UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2405

September Term, 2015

IN RE: ANDRE B.

Kehoe,
Nazarian,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: June 13, 2016

*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.

Appellant, Victoria B. appeals an order of the Circuit Court for Baltimore City that: (1) sustained facts stipulated to at a child in need of assistance ("CINA") adjudicatory hearing; (2) awarded custody of Andre B. ("A.B." or "respondent") to his father, Antwann C. [1]; (3) permitted appellant supervised visitation with A.B.; and (4) dismissed the CINA case.

She presents two questions for our review:

> 1. Did the court err by finding that the sustained allegations, set forth in the Petition, would have amounted to a CINA finding if the father was not present?
> 2. Did the court err by allowing the father to make decisions, with respect to the mother's access to her son, where the parents were unable to effectively communicate?

For the reasons that follow, we affirm the order of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On June 22, 2015, Baltimore City Department of Social Services ("BCDSS") filed a Petition With Request for Shelter Care alleging that A.B. was a CINA because he had "been neglected by his parents, Victoria B. and Antwon C[.]" After a shelter care hearing[2] on the same date, the circuit court issued an order directing A.B.'s father to

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[1] There are several different spellings of the father's name in the record. For consistency, we use the spelling contained in A.B.'s brief.

[2] A shelter care hearing is "a hearing held before disposition to determine whether the temporary placement of the child outside of the home is warranted." Md. Code (1973, 2013 Repl. Vol.) § 3-801(z) of the Courts & Judicial Proceedings Article ("C.J.P. § 3-801(z)").

"provide care and custody" for A.B.,[3] pending an adjudication hearing,[4] and to permit supervised visitation by appellant with A.B.

At the contested adjudication hearing on August 31, 2015, BCDSS, A.B.'s father, A.B., through counsel, and appellant, through counsel, stipulated to the following facts in lieu of testimony:

> 1. Mother, Victoria B., left both respondents[5] for over one (1) week at a time in the care of others. Mother left a half a box of pampers and milk for [A.B.'s brother], but at the time of removal those provisions were running low. While left in the care of the non-relative [A.B.] became ill. Mother came to the home and left Tylenol for him. She was to return to take him to the doctor but did not. Mother did not leave the contact information of the Father of [A.B.], Antwann C., therefore h[e] was unable to be contacted to assist with attending to his child's medical needs.
> 2. [A.B.'s brother], was seen at Johns Hopkins Hospital for a rash around his lips.
> 3. The family's situation became known to BCDSS. BCDSS provided support, including home visits to mother. The home visits took place on Tuesdays and Thursdays at two (2) hours per day. BCDSS' efforts also included investigating and monitoring the family's safety through CPS, offering continuing protective services, referring for intensive family services, and exploring relative resources.
> 4. The respondent's mother had improved her stability, behavior and parenting for a time with BCDSS involvement. However, once BCDSS ceased its CPS efforts, mother again began leaving the respondents with non-relatives for periods of time.

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[3] According to the father's counsel at the disposition hearing, A.B. was "living with his father" when appellant "took [him] from . . . school and transferred him to another school." A.B.'s father did not know A.B.'s whereabouts until he came into the care of Baltimore City Department of Social Services ("BCDSS") on June 19, 2015.

[4] An adjudicatory hearing is defined as follows: "a hearing under this subtitle to determine whether the allegations in the petition, other than the allegation that the child requires the court's intervention, are true." C.J.P. § 3-801(c).

[5] Appellant had two children, A.B. and A.B.'s eight-month-old half-brother, who were named in the original petition. Both respondents were considered at the August 31 adjudicatory hearing. The remaining hearings related to A.B. were conducted on separate dates because the father of A.B.'s half-brother was not known.

> 5. The father of [A.B.] is Antwann C. He is willing and able to continue providing care for his son.
> 6. The father of [A.B.'s brother] is not known to the BCDSS.

Appellant's attorney "agree[d] with [the facts] a little reluctantly," stating that she did not "believe that the facts necessarily amount[ed] to a CINA finding." The court "shared [her] reluctance," because the stipulated facts only related to appellant and not A.B.'s father. The court, however, sustained the facts because it was "good to resolve all the issues that we have before us so that things are stable for [A.B.] once this is resolved." After the hearing, the court issued a written order stating:

> The Court finds in accordance with Rule 11-114 and the Courts and Judicial Proceedings Code Annotated Section 3-817 that the allegations in the CINA petition have been proved by a preponderance of the evidence and that the facts recommended by the parties as stated herein were sustained.
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> The Court determined that continued residence in the home is contrary to the welfare of the child and it is not now possible to return the child to the home because the following reasons: Mother is unable to provide care for the respondents due to needed to follow through with referrals for substance abuse treatment, parenting classes, and a psychological evaluation.
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> * * * *
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> By agreement of parties, visitations between the respondent and mother shall be supervised as arranged by parents. Visitations shall be supervised by father.

A mediation session to permit appellant and A.B.'s father to discuss visitation was held at 9:00 a.m. on September 30, 2015, prior to the disposition hearing scheduled for 11:00 a.m. Appellant signed an agreement at the mediation, but afterwards repudiated the agreement, stating that "it was her understanding that there would be another session"

and that she “felt a little bit pressured to sign something.” In addition, she stated that the mediation lasted only fifteen minutes because A.B.’s father “stormed out.”

At the disposition hearing,[6] BCDSS requested that “the Court find the Respondent to be non CINA and dismiss this case and grant custody to Father.” BCDSS stated that “[A.B.] has been in his [father’s] care . . . since late June of this year. [He] is doing well in the home of the Father. His needs are being met there and we don’t feel that there’s any safety concerns for the continued care of the father.” In addition, BCDSS related that appellant’s service agreement with BCDSS required her to participate in parenting classes, substance abuse treatment, and psychological evaluation, terms which she had not yet satisfied.

A.B.’s counsel stated that he had been doing “very well” since being placed in his father’s care after the June 22, 2015 shelter care hearing; that he “has expressed . . . his appreciation for being safe and well cared for with his father;” and that he “would like to have visits with [appellant], but . . . he does not want to be alone with [her] because he feels that she cannot protect him.” Counsel asked that custody remain with the father and that visitation with appellant be supervised because her circumstances had not changed and she had not complied with the BCDSS service agreement. Counsel opposed appellant’s request for unsupervised visitation because “there is a risk of [A.B.] being

[6] A disposition hearing is defined as a hearing to determine:

“(1) Whether a child is in need of assistance; and

(2) If so, the nature of the court's intervention to protect the child's health, safety, and well-being.”

C.J.P. § 3-801(m).

taken and not returned" and stated that there had been "at least one circumstance" where appellant had gone to A.B.'s father's home and "attempted to take [A.B.] from the home," even though the court order permitted only supervised visits.[7]

Counsel for A.B.'s father was "basically in agreement with [BCDSS] and [A.B.'s] counsel," and requested custody be granted to the father as the non-offending parent to permit him to "take care of the matters he needs to take care of." Counsel emphasized the facts in the shelter care and adjudicatory orders that indicated that appellant had left A.B. for more than a week and failed to take him to the doctor when he was ill. Counsel also argued that appellant had made "a very minimal attempt to maintain contact" with A.B., and that the father had agreed to the mediation because he understands that A.B. misses appellant. The father, opposed unsupervised visitation because appellant "is absolutely not trustworthy with the care of [A.B.]." He was, however, agreeable to visitation supervised by BCDSS—or, if appellant preferred "by somebody else."

Counsel for appellant requested that custody be granted to appellant. She stated that when A.B. was younger, she and the father had lived together and "after they stopped living together, [they] coparented [A.B.] and both of them worked together to raise [him]. . . . [D]uring that time, [appellant] . . . took [A.B.] for his medical appointments." But, if A.B. is placed in his father's custody, appellant should be allowed unsupervised visitation every other weekend and one night per week. According to appellant's counsel, "if

[7] In addition, prior to the shelter care hearing, during a period where appellant and A.B.'s father appeared to have a sort of co-parenting arrangement, appellant removed A.B. from his father's home without notifying the father. *See* footnote 3, *supra* at 3.

there's an order that says visitation from X time to X time, clearly [A.B.] is to be returned at the end of the visitation, and [appellant] assured [her] that she would return [A.B.]." Counsel also pointed out that appellant had until December 4, 2015, to complete the service agreement with BCDSS.

Based on the arguments of counsel, the stipulated adjudicatory facts, and A.B.'s success in his father's home, the court dismissed the CINA case because A.B. "is not a child in need of assistance," and determined that A.B. should "remain in the legal and physical custody of Father," with visitation by appellant "once a week . . . supervised by Father."

Appellant filed a Notice of Exceptions to the court's ruling and requested a de novo hearing. Father filed a response, and an exception hearing was held on November 16, 2015. When appellant failed to show up for the hearing, despite being notified of the hearing by her counsel, the exceptions were dismissed. Appellant filed this appeal on December 15, 2015.

Standard of Review

"[T]he first step in our review of [a CINA case] is to scrutinize the factual findings of the juvenile court under the clearly erroneous standard." *In re Yve S.*, 373 Md. 551, 588 (2003). If the circuit 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 [court's] ultimate conclusion . . . founded upon sound legal principles and based upon factual findings that

> are not clearly erroneous, the . . . decision should be disturbed only if there has been a clear abuse of discretion.

Id. at 586 (quoting *Davis v. Davis,* 280 Md. 119, 126 (1977) (alterations added)).

The Court's Decision to Sustain the Factual Findings

Appellant does not dispute that father was willing and able to care for A.B. Her contention is that "the allegations set forth in the petition did not amount to facts that would result in a CINA finding against her." In her view, the allegations do not support a finding that she abused or neglected her son, or that he is currently at risk of being abused or neglected. For example, BCDSS did "not present adequate details to support a CINA determination, such as whether the caretakers were unwilling or unsuitable; what supplies were lacking and whether this impacted Respondent; or any evidence that she has left her son for longer than a week and why she left him."

BCDSS responds that "the juvenile court properly sustained factual findings against [appellant] and did not abuse its discretion in granting custody to [the father], who was willing and able to care for [A.B.]." In BCDSS's view, appellant "places an inappropriate emphasis on the petition" because she cannot contend that factual findings, to which she stipulated, were clearly erroneous.

Counsel for A.B. responds that "[t]he court did not err by finding that [A.B.] was not CINA and placing him in the legal and physical custody of his father, where there were clear stipulated adjudicatory facts sustained against [appellant], none against the father, and where the father was providing appropriate care for [him]." According to counsel, and "[o]pposite to what is averred by [appellant] in her brief, the court did not

sustain all of the facts alleged in the petition, but rather the parties agreed upon a specific set of six (6) adjudicatory facts, which relate directly to the petition allegations . . . .”

In *In re Michael W.*, 89 Md. App. 612, 617-18 (1991) (emphasis in original) (internal citations omitted), this Court explained:

> The Maryland Legislature has provided a comprehensive framework for the care and protection of children who are alleged to have been abused or neglected by their parents. The process begins when a local department of social services files a CINA petition alleging that a child requires the assistance of the court because he or she is not receiving proper care and attention and the parents are unable or unwilling to provide this care.
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> > The purpose of a CINA proceeding is to protect children and promote their best interest. It is not intended to punish the parents, and the statute limits the juvenile court to orders designed to protect the child. A CINA proceeding is aimed at accomplishing this protective purpose by temporarily separating the child from his parents *or* by supervising the parents in raising their children.
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> CINA proceedings are bifurcated: (1) an adjudicatory hearing, § 3–801(b); Maryland Rule 914; and (2) a disposition hearing, § 3–801(n); Maryland Rule 915.
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> The juvenile court initially conducts an adjudicatory hearing to determine if the allegations in the petition are true. When a CINA petition is filed at the request of the local department of social services, the local DSS is a necessary party to the proceeding and presents to the court the evidence in support of the petition. Allegations that a child is in need of assistance must be proven by a preponderance of the evidence.
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> If the allegations in the petition are sustained, the court conducts a disposition hearing. The court then determines whether the child needs the court's assistance and, if so, the nature of the assistance.

We review the relevant factual findings under the clearly erroneous standard. *In re A.N.*, 226 Md. App. 283, 305-06 (2015). “A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court’s

conclusion." *Liberty Mut. Ins. Co. v. Md. Auto. Ins. Fund*, 154 Md. App. 604, 609 (2004) (quoting *Lemley v. Lemley,* 109 Md. App. 620, 628 (1996)).

Maryland law defines a CINA as "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." Md. Code (1973, 2013 Repl. Vol.), § 3-801(f) of the Courts & Judicial Proceedings Article ("C.J.P. § 3-801(f)").

> "Neglect" means the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or individual who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate:
> (1) That the child's health or welfare is harmed or placed at substantial risk of harm; or
> (2) That the child has suffered mental injury or been placed at substantial risk of mental injury.

C.J.P. § 3-801(s).

"In determining whether a child has been neglected, a court may and must look at the totality of the circumstances[.]" *In Re Priscilla B.*, 214 Md. App. 600, 621 (2013). It is well settled "that a parent's past conduct is relevant to a consideration of the parent's future conduct[,]" *In re Adriana T.*, 208 Md. App. 545, 570 (2012). A court may also consider neglect of a sibling in its neglect determination. *In Re Priscilla B.*, 214 Md. App. at 625.

In the instant case, the parties stipulated to a set of six facts—virtually identical to the allegations included in the BCDSS petition—at the adjudicatory hearing on

August 31, 2015, that indicated that appellant left A.B. and his half-brother "for over one (1) week at a time in the care of others;" that she "left a half a box of pampers and milk for [A.B.'s half-brother], but at the time of removal those provisions were running low;" that "[w]hile left in the care of [a] non-relative [A.B.] became ill;" that appellant "came to the home and left Tylenol for him;" and that, having stated she would "return to take him to the doctor[, she] did not." Contrary to appellant's assertions, the court adopted only those six stipulated facts and not all the factual allegations in the BCDSS petition. In addition, appellant did not (and does not) dispute A.B.'s assertion at the disposition hearing that he "does not want to be alone with [her] because he feels that she cannot protect him." Nor does she dispute that she had not yet "complied with the service agreement [with BCDSS] to participate in substance abuse treatment, parenting classes,[8] and mental health treatment."

The evidence supported a finding of neglect by appellant, and appellant's past actions supported a reasonable concern about future actions and A.B.'s safety. *See In Re Priscilla B.*, 214 Md. App. at 613 (2013) (quoting the juvenile court's statements that it

[8] According to counsel, appellant attempted to enroll in parenting classes in September, "but she was told that class was full, so she[was] . . . waiting to enroll for the October class." Regarding the mental health treatment, counsel contended that "normally a psychological evaluation is something that [BCDSS] would refer [appellant] to. It's not up to [appellant] to go out and look for a psychologist so that she can have the evaluation. There has been no indication that [BCDSS] made any referrals that [appellant] has refused to comply with." Counsel did not address appellant's failure to obtain substance abuse treatment.

based its CINA finding in part "upon a six-year-old's position of being—of feeling unsafe"). Therefore, the court's findings are not clearly erroneous.

It is also clear that the court applied the correct law:

> The Court finds in accordance with Rule 11-114 the Courts and Judicial Proceedings Code Annotated Section 3-817 that the allegations in the CINA petition have been proved by a preponderance of the evidence and that the facts were sustained at a prior adjudicatory hearing.
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> The Court proceeded to disposition pursuant to Rule 11-115 and the Courts and Judicial Proceedings Code Annotated Section 3-819. The court having considered the evidence presented by the parties, it is therefore ordered by the Circuit Court for Baltimore City, Juvenile Causes Division:
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>> An Adjudication hearing was held in this matter on 31st day of August, 2015. At the current Disposition Hearing, [Respondent] is/are not found Child(ren) in Need of Assistance based upon Father is willing and able to provide care;
>>
>> The Court having granted custody to a parent or guardian willing and able to provide for [Respondent] the child(ren) is not a Child In Need of Assistance and the case is dismissed.

Therefore, we perceive neither error nor an abuse of discretion in the court's neglect determination and placement of A.B. in the custody of his father.[9]

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[9] C.J.P § 3-819(e) provides:
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.

The Visitation Arrangement

Appellant further contends that "the court erred by allowing the father to control the mother's access to [A.B.] by failing to set a specific visitation schedule and by ordering the father to supervise visits, [because] such interaction would not be in [A.B.'s] best interests." In support of that contention, she argues that the evidence clearly demonstrates that she and the father are "not able to work cooperatively in [A.B.'s] best interests" and points to their failure to agree on a visitation schedule at the September 30, 2015, mediation[10] and his "storming out" after fifteen minutes.

BCDSS responds that "the juvenile court did not abuse its discretion in granting [the] parents flexibility in determining a visitation arrangement given their history of co-parenting." BCDSS points to appellant's counsel's statements at the disposition hearing that she and the father had previously co-parented, as evidence that the two are "likely capable of settling on a mutually-acceptable visitation arrangement."

Similarly, A.B., through counsel, contends that "[t]he court did not err by ordering that visitation between [A.B.] and [appellant] be arranged and supervised weekly by [the father], where it found that [appellant] had neglected [A.B.], granted custody to [the father], and was not presented with evidence that there was no likelihood of further abuse or neglect of [A.B.]." Counsel also points to father's willingness to arrange supervised visits with appellant because of "his son's desire to spend time with [her]."

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[10] Appellant signed a visitation agreement, which she later repudiated, at the mediation.

A trial court's determination of visitation conditions for a parent in the CINA context is constrained by the requirements of Section 9–101 of the Family Law Article of the Maryland Code (1984, Repl. Vol. 2012) ("F.L. § 9-101"). *In re Billy W.*, 387 Md. 405, 447 (2005). Relevant to the issue before us is the provision that if a "court has reasonable grounds to believe that a child has been . . . neglected by a party to the proceeding, the court shall determine whether . . . neglect is likely to occur if custody or visitation rights are granted," and unless it finds "no likelihood of further . . . neglect . . . , the court shall deny custody or visitation rights . . . , [but] may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child." F.L. § 9-101.

In this case, as discussed above, the court had "reasonable grounds to believe" that A.B. had been neglected by appellant and that her past actions and her failure to satisfy the terms of the BCDSS service agreement did not support a finding of "no likelihood of further . . . neglect." In addition, appellant had disregarded an earlier court order regarding supervised visitation, and had tried to leave from the father's residence with A.B. As permitted by the statute, the court granted "visitation between [appellant] and respondent . . . [supervised by the father] once a week."

Appellant cites several cases concerning the importance of parental cooperation in awarding joint legal custody (*e.g.*, *Taylor v. Taylor*, 306 Md. 290, 304 (1986*); McCarty v. McCarty*, 147 Md. App. 269 (2002)), and contends that the ability of the parents to work toward an outcome beneficial to A.B. in regards to visitation is important to his best

interests and that "their capacity to meet his needs is not demonstrated in the record." There is, however, a paramount difference between joint custody and visitation by a parent who has neglected his or her child and a parent who has not; parents in the former situation have been determined to have in some way either harmed "the child's health or welfare . . . or placed [the child] at substantial risk of harm." The statute recognizes that in such situations visitation may need to be limited.

Moreover, we are not persuaded that appellant and the father are incapable of cooperating on a visitation schedule. Appellant claims that the father "stormed out" of mediation after fifteen minutes, but it appears that an agreement was reached. What happened at that session is not developed on the record. The record reflects that appellant's counsel stated at the disposition hearing that, at one time, "[they] coparented [A.B.] and both of them worked together to raise [him]," and that the father indicated his willingness for visitation to be supervised by BCDSS—or, if mother preferred, "by somebody else."

In sum, we perceive neither error nor abuse of discretion in the flexibility provided in the court's order for weekly supervised visitation. *See In re Justin D.*, 357 Md. 431, 447, 450 (2000) (stating that although "there is a great deal of flexibility permitted in visitation orders," the court "must determine, and set forth in its order, at

least the minimal amount of visitation that is appropriate . . . , as well as any basic conditions that it believes, as a minimum, should be imposed.”)

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.