Circuit Court for Baltimore City
Petition Nos. 813290001
813290002
813290003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 615

September Term, 2017

IN RE: A.S., M.S., AND M.S.

Nazarian,
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: January 12, 2018

This is the third appeal involving three children—MJS, a girl born March 2010, AHS, a girl born March 2011, and MAS, AHS' twin sister—who were previously declared children in need of assistance (CINA).[1] In the first appeal, we affirmed the decision of the juvenile court in the Circuit Court for Baltimore City to change the concurrent plan of reunification or guardianship with a non-relative to a sole plan of reunification with their father, Mr. S., and to lift a prior restriction on the Department of Social Services' use of the children's passports. Appellants, the children and their mother, Ms. L., then filed a petition for *certiorari* to the Court of Appeals, which was denied on September 22, 2017.

While the first two appeals were pending, the juvenile court conducted a hearing to consider allowing the children to travel to Mexico to visit Mr. S. The court issued orders on May 12 and 15, 2017, continuing the permanency plan and permitting the children to travel to Mexico for reunification visits with Mr. S. Appellants subsequently filed a motion for reconsideration, alleging for the first time that Mr. S. was convicted of second-degree assault under an alias. The juvenile court denied the motion. Appellants timely appealed and present the following issues that we have consolidated and rephrased[2]:

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[1] A CINA is "a child who requires court intervention because: (1) [t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) [t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." Md. Code Ann., Cts. & Jud. Proc. § 3-801(f) (West 2011).

[2] The children present the issues as follows: (1) "Did the Juvenile Court exceed its authority in conducting a hearing to review the Children's permanency plan and consider expansion of BCDSS' authority to transport the children to Mexico, even though these issues were the subject matter of consolidated appeals pending before the Court of Special Appeals?"; (2) "Is the Juvenile Court's September 26, 2016 Order which changed the Children's permanency plan to reunification with G.S. only constructive banishment of the Children and therefore unconstitutional and void?"; (3) "Did the Juvenile Court err in failing to

I. Did the juvenile court err in continuing the children's commitment and authorizing reunification visits with Mr. S.?

II. Did the juvenile court err in denying appellants' motion for reconsideration?

We hold that the juvenile court orders did not change the antecedent custody order, and appellants did not establish good cause for their motion for reconsideration. The orders at issue are thus non-appealable interlocutory orders, and we shall grant the Department and Mr. S.' motion to dismiss.

BACKGROUND

Appellants have taken three interlocutory appeals following a review hearing in November 2013 where MJS, AHS, and MAS were declared CINA.[3] The first appeal was from a September 26, 2016 order changing the children's permanency plans from concurrent plans of reunification with a parent and custody or guardianship to a non-relative to sole plans of reunification with Mr. S. The second appeal was from a December 1, 2016 order lifting a restriction on the Department's use of the children's passports. This Court affirmed the decision of the juvenile court to change the permanency plan to a sole plan of reunification with Mr. S. and to lift a prior restriction on the Department's use of

consider the application of Md. Fam. Law § 9-101 when ruling to grant visitation to G.S. in Mexico?; (4) "Did the Juvenile Court err in failing to properly consider the factors set forth in § 5-525 of Md. Family Law?" Ms. L. presents the following issue: "Did the juvenile court err by authorizing the Department of Social Services to take three children of tender years to Mexico?"

[3] Appellants have also filed a fourth appeal arising out of the juvenile court's decision to reset a December 4, 2017 review hearing. That issue is not the subject of this appeal.

the children's passports in an unreported opinion on July 31, 2017. *See In Re: M.S., A.S., and M.S.*, 2017 WL 3224883 (2017).

Appellants subsequently filed a petition for writ of *certiorari* to the Court of Appeals seeking review of this Court's decision. They included in their petition a request that the Court of Appeals bypass consideration of this pending appeal. The Court of Appeals denied appellants' petition on September 22, 2017.

On May 11 and 12, 2017, while the first two appeals were pending, the juvenile court conducted a hearing to consider allowing the children to travel to Mexico to visit Mr. S. The court issued an order on May 12, 2017, permitting the children to travel between June 12 and August 30, 2017, with their caseworker, Tracie Cook-Thomas, for reunification visits with Mr. S. On May 15, 2017, the court continued the children's commitment, continued the plan of reunification with Mr. S., and scheduled the next CINA review hearing for August 2017.

Appellants filed a number of motions after the review hearing. The children filed an emergency motion to stay or enjoin the May 12 and 15, 2017 orders pending appeals, which the juvenile court denied on May 26. The children also filed an emergency motion to reconsider the May 26 order, informing the court of newly-discovered evidence alleging that Mr. S. was convicted under an alias for second-degree assault against Ms. L. The motion was denied on June 5. Ms. L. filed a motion to stay the proceedings pending appeal and a supplemental emergency motion to stay, referencing the newly-discovered

conviction. Both of Ms. L.'s motions were denied on June 5. Appellants appealed the May 12 and 15 and June 5, 2017 orders, creating this third appeal.[4]

STANDARD OF REVIEW

In CINA cases, Maryland appellate courts apply three interrelated standards of review:

> First, when an appellate court scrutinizes factual findings, the clearly erroneous standard applies. Second, 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 reviewing a juvenile court's decision to modify the permanency plan for the children, this Court must determine whether the court abused its discretion.

In re A.N., 226 Md. App. 283, 305–06 (2015) (internal citations and quotations omitted).

DISCUSSION

I. Appellees' Motion to Dismiss

There are three orders at issue in this appeal: May 12 and 15, 2017 orders, which continued the plan of reunification and permitted the children to travel to Mexico and a June 5, 2017 order, which denied appellants' motion for reconsideration. None of the orders, appellees argue, are appealable interlocutory orders and thus the case should be dismissed. As we shall explain below, the first two orders did not change the antecedent custody order, and the newly discovered evidence, if considered, would not have produced a different outcome from the original trial.

[4] This Court issued a stay of the juvenile court's December 1, 2016 and May 12 and 15, 2017 orders, which was lifted on August 11, 2017. In response to a motion by appellants, the Court of Appeals stayed the December 1, 2016 and May 12 and 15, 2017 orders, pending further review. The Court of Appeals lifted the stay on September 22, 2017. That appeal is now moot in light of the Court of Appeals' lifting of the stay.

A. May 12 and 15, 2017 Orders

As a general rule, a party may only appeal from "a final judgment entered in a civil or criminal case by a circuit court." Md. Code Ann. Cts. & Jud. Proc. § 12-301 (West 2011). When considering whether a particular order constitutes an appealable judgment, "we assess whether any further order was to be issued or whether any further action was to be taken in the case." *In re Samone H.*, 385 Md. 282, 298 (2005). Within the context of custody cases, "the focus should be on whether the order and the extent to which that order changes the antecedent custody order." *In re Karl H.*, 394 Md. 402, 430 (2006). "[S]ubsequent interlocutory orders made in accordance with continuation of the same plan are not appealable because they do not change the terms of parental rights." *In re Ashley S.*, 431 Md. 678, 702 n.15 (2013).

Appellees argue that the orders on appeal did not change the children's custody or permanency plan. The May 12 order, appellees maintain, permits visitation between Mr. S. and the children in an effort to assess the viability of reunification and the May 15 order continues the permanency plan of reunification with Mr. S. As a result, this Court lacks jurisdiction to decide them. Appellants, by contrast, argue that the juvenile court did not have jurisdiction to rule on the same subject matter that was on appeal, and the court failed to make findings in accordance with sections 5-525 and 9-101 of the Family Law Article.

In their first appeal, appellants challenged the sufficiency of the evidence to support the juvenile court's order changing the permanency plan from a concurrent plan of reunification or guardianship with a non-relative to sole reunification with Mr. S. *In Re: M.S., A.S., and M.S.*, 2017 WL 3224883, at *7. We held that appellants failed to rebut the

presumption that it is in the children's best interest to be placed with Mr. S., and, as a result, "the juvenile court did not err in changing the permanency plan to reunification with Mr. S." *Id.* at 11. As pertinent here, we also held that the juvenile court did not err in removing language from a prior order that restricted the Department's ability to use the children's passports. *Id.* at 12.

The juvenile court's orders at issue in this appeal continued the commitment of the children and "limited guardianship [was] expanded to include express authority for the Baltimore City Department of Social Services to consent to international travel outside [of] the United States, to Mexico, on behalf of [the children] between June 13, 2017 through August 30, 2017, for the purpose of reunification visits with [Mr. S.]" As a result, because the May 12 and 15 orders were "made in accordance with continuation of the same plan," they "are not appealable because they do not change the terms of parental rights."[5] *In re Ashley S.*, 431 Md. at 702 n.15.

Next, while the subsequent review hearing addressed the same subject matter involved in the pending appeal, the juvenile court is statutorily required to hold a review hearing every six months. Cts. & Jud. Proc. § 3-823(h). The review hearing thus was not

[5] Since the May 12 and 15, 2017 orders did not change the terms of parental rights, the law of the case doctrine bars appellants' remaining arguments. *See Fid.-Balt. Nat'l Bank & Tr. Co. v. John Hancock Mut. Life Ins. Co.*, 217 Md. 367, 372 (1958) ("Once this Court has ruled upon a question properly presented on an appeal, or, if the ruling be contrary to a question that could have been raised and argued in that appeal on the then state of the record, as aforesaid, such a ruling becomes the 'law of the case' and is binding on the litigants and courts alike, unless changed or modified after reargument, and neither the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal.").

a "prohibited" action, and the juvenile court retained jurisdiction to hold the hearing. *In re Adoption of Jayden G.*, 433 Md. 50, 74 (2013) ("If the statute expressly authorizes the court's action, it cannot reasonably be characterized as 'prohibited' action."). Moreover, as the numerous appeals in this case illustrate, preventing the CINA case from moving forward while a permanency-plan appeal is pending would erect a bar to CINA review hearings, and "[p]rotracted proceedings in establishing the initial plan defeat the purpose of the statute." *In re Yve S.*, 373 Md. 551, 582 (2003).

Finally, we are not persuaded by appellants' arguments that the juvenile court failed to make findings in accordance with sections 5-525 and 9-101 of the Family Law Article. First, section 5-525 applies to the creation of a foster care program. That statute does not apply to this case, which involves a *review* of a previously established permanency plan. Second, appellants' assertion that the juvenile court erred in failing to consider section 9-101—which requires that a court determine whether abuse or neglect is likely to occur if custody or visitation rights are granted in a custody or visitation proceeding—is not supported by the record. At the conclusion of the hearing, the court stated: "[t]he Court finds after the hearing that there are no issues that I find would harm the safety or well-being of these children to make visits to their father nor for me to change the permanency plan that is in place now which is reunification to the father."

B. June 5, 2017 Order

Under Maryland Rule 2-535(c), a "court may grant a new trial on the ground of newly-discovered evidence that could not have been discovered by due diligence in time

to move for a new trial pursuant to Rule 2-533." The following factors must be met in order to merit a new trial on the basis of newly discovered evidence:

> A party is entitled to a new trial on the basis of newly discovered evidence when the court is persuaded that (1) the evidence has been discovered since the trial, i.e., the evidence is "newly discovered;" (2) the moving party was diligent in attempting to discover the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is "material" to the issues involved; and (5) the evidence is of such a nature that a different outcome would probably result if it was considered.

Holden v. Blevins, 154 Md. App. 1, 9 (2003). In this case, after the juvenile court issued its May 12 and 15, 2017 orders, children's counsel became aware of a second-degree assault conviction under a name similar to an alias allegedly used by Mr. S. and filed a motion for reconsideration. This motion was denied by the court, and the children timely appealed. Because the conviction was not discovered until after the hearing, it was not entered into evidence. But even if we were to assume that Mr. S. was convicted of second-degree assault, we are not persuaded that "a different outcome would probably result if it was considered." *Id.*

During the review hearing, the children sought to introduce testimony of two witnesses, one of which purportedly witnessed domestic violence between Ms. L. and Mr. S. The court found that such testimony would be highly prejudicial, explaining:

> THE COURT: I think it's highly prejudicial. I think, at this point in time, in this case, to have them talk about matters that happened six or seven years ago, I'm not -- I don't believe necessarily at this point it is relevant. I believe that those matters were -- this matter was before Magistrate Bailey. You took an exception and those matters were before this Court, and having the information that there were allegations, the Court took into consideration that there were allegations toward domestic violence as well as the Court took into consideration what steps have been taken by [Mr. S.] as asked by the Department as well as done on his own when he returned to Mexico.

We see no reason to distinguish between the newly discovered conviction from the above-mentioned witness testimony. The second-degree assault conviction, if Mr. S. committed it, is over five years old, he has undergone domestic violence counseling, and it addressed an incident that was litigated in a previous hearing. As a result, appellants have not established that the outcome would be different if the evidence was considered, and the juvenile court did not err in denying their motion for reconsideration. *Id.*

APPELLEES' MOTION TO DISMISS GRANTED. COSTS TO BE PAID BY APPELLANTS.