, [S.E.] came to school with injuries on her face that were covered by cosmetics, as well as numerous injuries on other parts of her body, including bruises, scars and loop marks. [Appellant] asserted that the injuries on [S.E.'s] face were caused by a tire swing. [Appellant] has expressed no theory to CWS as to the cause of the *other injuries*. [S.E.] reported to multiple staff persons that her injuries were caused by her mother using her hands or a belt, and that her mother physically

[2] The State's brief submitted in *Appeal II* describes two other Department investigations of appellant. In August 2008, the Department initiated a neglect investigation after appellant left then three-year old [S.E.] unattended in a hallway following a domestic dispute. The investigation revealed appellant had a history of leaving [S.E.] unattended. Appellant was provided mental health and housing services following the investigation. In October 2009, the Department again investigated appellant for neglect, this time as it concerned her then newborn son, [N.I.] as he was not maintaining weight under appellant's care. The Department learned during this investigation that appellant had a history of aggressive behaviors, poor impulse control and schizoid tendencies, and had been diagnosed with depression with psychotic features and schizoaffective disorder.

> disciplined her whenever she wet herself or fought with her brother. [S.E.] stated that her mother told her to say that her injuries were caused by a tire swing.
>
> . . . At the time of the investigation and removal, the whereabouts of the children's father, [D.E.] were unknown. [D.E.] later presented himself to the Department, stating that he would like custody of his children. However, concerns over [D.E.'s] criminal and CPS history prevented the Department from placing [S.E.] and [N.I.] in his care.[3]

(Emphasis supplied).

The case was adjudicated on December 6, 2012, with the children found to be CINA. The court ordered, *inter alia*, both children placed in foster care and supervised visitation between appellant and the children. Appellant noted an appeal of the CINA finding, and this Court affirmed the juvenile court's decision in, *In re S.E. and NI.,* No. 2135, Sept. Term 2012 (Md. App. May 31, 2013) ("*Appeal I*").

Over six months after the September 2012 child abuse incident, the Department noted that S.E. disclosed to her foster mother that, prior to removal from appellant's care, appellant had hit S.E. in the eye with a belt, causing it to swell shut. Although S.E. had been able to open her eye subsequently, she indicated that "she could no longer see clearly out of it." A subsequent ophthalmic exam indicated that S.E. had a "dense cataract" likely caused by

[3] Department reports and court findings indicate that, initially, after the September 2012 child abuse incident, the father was participating, albeit inconsistently, in court-ordered services and therapy. However, eighteen months prior to the October 9, 2015 Order, D.E. had not seen either child, had stopped participating or refused to participate in Department recommended and court-ordered services, *e.g.*, therapy, drug testing, and ultimately was incarcerated at the time of the court hearings.

trauma to the eye. Her vision was described as "very impaired" and surgery was recommended.[4]

Appellant pled guilty to second degree child abuse of S.E. in a criminal case, on May 1, 2013. She was sentenced to five years' probation with a five-year suspended sentence. Subsequent to her conviction, there have been concerns regarding her compliance with the terms of her probation, *i.e.*, participation in services and therapy. Furthermore, appellant was charged with Malicious Destruction of Property for an alleged "car-keying" incident in April 2015.

Department reports and court materials note that appellant's progress concerning visitations with her children have been inconsistent. There have been concerns over her "affect" during visitation; sometimes she appears engaged, other times she appears withdrawn. Additionally, there have been concerns over favoritism shown to one child and not the other and her general handling, *vel non,* of stressful situations.

Although appellant made some inconsistent progress, there were several documented incidents of inappropriate interactions with her children. She has questioned the children about visitations with their father and family, asked them where they wanted to live and inquired as to whether their foster family ever "spanked" them, despite a prohibition on

[4] S.E. had surgery on July 31, 2013. The surgeon removed the cataract and described the damage as "quite extensive," but indicated that with the use of corrective lenses, her vision should improve over time.

discussions that could impact the children's placement. Appellant has disregarded N.I.'s food allergies, on at least one occasion, by feeding him prohibited items during a supervised visit. Appellant has also given her telephone number to S.E., telling her to call her "anytime" and, on one occasion, has attended the same church services as the children and foster family, despite a No-Contact Order. Moreover, during one supervised visit, appellant told S.E. she was "selfish" and to stop "doing things to get her way." She also told S.E. she disliked the hairstyle S.E. had received the night before and discouraged her from calling her father, "Dad."

Both the Department and the courts have noted appellant's regression months after the September 2012 child abuse incident. Appellant minimized the issues that led to the children's removal from her home and refused to accept responsibility for her behavior. Appellant stated to a social worker that "she does not believe that the abuse has had any lasting emotional impact on S.E.," and she has also stated that she does not believe S.E. is afraid of her." According to appellant, prior to the September 2012 incident, she "never laid a hand" on either child.

During the time frame preceding the instant appeal, appellant participated in court-ordered services and therapy in an inconsistent manner, often not completing programs or missing appointments. Although appellant frequently cited a lack of transportation as the leading obstacle to her full participation, she failed to utilize the free or assisted transportation services made available to her.

Initially, service providers worked toward temporary placement of the children with family. At first, a maternal great aunt and uncle were considered and the children even participated in unsupervised and overnight visits with them. However, the uncle later informed the Department that he had separated from the aunt and neither was in a position to assume full care and responsibility for the children. The Department also reached out to maternal and paternal grandmothers, but both indicated that they were also unable to assume full care and responsibility for the children.

By December 20, 2013, appellant was able to progress from supervised to unsupervised visitation with her children. The first overnight visit with appellant took place March 15, 2014. Although the children reported that they "had fun" during the first overnight visit with appellant, the foster family reported that N.I. disclosed to them that "S.E. wet the bed and Mommy got mad," but that there was no concerns about any physical abuse. Another overnight visit was scheduled for March 21, 2014, but appellant contacted the social worker stating that she was concerned about having enough food for the children that weekend. Ultimately, appellant requested, and the Department granted, a change to a day visitation.

Overnight visits resumed and progressed without any concerns for the children's safety until May 2, 2014 when the foster care providers informed the social worker that S.E. "doesn't want to go" to appellant's home. S.E. provided several reasons, including a lack of privacy during bathing and that her mother had "smacked" her mouth during an argument.

On May 12, 2014, the juvenile court revoked overnight visitation between the children and appellant due to the concerns S.E. raised. Appellant noted an appeal of the Order, but this Court upheld the Order in, *Appeal II*, *supra*.

By August 2014, the juvenile court had again approved unsupervised visitation that gradually increased over time and eventually once again led to overnight visits. By May 1, 2015, the court ordered a trial home visit after the school year ended in anticipation of reunification with appellant.

However, in late May 2015, the Department informed the court that it had opened an investigation into an incident occurring at appellant's home during an unsupervised visit. According to the Child Protective Services, Child Abuse Report, the children's foster mother discovered a lump that was "tender to the touch" on the left side of N.I.'s head. When she asked him about it, N.I. stated that appellant had thrown the "mote" (remote controller) at him. When the foster mother further inquired if N.I. and appellant were playing a game, N.I. stated, "No, I wasn't listening." The Department's investigation concluded that the incident was indicated physical abuse.[5] Consequently, the court suspended the plan for a trial home visit that would have commenced on June 15, 2015 and by June 25, 2015, the court decided it was best not to proceed with the trial home visit, at that point, but to permit the children

[5] In Spring 2015, the Department also made a finding of unsubstantiated neglect against appellant concerning her third child, A.L., born in late December 2014. Appellant left the newborn unattended in her apartment as she threw out trash. Additionally, around the same time, an allegation that appellant had kicked S.E. was later ruled out by the Department.

and appellant to have more time for additional therapy. Appellant was permitted supervised visitation.

The Department then recommended to the court that the permanency plan change from reunification to custody and guardianship to a non-relative, *i.e.*, the children's foster parents. The Department cited all of the prior issues with visitations, inappropriate behaviors and the recent child abuse incident to support its recommendation. The court examined the Department recommendations as well as the history of the case and ordered the permanency plan modified from reunification with appellant to custody and guardianship to the foster parents in an Order issued October 9, 2015. The instant appeal followed.

DISCUSSION

I. ADMISSION OF TESTIMONY OF SOCIAL WORKER

A. *Standard of Review*

In *In re Shirley B.*, 419 Md. 1 (2011), the Court of Appeals explained that, as it pertains to child custody disputes, appellate courts "simultaneously" apply three different standards of review:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. [Secondly], if 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.

Id. at 18 (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)) (alternation in original).

B. Hearsay Evidence

Appellant contends that the trial court erred in admitting hearsay testimony that she intentionally threw the television remote control at N.I. The social worker, Victoria Davis, testified that N.I. told her that appellant had thrown the remote control at him because "he woke her up and she got mad." Appellant asserts that the court ruling to admit the evidence as an admissible statement by a party opponent was erroneous in light of *In re Michael G.*[6] Appellant further asserts that the erroneous admission was prejudicial because it "colored" the court's perception of whether the children could be safely returned to appellant's custody.

The State responds that appellant cannot establish that Davis' testimony regarding N.I.'s statements about his abuse are impermissible and prejudicial. First, the State asserts that the rules of evidence "need not be strictly applied in permanency planning hearings." Second, the State argues that N.I.'s statements provide the basis for Davis' expert opinion and are, therefore, admissible. Finally, the State contends that the statements are not prejudicial and that Davis' testimony is "essentially" the same as other evidence, *i.e.*, Department reports, that were admitted without objection and the juvenile court relied on the testimony of other witnesses in reaching its decision. Accordingly, the State proffers that any error is harmless.

[6] 107 Md. App. 257 (1995).

1. Application of the Rules of Evidence

Md. Rule 5–101(a) provides that the Rules of Evidence apply to all actions and proceedings in the State unless "as otherwise provided by statute or rule[.]" Evidentiary rules govern hearsay testimony or testimony concerning out-of-court statements offered to support the truth of the matter for which they are asserted. Generally, hearsay is not admissible as evidence. MD. RULE 5–802. This is true because of hearsay's "inherent untrustworthiness." *Marquardt v. State*, 164 Md. App. 95, 123 (2005) (citing *Parker v. State*, 365 Md. 299, 312 (2001)). Typically, "hearsay must fall within an exception to the hearsay rule or bear 'particularized guarantees of trustworthiness' in order to be admitted into evidence." *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

"In general, the rules of evidence, including the rules regarding hearsay, apply in juvenile adjudicatory hearings." *Michael G.*, 107 Md. App. at 265 (citing *In re Rachel T.*, 77 Md. App. 20, 30–32 (1988)). *See also In re Delric H.,* 150 Md. App. 234, 244–45, n. 15 (2003) (citing MD. RULES 11–115 and 11–118) (noting the fact that the rules of evidence apply in juvenile adjudicatory hearings under Md. Rule 11–114).

However, "[d]isposition hearings under Rule 11–115, including *permanency planning hearings* under . . . §3–823," are afforded *discretionary application* of the Rules of Evidence. MD. RULE 5–101(c)(6) (Emphasis supplied). Although permanency planning hearings do not strictly apply the rules of evidence, "the court must still determine whether proffered

evidence is 'sufficiently reliable and probative to its admission.'" *In re A.N.*, 226 Md. App. 283, 310–11 (2015) (quoting *In re Billy W.*, 387 Md. 405, 434 (2005)).

Appellant cites *Michael G.*, *supra*, to support the proposition that the party-opponent exception to the hearsay rule is not applicable in CINA cases. That case concerned a CINA proceeding where the hearing master admitted testimony, by a police officer and a social worker, regarding out-of-court statements the child made to them. Although we held that a party-opponent exception to the hearsay rule is impermissible in CINA proceedings, that does not mean that the door is completely shut regarding hearsay testimony. *Id.* at 267. A child's out-of-court statements may be admitted in a CINA proceeding if they were properly admitted under *another* exception.[7] *Id.*

In the case *sub judice*, appellant's reliance upon *Michael G.*, to support the argument that a child's statements to a social worker are inadmissible as hearsay during the social worker's later testimony is flawed. In fact, the same issue arose in one of the prior appeals in this case. In *Appeal I*, we held that S.E.'s statements to two social workers "were properly

[7] At issue in *In re Michael G.*, was the version of the "tender years" statute. When *Michael G.* was decided, the statute required the child declarant to be "available" to testify, notwithstanding certain exceptions. The subsequent version of the statute, however, changed the requirement of the child's availability for in-court testimony and cross examination, and took effect twenty-four days *after* the adjudicatory hearing decided by the master in *Michael G.* We noted in our opinion that if *Michael G.* had been decided under the subsequent version of the tender years statute, the child's out-of-court statements would have been admissible under the tender years exception to hearsay. *See In re Michael G.*, 107 Md. App. 257, 267 (1995).

admitted into evidence under Md. Code (2001, 2008 Repl. Vol., 2012 Supp.), § 11–304 of the Criminal Procedure Article, the Tender Years Exception to the rule against hearsay." In the instant case, notwithstanding that neither appellant nor the State offered arguments for or against another hearsay exception, appellant's assertion that Davis' testimony concerning N.I.'s statements "did not fall within a recognized exception to the rule barring hearsay, and it was error for the court to admit and rely on them," is incorrect.

Furthermore, in comparing the case *sub judice* to *Michael G.*, it is inescapable that the proceeding in *Michael G.* was an adjudicatory hearing, where the rules of evidence apply. In contrast, the instant case concerns a permanency planning hearing for which the Maryland Rules specifically afford discretionary application of the rules of evidence. MD. RULE 5–101(c)(6). Although evidence admitted in a permanency planning hearing must still be "sufficiently reliable and probative to its admission," the discretionary application of the rules of evidence is permissible in determining the admission, *vel non*, of hearsay testimony.

In evaluating the sufficiency of the evidence and its probative nature, the Court of Appeals in *In re Billy W.*, *supra*, held that a social worker's "testimony was sufficiently reliable and probative based upon her responsibilities and opportunities to observe both parents and children." 387 Md. at 434. Similarly in the instant case, Davis' responsibilities, as a social worker charged with the responsibility of working with appellant, the children, family and foster care providers for the past three years, certainly afforded her the opportunity to observe both parents and children. Her written reports, which encapsulated

her observations, were admitted into evidence without objection. Furthermore, the Department's findings, which were based, in part, on her written reports and recommendations, were also admitted into evidence without objection. Therefore, we hold that Davis' testimony was sufficiently reliable and probative.

Appellant counters that she "had no opportunity to cross examine N.I. and to challenge his veracity, or the reliability or credibility of his statements," reiterating that the "opportunity to cross-examine cannot be overstated." In a proceeding where the rules of evidence strictly apply, appellant's argument would be appropriate. As discussed, *supra*, the rules of evidence do not strictly apply in permanency planing hearings. Evidence admitted in a permanency planing hearing must be "sufficiently reliable and probative to its admission," which we discussed, *supra.*

Furthermore, appellant was afforded the opportunity to cross examine Davis. Appellant includes, in her Statement of Facts, that during her testimony, Davis confirmed that N.I. "was interviewed about the remote control incident on five different occasions, and his description of the incident varied on at least two occasions with two difference people." Ultimately, the fact finder weighed the evidence and found Davis' testimony concerning N.I.'s out-of-court statements credible. We defer to the fact finder's discretion in determining the credibility of witnesses.

2. Basis for Expert Opinion Testimony

The State also posits that Davis' testimony, concerning N.I.'s out-of-court statements, are admissible as a basis for expert opinion testimony. Davis offered several expert opinions, according to the State, "including that (1) the permanency plan should be changed to custody and guardianship to a non-relative; (2) a pattern of abuse existed; (3) the children would not be safe with appellant." To support these expert opinions, Davis described S.E.'s injuries, appellant's attempt at minimization of the injuries and her failure to engage in Department and court-appointed services. N.I.'s out-of-court statements, the State asserts, are another basis for receipt into evidence of Davis' expert opinion. We agree.

Md. Rule 5–703 governs the legally cognizable bases of opinion testimony by experts and provides, in pertinent part:

> (a) In general. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
>
> (b) Disclosure to jury. If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert pursuant to section (a) may, in the discretion of the court, be disclosed to the jury even if those facts and data are not admissible in evidence. Upon request, the court shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

Furthermore, we are instructed by the "language in Rule 5–703(a) that facts or data forming the basis for an expert's opinion may be relied on 'if of a type reasonably relied upon

by experts in the particular field' ordinarily relates to hearsay evidence.'" *Alban v. Fiels*, 210 Md. App. 1, 21 (2013) (citing *Attorney Grievance Comm'n v. Nothstein*, 300 Md. 667, 682 (1984)). Accordingly, "[i]f such information received from others is inadmissible hearsay, 'it ordinarily comes in, not as substantive evidence, but only to explain the factual basis for the testifying expert's opinion.'" *Id.* (citing *United States Gypsum Co. v. Mayor and City Council of Baltimore*, 336 Md. 145, 176 n. 10 (1994)).

In the case *sub judice*, we held, *infra*, that the rules of evidence do not strictly apply to permanency plan hearings and that Davis' testimony was sufficiently reliable and probative. If, however, the rules of evidence strictly apply or Davis' testimony was neither reliable nor probative, rendering her testimony concerning N.I.'s out-of-court statements inadmissible hearsay, the testimony would still be admissible to explain the factual basis for her expert opinion as *Alban*, *supra*, elucidates.

Accompanying its ruling on the objection to Davis' testimony concerning N.I.'s out-of-court statements, the court offered the following: "This is an expert witness. So, I presume we're heading toward an opinion at some point. I mean, she's given some part of an opinion; I'll overrule the objection." The State proffers that the trial court's explanation supports the premise that the testimony was admitted for this limited purpose. Appellant does not contest Davis' status as an expert witness, nor does appellant present an argument as to why the evidence is inappropriate as a factual basis for her expert opinion. Accordingly, we are persuaded by the State's argument.

3. Prejudicial Effect

Appellant contends that the admission of the hearsay testimony was prejudicial because it "colored" the court's perception of whether the children could be safely returned to appellant. The State counters that, assuming, *arguendo*, Davis' testimony concerning N.I.'s statements was inadmissible, appellant did not suffer prejudice because the testimony was duplicative of undisputed evidence that appellant abused N.I.

"[A]n error in evidence is harmless if identical evidence is properly admitted." *Barksdale v. Wilkowsky*, 419 Md. 649, 663 (2011). *See Frobouck v. State*, 212 Md. App. 262, 283–84 (2013) (noting that there was no prejudicial effect given the "cumulative nature of [the] similar statements").

In the case *sub judice*, Davis' written report, which was admitted into evidence without objection, confirms her testimony concerning N.I.'s out-of-court statements about the remote controller incident. The State also points out that the Department's investigation of the remote controller incident, which occurred in May 2015, resulted in a finding of "indicated child abuse," is uncontested. Appellant admitted that she struck N.I. in the head, although she claims it was accidental. The trial court, however, found that appellant's explanation lacked credibility. In light of the fact that evidence was before the court which corroborated the trial judge's conclusion that appellant *intentionally* struck N.I. in the head with the remote controller, we hold that Davis' testimony was properly admitted into

evidence and, even assuming error, any error resulting the admission of the hearsay testimony was harmless.

II. PERMANENCY PLAN MODIFICATION

A. Standard of Review

In *Shirley B.*, *supra*, the Court of Appeals held that a juvenile court's modification of a permanency plan is reviewed for abuse of discretion.

> Questions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred. In sum, to be reversed the decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

Id. at 18–19 (quoting *Yve*, 373 Md. at 583–84).

B. Change of the Permanency Plan to Custody and Guardianship

Appellant contends that the court interfered with her fundamental, constitutionally-based right to raise her children free from undue and unwarranted interference from the State. Appellant acknowledges that the parental right is not absolute. The State may act to protect the best interest of the child if parents are unable or unwilling to provide proper care for the child. Appellant asserts that, even when a child is determined to be CINA, reunification with a parent is the most preferred placement and that custody and guardianship to a non-relative is the second-to-last preferred option. Appellant further asserts that the instant case does not present compelling circumstances that would weigh against reunification.

Appellant's primary argument is that, for three years, the permanency plan was working toward reunification but, based on a single incident, the court modified the plan finding appellant's progress to support reunification "suddenly insufficient." Appellant maintains that, although she is not perfect, she is "by no means derelict, negligent, or lackadaisical about complying with the conditions necessary to be reunified with her children." Furthermore, appellant asserts, that "the best interest standard does not mean that the children need to be placed in the best possible environment." Appellant characterizes the juvenile court's decision as an "err-on-the-side-of-caution response" that was "fueled by the Department and service providers' reaction" to one incident.

The State's retort is that appellant is not disputing that the juvenile court appropriately considered all relevant factors before changing the permanency plan. Rather, contends the State, appellant argues that she is being held "to a standard of parenthood that was beyond that required by law," but that this argument "blindly ignores the multitude of allowances and accommodations provided for her" during the past three years in an effort to ready her for reunification with her children. The State reiterates that, in deciding to change the permanency plan from reunification to custody and guardianship with foster care providers, the juvenile court did not abuse its discretion.

Once a child is determined to be CINA and placed out-of-home, the juvenile court "must hold, within 11 months, a hearing to determine a 'permanency plan' for the child." *In re Ashley S.*, 431 Md. 678, 686 (2013) (citing MD. CODE ANN., CTS & JUD. PROC. ("CJ")

§ 3–823(b)(1)). In developing a permanency plan, a court's primary concern is the "best interests of the child." *Id.* (citing MD. CODE ANN., FAM. LAW § 5–525(f)(2)*;* CJ § 3–823(e)(1)). To determine a child's best interests, the Court noted that the Maryland Code has provided certain factors as a guide:

> (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 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.

Id. at 686 (citing CJ §§ 3–823(e)(1–2); FAM. LAW §§ 5–525(f)(1–2)).

"[U]nless there are compelling circumstances to the contrary," the law "presumes" that a permanency plan should "work toward reunification, as it is presumed that it is in the best interest of a child to be returned to his or her natural parent." *Id.* at 686–87 (quoting *Yve S.*, 373 Md. at 582).

> The court must consider the following hierarchy of placement options, in descending order of priority: (1) reunification with the child's parent or guardian, (2) placement with a relative for adoption or custody and guardianship, (3) adoption by a nonrelative, (4) custody and guardianship by a nonrelative, or (5) '[a]nother planned permanent living arrangement that ... [a]ddresses the individualized needs of the child, including the child's educational plan, emotional stability, physical placement, and

> socialization needs; and . . . [i]ncludes goals that promote the continuity of relations with individuals who will fill a lasting and significant role in the child's life.'

In re Andre J., 223 Md. App. 305, 321 (2015) (citing CJ §3–823(e)(1)(i)).

> Once set initially, the goal of the permanency plan is re-visited periodically at hearings to determine progress and *whether, due to historical and contemporary circumstances, that goal should be changed*. It is not the purpose of the initial permanency plan hearing, however, to resolve all issues involved in that final resolution. If that were the case, there would be no need for review of how, on a regular basis, the plan is progressing or not.

Yve S., 373 Md. at 582 (Emphasis supplied). If there are compelling circumstances that would render a plan other than reunification appropriate, then a modification may be granted. *Ashley S.*, 431 Md. at 687 (citing *In re Adoption/ Guardianship of Cadence B.*, 417 Md. 146, 157 (2010)).

In the case *sub judice*, the juvenile court had over seven years of historical and contemporary circumstances to examine in making the decision to modify the permanency plan. After evaluating this time period in conjunction with the statutory factors and all of the evidence and testimony presented, the court determined that the best interests of the children would be served through a modification of the permanency plan, from reunification to custody and guardianship with non-relatives. We agree.

It is clear, from the following quoted excerpt from the court's October 9th Order, that the trial court very carefully examined the statutory factors, all of the evidence and history associated with this case and determined that a permanency plan modification would be in the children's best interest.

First, with regard to S.E. and N.I's health and safety if they're returned to [appellant]. This case began with the physical abuse allegation against [appellant] with regard specifically to S.E. and also neglect sort of generally. That physical, I guess I'll just say it this way, it took us a long time to get to the end of the adjudication in this case. S.E. had to be interviewed. There was testimony about what S.E. had said about what happened to her. And the descriptions of both S.E.'s condition and the efforts that were made to cover it by [appellant] were pretty specific.

And then S.E. and N.I. were in foster care and improving and so was [appellant]. She seemed to, first of all, most important of all, acknowledge to S.E. that she had been hurt and that [appellant] was sorry. [Appellant] was pursuing the services that the Department was providing, perhaps not always exactly as the Department would have had her do, but still she was cooperating and progressing to the point where there came a time when the children were put back with her. And right around this time . . . began the undercurrent that has led us back to where we are now and I think it is a cycle.

[Appellant] had what I'll call a run-in with the foster parents. That made it so that the foster parent's weren't willing to do some of the things they had been doing for safety and other concerns. Then [appellant] came along and then I would say sort of culminated this [S]pring in the combination of things that occurred. There was the incident with the thrown remote and the allegation that [appellant] had kicked S.E. and the little one being left in the apartment while [appellant] went out to the trash. Two of the three of those were, let's see, one was ruled out, one was unsubstantiated and the remote incident was indicated.

And the, and at the same time there began to be a series of problems with service providers and how the services were provided and whether they were provided on time and whether [appellant] was or was not at home when they arrived. And we began to descen[d] back into the place where we had come from, which is that [appellant] lost her ability to take responsibility for the things that sometimes happen in life. *That, more than anything else, is a troubling sign because it's one thing to make a mistake; it's a whole another thing to deny you made it.*

And while the 2013 progress that got made around that acknowledgment that [appellant] had, in fact, hurt S.E. was replaced by she's sorry that S.E. was hurt, but she didn't hit her with a belt. *That's just—what that does is turn the progress on its head.*

Meanwhile, however, what's been true is that the Department has worked very consistently to maintain the relationship between [appellant] and her children despite some complications that might have been allowed to interfere. I think the Department social worker made allowances is probably not the word I mean, but, but it's what I can come up with right now, for some things that happened that were not precisely what the social worker would have had occur because it was an effort to try to focus on what the Department and the Court were working on, which was to get enough stability into the lives of the children so that they could return to their mother.

Instead, what's happened is that the children now have visits with their mom, have been unsupervised or had been until the series of incidents that occurred and compliance with services started to decline. And now we're back at the place where we have to decide three years into this project what's best under *all the circumstances.*

Ms. F testified when we were here at the end of September and what I was impressed with the most was how generous she was about two things, one, the reality that both S.E. and N.I. have needs that have to be met and that it is a continuum, not just an event; and that it is important to her that [appellant] continue to have a relationship with the children. And while that goes the other way too, that the children need a relationship with her, Ms. F was able to articulate it in terms of [appellant]. That is a very important part of the [court's] analysis of the question which is whether or not the permanency plan should be changed.

So with regard to health and safety if returned to [appellant], at this point I cannot say that that would be safe. And the plan reunification hangs on the notion that we're making progress towards safety. I think what we have done recently, particularly in the last six months, is regress, not progress. *And it isn't only physical health and safety, it's also mental and emotional health and safety* . . . . These kids have been through a lot and they cannot endure that kind of emotional upheaval.

Attachment and emotional ties of the children to their mother and father and siblings. I don't think there's any question that they're attached to their mom. They have a, a bond to her. They love her, but tragically they are also afraid of her.

* * *

The next factor is the children's attachment and emotional ties to the caregiver. That would be the F., the foster parents and their family. I think all of the testimony is that the children are very attached to the F.'s. That the F.'s have been patient, cooperative.

> Dr. Wolf talked about her interactions with the F.'s around the, the trauma-focused cognitive behavioral therapy that the children are involved in and I thought Dr. Wolf's description of the relationship that she has with the foster parents and their, their, that would be the foster parents' willingness and openness about what goes on in their home and what the children's issues are and what can be done to improve upon certain elements of their behavior was very telling in terms of the F.'s openness and willingness to do what they need to do for [S.E.] and [N.I.].
>
> The children are also clearly attached to their foster parents. [N.I.] calls it home. I think [S.E.] is somewhat more . . . cautious about identifying anything as something permanent, perhaps because of her age and also her, the initial circumstances that brought them into care. But they are clearly attached to the F.'s.
>
> They've been with the F.'s, I think, close to three years, shortly after they came into care. The potential emotional, developmental and educational harm of moving the children from the F.'s, I think I've basically already talked about this, the children are in school doing extremely well. They have had the opportunity to catch up developmentally. They are well-fed, they're housed, they're clothed and their lives are consistent and predictable. And perhaps that last thing is the more important than the rest of what I said, but it is clear that to take them now from that placement would be very detrimental to them.
>
> . . . no one is asking that the children be returned to [appellant] today and, and that's true, no one is. But the next factor is the one that talks about the children remaining in state custody. And I think what that goes to is not that they're living in an orphanage . . . but that the instability and uncertainty in their lives is, it gnaws at them . . . . So I think the emotional harm of having it not be settled is a big problem for kids that we frequently overlook.
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> * * *
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> So I will change the permanency plan to custody and guardianship to a non-relative.

(Emphasis supplied).

The children have been in out-of-home foster care placement since September 2012. Prior thereto, while the children were in appellant's care, there were no less than three

Department investigations for abuse or neglect of S.E. This length of time, seven years, constitutes the majority of eleven-year-old S.E.'s life and exceeds the existence of six-year-old N.I. The juvenile court, looked at more than just the incident that occurred in May 2015, *i.e*. the "remote controller incident," as appellant characterizes it, in determining that the permanency plan required modification. The May 2015 incident of indicated child abuse was certainly part of the calculus, contemplated by law. As the above excerpt illustrates, however, the court examined all the circumstances of the case and determined that a modification of the permanency plan was appropriate. Upon our reviewing the court's order, in light of all of the evidence available, we hold that, in modifying the permanency plan, the juvenile court did not render a decision "well-removed from any center mark" imaginable and "beyond the fringe of what [this Court] deems minimally acceptable." Accordingly, we affirm the decision of the trial court.

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