Juvenile Petition No. C-02-J-16-000626

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 259

September Term, 2017

---

IN RE: H.B.

---

Woodward, C.J.,
Meredith,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

---

Opinion by Davis, J.

---

Filed: September 21, 2017

Appellant, R.B., appeals from the Opinion and Order of the Circuit Court for Anne Arundel County (McCormack, J.), sitting as a juvenile court, which adjudged, *inter alia*, that, as a result of Appellant's neglect, her minor child, H.B., was a child in need of assistance ("CINA")[1] and that custody of H.B. be awarded to the Anne Arundel County Department of Social Services ("the Department" or "DSS") for out of home placement. Appellant posits the following questions, which we quote, for our review:

1. Should the juvenile court's CINA finding be reversed where it failed to articulate its second level factual findings either orally on the record, or in its order?

2. Did the court err by proceeding to disposition and declaring H.B. a CINA where the facts did not warrant a finding that the Department proved a *prima facie* case for neglect?

3. Did the court err in finding that Ms. B. was unable or unwilling to provide proper care and attention to H.B. and that he was a CINA?

## FACTS AND LEGAL PROCEEDINGS

### Background

H.B. was born on May 25, 2016.[2] His biological mother is Appellant, 37 years old. His biological father is unknown.

In November 2015, Appellant voluntarily underwent detoxification at Frederick

[1] Md. Code Ann., Cts. & Jud. Proc. § 3–801(f) defines CINA as follows: "'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."

[2] In the disposition report to the Circuit Court, the Department indicated that it received a report for Substance Exposed Newborn for H.B. in May 2016. There is no further information regarding this report or of H.B.'s drug exposure in the record.

Memorial Hospital from alcohol, oxycodone, morphine and switched from Suboxone to Subutex for the duration of her pregnancy. She was three-months pregnant with H.B. at the time. After her detoxification on December 6, 2015, Appellant went into impatient treatment at the W House, a residential treatment program in Hagerstown, Maryland that does not allow children. Arrangements were made for her transfer to Chrysalis House in March 2016, prior to H.B.'s birth. Chrysalis House, in Crownsville, Maryland, is a residential addiction treatment facility for women and their children.

Appellant suffers from a variety of serious health conditions including alcohol and drug addiction,[3] a diagnosis of major depression and anxiety, diabetes and severe blood clots, which are painful and significantly decrease Appellant's mobility. She has had several vascular surgeries and other hospitalizations in relation to the condition. Appellant is also treated for low blood pressure and, combined with low-blood sugar from her diabetes, can cause Appellant to pass out, which is recorded in her medical history. Appellant's history of alcohol abuse[4] has left her with persistent memory problems. Appellant testified that her "mind can be foggy." However, Appellant indicates, in her

[3] There is no evidence to the contrary that, at the time of this appeal, Appellant has maintained sobriety. Appellant states, in her brief, that she was sober for one year and 11 days on the first day of the hearing. Appellant provides no information as to her sobriety as of the time of this appeal and the State provides no evidence of a lack of Appellant's sobriety.

[4] There are repeated references in the briefs of all parties to Appellant's alcohol abuse beginning at an early age. Appellant alleges that her abuse began at age 13; the Department and Appellee child, through counsel, allege that Appellant's alcohol abuse began at age 6 when she was provided alcohol by family members.

brief, that she has no other "long-term effects from alcohol consumption," and she testified that her liver enzymes continue "to improve."

Appellant testified that, while still in the hospital following H.B.'s birth, she was informed about the dangers of co-sleeping with her child after a staff member witnessed her doing so. Approximately three months later, in August 2016, the Department spoke with Appellant about the dangers of co-sleeping after receiving reports that she was doing so with H.B. At this point, the Department placed a "risk of harm comment" in her file and provided Appellant with a Pack'n Play portable crib for H.B.'s sleeping arrangements. Appellant testified, at the Adjudication hearing on December 2, 2016, that she understood co-sleeping presented dangers: "[Y]ou could suffocate the baby and, you know, they [the baby] could roll off . . . ."

Vickie Montz, an employee of Chrysalis House and an addiction counselor, testified that, on October 13, 2016, she went to Appellant's room at the facility and found H.B. lying face-down on the floor next to the bed. The room was dark. He was wearing only a diaper and the front of his body and face were red. Appellant, who was asleep on the bed, was unresponsive to H.B.'s cries when Ms. Montz picked him up. Ms. Montz said that, after she "yell[ed]" Appellant's name several times, Appellant finally responded, but was incoherent, *i.e.,* "dazed," and disoriented as to where H.B. was; Appellant thought he was in the Pack'n Play. Ms. Montz testified that she did not feel that Appellant was capable of safely holding H.B., so she carried him and accompanied Appellant to the resident nurse. Appellant testified that H.B. had not mastered the ability to roll-over by himself at that time. After Appellant was seen by the nurse, the program referred Appellant and H.B. to

the Emergency Room for further evaluation. H.B. was not admitted to the hospital.

The Department assigned Nicole Harvey, a Child Protective Services Investigator with the Department, to investigate the incident. On October 14, 2016, Ms. Harvey met with Appellant and observed H.B., who had no visible external bruising. Ms. Harvey testified that Appellant appeared coherent when they met and that she understood the nature of the meeting. According to Ms. Harvey, Appellant indicated that she was detoxifying from Suboxone and that she placed H.B. on the floor and then fell asleep in the bed. Appellant did not explain why the Pack'n Play was not utilized. Then, according to Ms. Harvey, Appellant could not remember what occurred. Ms. Harvey and Appellant entered into a safety plan in which Appellant agreed she would not co-sleep with H.B. Subsequently, Appellant supplied another explanation for the incident: Appellant stated, on December 16, 2016, that she stood up and passed out when she was getting clothes out of the dresser. Appellant did not explain why the room was dark or why she was located on the bed when Ms. Montz found her. Appellant also testified on December 2, 2016 that she does not have a good memory and that she was unclear as to what happened when she spoke to the investigator.

While living at Chrysalis House, Appellant shared a room with two roommates, J. and S., and their children. Appellant and J. did not get along with S. According to a report made to the Anne Arundel Police Department in November 2016, Appellant stated that they did not get along with S. because of her children's poor behavior. Appellant stated that she rubbed S.'s toothbrush on her [Appellant's] back and sprayed it with Febreze air freshener. Ms. Montz corroborates that Appellant had issues with her roommates. At the

December 16, 2016 Adjudication Hearing, Appellant denied telling the police about any "mean-spirited" acts she made against her roommate. She did not deny telling the police, however, that J. suggested, on November 1, 2016, that they put some flour in the baby formula so they could tell the staff that S. did it.

On November 3, 2016, J. told several other residents that her child was sick and that the baby formula smelled like baby powder. The only resident who claimed to have smelled baby powder was Appellant. At this point, H.B. had been sick for two weeks. On November 4, 2016, J. suggested that Appellant check her own baby formula. According to Appellant, she smelled baby powder in the formula and informed the Chrysalis House Staff. Both Appellant and J.'s babies were taken to the hospital, on November 4, 2016, along with the cans of baby formula for evaluation. Although Appellant insists that she found out about the baby powder tainting the formula on November 4, 2016 and immediately reported it to the program that day and took H.B. to the hospital, according to the Department, Appellant waited two days and reported the incident and took H.B. to the hospital on November 6, 2016.[5] The Department notes that Appellant also took H.B. to the hospital on November 4, 2016, for treatment of "flu-like symptoms," but not in relation to the tainted baby formula. The hospital confirmed that H.B. had ingested a toxin and that the baby formula contained baby powder.

On November 7, 2016, Ms. Harvey met with Appellant at the hospital after discovering that the Department had learned about the tainted baby formula. Upon her

[5] Neither the magistrate or juvenile court judge made an express finding as to the date that Appellant discovered and reported the tainted baby formula.

arrival at the hospital room, Ms. Harvey observed H.B. lying, unsecured on a hospital gurney with the sides down. Appellant explained that she had little sleep over the past few nights due to taking H.B. to the hospital, consequently, she was attempting to rest. She rested her head on the stretcher and placed her hand on H.B. to secure him. Appellant "nodded" off repeatedly during the 30 to 40 minute interview. Ms. Harvey testified that, based on her experience, skills and knowledge as a CPS worker, she would not have allowed Appellant to hold H.B. based on her observations. Ms. Harvey asked Appellant to secure H.B. in his car seat for safekeeping.

The Anne Arundel County Police also received a report on November 7, 2016, regarding the tainted baby formula and assigned Detective Kristen Mays of the child abuse unit to investigate. Detective Mays attempted to interview Appellant on November 7, 2016, at Chrysalis House, but she was not there. When Detective Mays interviewed Appellant on November 10, 2016, Appellant told the Detective about her roommates, J. and S., and indicated that she did not know about the baby powder in the formula and that she did not put it there. The State did not pursue criminal charges because law enforcement could not determine who put the baby powder in the formula. Before concluding her investigation, however, Detective Mays confirmed that there was baby powder in the formula.

H.B. was placed in shelter care on November 7, 2016. On November 9, 2016, the juvenile court continued H.B. in the temporary custody of the Department. On November 11, 2016, Chrysalis House advised the Department that it was discharging Appellant from the program due to her non-compliance, her medical condition and her behavior during the stay. Ms. Harvey organized a brief extension at Chrysalis House for Appellant to locate

another facility. Ms. Harvey provided Appellant a list of other programs, some that included mother-child placement, but Powell Recovery was the first program to accept Appellant. On November 15, 2016, Appellant entered Powell Recovery, a program that does not permit children.

**Shelter Care Findings and Order**

The Shelter Care Hearing was held on November 9, 2016. In the November 14, 2016 Order, the Circuit Court for Anne Arundel County, sitting as a juvenile court, found that H.B. was "at risk of physical harm because of [Appellant's] impaired parenting."

In the disposition report in support of the Shelter Care Hearing, the Department noted numerous attempts to coordinate visitation with Appellant, but that the Powell Recovery Program had a "30-day blackout period for new residents of the program" and the Department was unsuccessful in getting the Director, Marcella Knight, to respond.

The report also noted difficulty in locating H.B.'s father or blood relatives. Technically, due to the 30-day blackout period, Appellant could not be reached and the identity of H.B.'s father was unknown. Appellant's mother was located through a search in the Maryland CHESSIE[6] system. The Department attempted to contact her, but has not received a response to its mailings and the phone number associated with Appellant's

[6] "The Maryland Children's Electronic Social Services Information Exchange." *See* MD. DEP'T. OF HUM. RESOURCES, https://dhr.maryland.gov/documents/ (follow "Data and Reports" hyperlink; then follow "SSA" hyperlink; then follow "Annual Progress and Services Review Report" hyperlink; then follow "2015 APSR Report" hyperlink; then follow "Appendix.T.Report.Detail.MD.CHESSIE.IVB.Section.pdf" hyperlink) (last visited Aug. 31, 2017).

mother was found not to be in service. The Department was also aware that Appellant's maternal aunt was providing care for Appellant's oldest child. However, Appellant refused to supply any information regarding her aunt.

**Adjudicatory and Disposition Hearings and Magistrate's Findings**

The Adjudicatory and Disposition Hearings were held before Magistrate Sandra F. Howell on December 2, 2016 and December 16, 2016. After sustaining various allegations in the amended CINA petition, the magistrate recommended that H.B. be found a CINA due to Appellant's neglect.

On December 27, 2016, the magistrate issued a written Report and Recommendation, citing the Amended Petition with Request for Shelter Care, and found that the parties had either agreed to the following paragraphs or that the following paragraphs had been proved by a preponderance of the evidence:

> 1. [H.B.] was removed from the custody of the mother. The mother was a resident of Chrysalis House.
>
> 2. The mother was observed co-sleeping with [H.B.] while at Chrysalis House and in September the Department responded to a risk of harm assessment. The Department provided the mother with a Pack'n Play and parenting instruction.
>
> 3. A neglect investigation began following a report on October 13, 2016, that the mother was co-sleeping with [H.B.]. The mother fell asleep and [H.B.] rolled off the bed face down. The baby was found crying and the mother could not be awakened.
>
> 4. Staff at Chrysalis House transported both mother and baby to Anne Arundel Medical Center and the Department executed a written agreement with the mother to discontinue co-sleeping.
>
> 5. The mother admits that she has depression and anxiety and is prescribed psychotropic medication, including Effexor and Wellbutrin. The mother admits she was prescribed Suboxone and that she has a history of alcohol abuse and misuse of

prescribed medication including pain medication.

6. She stated that she placed the baby on the floor but is unsure of the details.

7. The Department received another report of neglect on November 7, 2016. The Department received concerns that [H.B] had ingested baby powder in his formula.

8. The mother stated that [H.B.] had been ingesting baby powder in his formula since on or about November 4, 2016.

9. The mother and Chrysalis House staff took the baby to the Anne Arundel medical center twice on November 7 due to the baby having diarrhea and vomiting and was fussy.

10. While at the hospital the mother was observed nodding off while holding [H.B.] and was incoherent and could not wake up.

11. For approximately 45 minutes the hospital staff could not locate the mother. The mother states that she went to get food and drink and was gone for a short time.

13. The mother has admitted to co-sleeping with [H.B.].

15. The police began an investigation due to the allegations of the baby allegedly being poisoned.

16. A Team Decision Making meeting (TDM) was held on November 9, 2016. At the close of the TDM the participants were unable to develop a plan that would ensure [H.B.'s] safety other than to place [him] in out of home care.

17. Neither [H.B.] nor [his] biological parents is an enrolled member or eligible for enrollment in any federally recognized [American] Indian tribe.

18. The Department asked for the identity of the father and the mother stated that she does not know [] the identity of [H.B.'s] father.

19. The mother was exited from Chrysalis House on November 9, 2016.

20. There are no known family members willing and able to care for [H.B.] at this time. The Department has asked the mother for the name and contact information for the maternal relative, who is the caregiver for [H.B.'s] half sibling, [C.B.] [] but she has refused to cooperate.

21. The respondent was placed in shelter care on November 7, 2016 and notice was

provided.

22. Return of [H.B.] to [his] home is contrary to the safety and welfare of [H.B.]; removal of [H.B.] from [H.B.'s] home is necessary due to an alleged emergency situation and in order to provide for the safety of [H.B.]; reasonable efforts were made but were unsuccessful in preventing or eliminating the need for removal of [H.B.] from the home and the absence of efforts to prevent removal was reasonable; OR, because of an emergency, the absence of efforts to prevent removal was reasonable.

The magistrate found that the following paragraphs had not been proven:

12. Later that day [November 7th], the mother could not be located for approximately 45 minutes and when she returned she was incoherent. The mother stated that she went to get food and drink and was gone for a short time.

14. The mother failed to fill prescriptions for [H.B.] for the diarrhea, nausea and a fever.

In the same report, the magistrate explained how H.B. was neglected by his mother:

The totality of the circumstances in this case support a finding that the child is in need of assistance and that his custody should be awarded to the [DSS] for out of home placement. The mother is unable to give proper care and attention to the child as evidence by the history of alcoholism and drug addiction, current health problems which require medication and could result in mother passing out, a history of co-sleeping coupled with an incident that involved the child, at five months of age, found on the floor while mother was passed out or asleep and immediately unarousable. The circumstances indicate that child's health and safety are at substantial risk of harm from mother. Further, mother is in a recovery program that does not allow children and has refused to identify relative resources. Father is unknown. Evidence of baby powder ingestion by [H.B.] was not considered as evidence of neglect as there is no evidence that [Appellant] caused [H.B.] to ingest powder or knew about ingestion and ignored it. Further, there was no medical evidence corroborating actual ingestion of baby powder and no evidence that [H.B.'s] illness was caused by baby powder ingestion.

**Appellant's Exceptions to the Magistrate's Report and Recommendations**

Appellant filed exceptions, on the record, to the magistrate's Report and Recommendations. Specifically, Appellant excepted as follows:

> 1. The magistrate erred in recommending a finding that the facts in the petition she found were proven or agreed upon by the parties proved by a preponderance of the evidence that [H.B.] had been neglected by the [his] mother.
>
> 2. The magistrate erred in recommending a finding that the [H.B.'s] mother is unable or unwilling to provide care for [H.B.].
>
> [3.] The magistrate erred in recommending a finding that [H.B.] is a child in need of assistance.

Appellant requested that the juvenile court sustain her exceptions and find that H.B. was not a CINA.

On February 6, 2017, the juvenile court (McCormack, J. presiding) held an on-the-record hearing on Appellant's exceptions. Appellant took exception to the magistrate's recommendation that the court find that she neglected her son and to the conclusion that she failed, or was unable or unwilling, to provide him with proper care and attention. Counsel for the mother clarified that the exceptions were not to the magistrate's first level fact-finding, but to the second level facts, which required an analysis of the first level facts, specifically, whether they led to a finding of neglect.

At the conclusion of the hearing, the juvenile court deferred judgment pending a re-reading of the record. The judge stated:

> I am going to go back through . . . the transcripts. I will make an independent judgment and based on no dispute that the first level findings of facts . . . are not being disputed. So no argument that they're clearly erroneous. So I will go through and make my own independent judgment . . . .

On March 23, 2017, the juvenile court issued an order acknowledging that the magistrate's first-level facts were not in dispute. The court then found H.B. a CINA based on neglect and awarded custody to the Department. Appellant appealed.

## STANDARD OF REVIEW

In *In re Yves S.*, 373 Md. 551, 586 (2003), the Court of Appeals articulated the "three distinct aspects of review in child custody disputes."

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of Rules 886 and 1086 applies. [Secondly,] [i]f it appears that the chancellor 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 chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

*Id.* (citation omitted).

## DISCUSSION

### I.

Appellant initially contends that the juvenile court committed reversible error by failing to fulfill its obligation to provide an independent review of the magistrate's second-level factual findings and legal conclusions. Specifically, Appellant asserts that the juvenile court's Order does not explain its rationale and that she was denied her right to have a judge make an independent review of the judicial determination. Appellant maintains that the court failed to clarify if it was deferring to the magistrate's recommendations because of the reasons cited by the magistrate or because of an independent rationale. Appellant also asserts that her arguments raised at the Exceptions Hearing were not addressed.

Appellee child, through counsel, asserts that the first-level factual determinations made by the magistrate are largely undisputed and that the court correctly found H.B. to be

a CINA because of Appellant's neglect and that custody was properly awarded to the DSS.

The Department responds that Appellant was not denied an independent review of the magistrate's findings and recommendations. The Department notes that, on exceptions, a trial court is required to state whether it accepts the first-level findings and explain in detail if it does not. The Department argues that there was no explanation required because there was no dispute concerning the magistrate's findings. According to the Department, when the court stated that it reviewed the transcripts, magistrate's findings and arguments of counsel, "it had a sufficient factual predicate for its ultimate determination that [Appellant] had neglected H.B. and that [Appellant] was unable to care for him."

"Litigants in a child custody proceeding, as in all judicial proceedings, are entitled to have their cause determined ultimately by a duly qualified judge of a court of competent jurisdiction." *Ellis v. Ellis*, 19 Md. App. 361, 365 (1973) (citations omitted).

> The conclusions and judgments of the master to which the chancellor referred are those that must be made by the chancellor, upon his independent review of the record and of the facts properly found by the master. The ultimate conclusions and recommendations of the master are not simply to be tested against the clearly erroneous standard, and if found to be supported by evidence of record, automatically accepted. That the conclusions and recommendations of the master are well supported by the evidence is not dispositive if the independent exercise of judgment by the chancellor on those issues would produce a different result.

*Domingues v. Johnson*, 323 Md. 486, 491–92 (1991).

> Deference will be accorded to the facts as found by the master, but this only applies to "first-level" facts. First-level facts are those that answer the What?, Where?, and How? questions. Deference is not accorded to "second-level" facts or to recommendations. Second-level facts are ultimate conclusions drawn from the first-level facts.

*Levitt v. Levitt*, 79 Md. App. 394, 398 (1989).

> Second-level facts are conclusions and inferences drawn from first-level facts. A first-level fact would be that one or both parents used drugs. A second-level fact would be that that use did or did not affect [the child]. A recommendation would be a change or lack of change of custody.

*Id.*

> The function of the chancellor *vis-a-vis* the master is quite different. He may, of course, order *de novo* fact-finding in whole or in part. Where he chooses to rely exclusively upon the report of the master, however, he should defer to the fact-finding of the master where that fact-finding is supported by credible evidence and is not, therefore, clearly erroneous. The chancellor, however, (unlike the appellate court) always reserves unto himself the prerogative of what to make of those facts the ultimate disposition of the case.

*Wenger v. Wenger*, 42 Md. App. 596, 602 (1979).

> If it is remanded to the master, detailed findings of first-level facts, conclusions flowing from these facts and recommendations are necessary. If on exception the chancellor accepts the findings of fact, he or she should so state; if not, the basis therefore or any further fact-finding should be articulated in detail. The second-level facts as found should be examined and if the chancellor differs from the master, he or she should explain that difference. We direct that these matters be considered on an expedited basis.

*Levitt*, 79 Md. App. at 404.

> Maryland's appellate courts have concluded that, when faced with exceptions to the master's findings of fact, the trial court must exercise its independent judgment, "consider the allegations[,] and decide each such question." The judge "should, in an oral or written opinion, state how he resolved those challenges. Having determined which facts are properly before him, and utilizing accepted principles of law, the chancellor must exercise independent judgment to determine the proper result."

*Kierein v. Kierein*, 115 Md. App. 448, 454 (1997) (citations omitted).

This Court, in *Ellis, supra*, held that the lower court denied the appellant, in that case, the right to an independent review when the judge signed the order "without, apparently, ever reviewing the evidence and testimony taken before the Master." 19 Md.

App. at 366. We noted that "[i]t [was] clear from the record that the Chancellor did not have before him a transcript of the testimony taken before the master[.]" *Id.* at 363. "It is equally clear that the so-called report of the master contained no summary of the testimony adduced at the hearing and set forth no findings or basis for his recommendation." *Id.* We further noted:

> If, as we can only assume from the state of the record before us, the chancellor below had no evidence or testimony before him from which to make a determination of the status or the respective living conditions of the mother and father, which determination would be a *sine qua non* to an intelligent judgment of what course of action would be in the best interest of the infant child of the parties, a gross miscarriage of justice has occurred.

*Id.* at 365. We concluded that, by signing the order in such a manner, the judge's actions constituted "no more than a *pro forma* adoption of the Master's recommendation." *Id.*

In *Kierein, supra,* we also vacated the lower court's order for abuse of discretion. We explained:

> Our problem with the order is that it fails to reflect the trial court's "consideration of the relevant issues and reasoning supporting [its] independent decisions on those issues," other than stating that it "reviewed the transcript of the proceedings before Master Trimm . . . and based upon the aforementioned review of all of the evidence, adopts the findings and recommendations of Master Trimm."

115 Md. App. at 455. We further noted that "we do not mean to imply that a trial court must give a litany of its reasons for accepting and adopting the fact finding, conclusions, and recommendations of a master." *Id.* at 455–56. Ultimately, we reasoned that,

> if it is apparent from the record that the exercise of discretion to resolve the ultimate issue was done independently, after a consideration of appropriate factors, and if the disposition is supported by the record, the specificity required for resolving challenges to fact finding is not necessarily required to explain the exercise of that discretion. It is only necessary for an appellate court to be able to determine if the trial court abused its discretion.

*Id.* at 456.

Therefore, even when the trial judge does "not delineate as clearly as he might the reasons for his decision," we will uphold the court's decision when "the reasons underlying [the] decision are supported by the record." *In re Beverly B.*, 72 Md. App. 433, 442 (1987).

In the case *sub judice*, the first-level factual determinations made by the magistrate are, for the most part, undisputed. Appellant's on-the-record exceptions to the magistrate's Report and Recommendations do not constitute first-level fact-finding, *i.e.*, the "what?, where? and how?" questions. *Levitt, supra*. In contrast, Appellant's exceptions are second-level fact-findings, *i.e.*, the legal conclusions made based on first-level fact-finding. *Levitt, supra.* Appellant did not except to incidents, specific facts or actions; rather, she excepted to the finding that H.B. was "neglected," that she was "unable or unwilling to provide care" for H.B. and that H.B. is a "CINA." Therefore, there were no exceptions to the magistrate's first-level factual findings. Accordingly, the juvenile court was not required to make an independent answer to each exception, in a written or oral opinion, and provide resolutions to each. *Kierein, supra.*

Furthermore, unlike *Ellis,* it is clear, in the instant appeal, that the court was in possession of all the relevant evidence and considered it before rendering its decision. The court had all the transcripts, the magistrate's findings as to first-level facts and held a hearing on Appellant's exceptions on March 23, 2017.

Moreover, the court's ultimate legal conclusion, *i.e.*, that H.B. was a CINA and that Appellant had neglected him, was not in conflict with the magistrate's recommendation.

Therefore, the court was not required to explain "the differences" as there were none. *Levitt, supra.*

Accordingly, we hold that the juvenile court did not abuse its discretion. The court clearly possessed and considered all relevant evidence and its legal conclusions are supported by the record. Appellant's on-the-record exceptions were to the magistrate's legal conclusions or second-level findings of fact, not the first-level factual findings which were undisputed.

**II.**

Appellant next contends that the juvenile court "erred in concluding that the Department proved a *prima facie* case for neglect and the court erred in proceeding to the disposition hearing, where it concluded that H.B. was a CINA." Appellant asserts that the Department failed to fulfill its burden of proving, by a preponderance of the evidence, that H.B. was neglected by Appellant and that she was unable or unwilling to provide care for him. Appellant alleges, in her brief, that "[t]he Department failed to establish any of the elements" required to find a child CINA. In support of this premise, Appellant asserts that she does not challenge, on this appeal, any of the facts in the CINA Petition that the juvenile court sustained; however, she maintains that the sustained facts, *i.e.*, her substance abuse, her general health, her "compliance with medication" and reports of co-sleeping with H.B., "neither jointly, nor severally demonstrate any reason to believe that Appellant neglected H.B. or placed him at a substantial risk of harm."

Appellee child asserts that, from "birth until the CINA determination, there was an overarching pattern of neglect by [Appellant] in the decisions she made regarding H.B., his

care and his needs."

The Department responds that the lower court properly concluded that Appellant neglected H.B. According to the Department, "[t]he juvenile court was required to evaluate the facts to determine whether H.B. was at substantial risk of harm based on [Appellant's] failure to provide for his welfare." The Department argues that H.B was at substantial risk of harm by Appellant's neglect because she "failed to perform basic parental duties."

> The purpose of CINA proceedings is "to protect children and promote their best interests." The burden of proof here, a preponderance of the evidence, is lower than the burden the State bears when seeking to terminate parental rights, where the "much more drastic and permanent interference" justifies the higher burden of proof of clear and convincing evidence.

*In re Priscilla B.*, 214 Md. App. 600, 622 (2013) (citations omitted).

Md. Code Ann., Cts. & Jud. Proc. ("CJS") § 3–801(f)[7] provides that, a CINA is "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."

CJS § 3–801(s) defines "neglect" as "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[.]" Subparts (s)(1–2) further provide that neglect occurs when the child's circumstances indicate "[t]hat the child's health or welfare is harmed or placed at substantial risk of harm" or "[t]hat the

[7] CJS § 3–801 has been amended by 2017 Maryland Laws Ch. 655 (S.B. 272).

child has suffered mental injury or been placed at substantial risk of mental injury."

This Court's description of neglect, for purposes of a CINA, in *Priscilla, B.*, *supra,* is instructive:

> It makes sense to think of "neglect" as part of an overarching pattern of conduct. Although neglect might not involve affirmative conduct (as physical abuse does, for example), the court assesses neglect by assessing the inaction of a parent over time. To the extent that inaction repeats itself, courts can appropriately view that pattern of omission as a predictor of future behavior, active or passive: "[it] has long been established that a parent's past conduct is relevant to a consideration of the parent's future conduct. Reliance upon past behavior as a basis for ascertaining the parent's present and future actions directly serves the purpose of the CINA statute." Differently put, "[c]ourts should be most reluctant to 'gamble' with an infant's future; there is no way to judge the future conduct of an adult excepting by his or her conduct in the past." And of course, we need not and will not wait for abuse to occur and a child to suffer concomitant injury before we can find neglect: "The purpose of [the CINA statute] is to protect children—not wait for their injury."

214 Md. App. at 625–26.

In the instant case, the juvenile court properly ruled that H.B. was a CINA, that he was neglected by Appellant and that Appellant was "unable or unwilling to give proper care and attention" to H.B. and his needs. There were several instances where Appellant was found co-sleeping with H.B., where she was counseled on the dangers of co-sleeping, but, nevertheless, persisted co-sleeping with H.B. When H.B. was found face down on the floor at Chrysalis House unable to turn himself over and protect his airway, Appellant was sound asleep in bed. When H.B. began to cry, Appellant was unresponsive and only awoke after Ms. Montz yelled her name several times. Upon waking, Appellant was described as "dazed" and "incoherent" and continued to present a lack of coherence until the next day. After being informed as to how H.B. was discovered, Appellant denied that he had been on the floor, rather than demonstrate concern for H.B.'s safety and well-being.

Although the magistrate's finding of neglect was not based on evidence that H.B. had ingested tainted baby formula, Appellant's knowledge and inaction concerning the tainted baby formula constituted neglect and placed H.B. in substantial risk of harm. Appellant testified that her one roommate, J., suggested that they both taint the babies' formula and blame it on the other roommate, S. Appellant testified that, on November 3rd, she smelled baby powder in J.'s baby formula. On November 4th, Appellant testified that J. told her to check her own baby's formula for contamination. Appellant alleges that she took H.B. directly to the hospital; however, the Department asserts that she was seeking medical attention for her child on a separate matter and that, on November 6th, Appellant sought treatment for H.B. concerning potential ingestion of baby powder. This is particularly troubling, given that H.B. had been very ill, *i.e.,* vomiting and feverish, for two weeks. It was confirmed that the baby formula did contain baby powder. Again, we reiterate that the magistrate's findings of neglect were not based on evidence that H.B. had actually ingested baby powder.

However, Appellant was informed by J., on November 3rd, that her own child's baby formula was tainted. J. was someone that Appellant had previously discussed tainting baby formula with in order to blame their roommate, S., and get her into trouble. Appellant testified that she detected an odor of baby powder in the formula that J. presented her. Appellant's own child had been actively vomiting and ill for two weeks. By Appellant's own testimony, she waited a day to inform the staff at Chrysalis House of the potential contamination and to seek medical treatment for H.B. According to Appellee Child and the Department, Appellant waited four days before seeking medical intervention for H.B.

Either account supports the very definition of neglect.

Accordingly, we hold that the juvenile court properly found that the Department established the element of neglect.

**III.**

Appellant's final claim of error is that, in the absence of evidence of abuse or neglect, or evidence of a "lack of willingness or ability of [Appellant] to provide care for her son, the court erred in concluding that [H.B.] was a CINA." Appellant argues that "[t]he liberty interest in raising a child cannot be taken away without clear justification" and that, "[i]n this case, there was no justification for finding H.B." a CINA. Appellant asserts that the court's error must be reversed.

Appellee child responds that Appellant's "persistent medical conditions and cognitive memory deficits make her unable to properly care for H.B." Appellee child maintains that the "juvenile court correctly made a CINA determination as the totality of the circumstances proved that H.B. was placed at a substantial risk of harm" by Appellant.

The Department responds that, "[a]t disposition, upon finding that [Appellant] had neglected H.B., the juvenile court had to determine H.B's current circumstances and [Appellant's] current ability to assure his safety and well-being." The Department notes that, "[i]n challenging the court's finding that she was unwilling or unable to provide proper care and attention, [Appellant] did not address her non-compliant behaviors resulting in her dismissal from Chrysalis House" and where H.B. will reside, as her current residential program does not permit children. The Department argues that Appellant was unable to care for H.B. when he lived with her. According to the Department, the juvenile court did

not err or abuse its discretion in finding that Appellant was unable or unwilling to care for H.B. and his needs.

As stated, *supra,* CJS § 3–801(f) outlines the statutory requirements of a finding that a child is a CINA. After finding that a child had been abused or neglected, a court must also find that "[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."

Regarding this second prong of a CINA determination, the magistrate, in the instant case, found as follows:

> The mother is unable to give proper care and attention to the child as evidence[d] by the history of alcoholism and drug addiction, current health problems which require medication and could result in mother passing out, a history of co-sleeping coupled with an incident that involved the child, at five months of age, found on the floor while the mother was passed out or asleep and immediately unarousable.

The juvenile court properly found that Appellant is "unable or unwilling to give proper care and attention" to H.B. and his needs at the time of the CINA determination. Appellant did not address where H.B. will live if he were returned to her care and custody, as Appellant's current residential program does not permit children. Appellant also admits that her history of alcohol abuse and drug addiction has left her with memory deficits. She also testified that her detoxification from certain drugs and her current medications can leave her feeling drowsy. Appellant also acknowledges that she can pass out from her health conditions and medications. Although she alleges that she can forestall these episodes, by her own account, the incident where H.B. was found face-down and Appellant was immediately unresponsive to his cries and initially unresponsive to attempts to wake her up, was a result of such a passing-out episode. As we stated in *Priscilla, B., supra,* "The

purpose of [the CINA statute] is to protect children—not wait for their injury."

Accordingly, we hold that the juvenile court properly determined that Appellant was unable to properly care for H.B. and that H.B. is a CINA.

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