Circuit Court for Baltimore City
Case No. 818099002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2146

September Term, 2018

IN RE: D.J.

Nazarian,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: March 13, 2019

In April 2018, after I.H. ("Mother") assaulted her 14-year-old son, D.J., at his school (Mother later was arrested and incarcerated), the Circuit Court for Baltimore City, sitting as a juvenile court, granted the Baltimore City Department of Social Services' ("Department") petition for emergency shelter and placed D with a maternal aunt. After an adjudicatory hearing and a disposition hearing, the magistrate recommended that D be found a child in need of assistance ("CINA") and that the aunt be granted limited guardianship. Mother filed exceptions, and after a *de novo* hearing, the juvenile court affirmed the magistrate's recommendation. Mother appeals and, after reviewing the hearing transcripts, the written orders, and the record as a whole, we affirm.

I. BACKGROUND

On April 6, 2018, a social worker at D's school saw Mother come into the school, whip him with her belt, and choke him in the hallway. The magistrate's findings of fact,[1] which Mother doesn't dispute and the juvenile court affirmed, recount the assault in detail:

> The following facts are sustained based on the testimony of [] the witness for BCDSS. On 4/6/2018, [the witness] was employed as the school social worker at [D's school] in Baltimore City. On that day as she was walking down the steps from the third floor she saw [Mother] [] take off her belt and begin to spank [D] with it. She was about three feet away. [The witness] testified that she froze and didn't know what to do so she went back up the stairs. A few minutes later she was walking down the hallway with the Assistant Principal and another staff person when she heard yelling. She saw [Mother], now in the third floor hallway, with her hands around [D]'s neck. A student came out of a classroom and pulled [D] back. [The witness] then saw [Mother] take off her jacket and

[1] The magistrate's findings appear in a July 2, 2018 order that followed the disposition hearing.

> "square up" on him. [The witness] pulled [D] away and behind her, and [Mother] then came at her. She said to [Mother] "That's enough. He already has a knot on his head." [Mother] said to her "F--- that. I don't give a f---. Let my son go." Another staff person took [D] into the Teacher Planning Room. [Mother] then put her belt back on, got her daughter from a classroom, went down to the office and fussed and finally left the building. [The witness] called CPS and School Police as she is required to do and then accompanied [D] to the hospital. [D] was tearful throughout the incident and at the hospital.

Three days later, the Department filed a CINA petition and requested shelter care for D. A hearing was held the same day, and the magistrate denied shelter care, but ordered Mother to arrange for D to live with a maternal aunt, Y.W.

D filed a motion for review of the shelter care decision, asserting that Mother had been "immediately arrested" after the shelter care hearing on charges arising from the school assault. On April 24, 2018, the magistrate held a review hearing, and the parties agreed to ask the court to order shelter care with placement in the home of a different maternal aunt, T.B. ("Ms. B"). The court entered an order to that effect.

On May 24, 2018, the court held an adjudicatory hearing[2] before a magistrate. Ms. Haynes, the school social worker, testified and described the April 6 incident. After sustaining the Department's factual allegations, the magistrate ruled orally that shelter care and the limited guardianship to Ms. B would continue. The magistrate also decided, in response to D's counsel's request for more time to consult with D and prepare, that there

[2] An adjudicatory hearing is "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." Maryland Code, (1973, 2013 Repl. Vol., 2018 Cum. Supp.), § 3-801(c) of the Courts and Judicial Proceedings Article ("CJ").

was good cause to bifurcate the proceedings and consider the disposition of D's CINA status separately.

On June 28, 2018, a disposition hearing[3] was held, again before the magistrate. The Department's caseworker, Chiquita Polk, and D's aunt, Ms. B, both testified. At the conclusion of the hearing, the magistrate found D to be a CINA and committed him to the Department for relative placement with Ms. B. On July 2, 2018, Mother filed a notice of exception and requested a *de novo* hearing.[4]

On July 31, 2018, a hearing was held before the juvenile court at which Ms. Polk and Ms. B testified again on behalf of the Department. Mother's brother, J.W., testified on Mother's behalf. The court also admitted evidence of Mother's completion of a parenting class. After hearing closing arguments, the court affirmed the magistrate's recommendations finding D a CINA and committing him to the Department and to relative care with Ms. B.

Additional facts will be supplied as necessary below.

[3] CJ § 3-801(m) defines a "disposition hearing":

> "Disposition hearing" means a hearing under this subtitle 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.

[4] The magistrate's recommendations in a CINA proceeding are not final, and if a party believes the magistrate has erred, she has the right to file exceptions and elect a *de novo* hearing. CJ § 3-807(c); Maryland Rule 11-111(c).

II. DISCUSSION

Mother raises three questions that we have reordered and rephrased: Did the circuit court err in (1) finding D.J. a CINA; (2) denying Mother's request to call D.J. as a witness; or (3) expressing views about the disposition of the case before hearing closing arguments?[5]

[5] Mother states the Questions Presented as follows:

> 1. Did the court err when it refused to allow [Mother] to call then fourteen-year-old D.J. as a witness?
>
> 2. Did the court err when it decided that D.J. should be found a CINA before allowing the parties to proceed with closing arguments?
>
> 3. Did the court err in finding D.J. to be a CINA?

D.J. restates the Questions Presented as follows:

> 1. Whether the court erred or abused its discretion when it denied [Mother's] request to call her son, fourteen (14) year old D.J. as a witness, where the court heard ample evidence demonstrating D.J.'s abuse by [Mother] to support the CINA finding and D.J.'s commitment to the Department?
>
> 2. Whether the Magistrate's announcement that D.J. should be found CINA and committed to the Department for relative placement, prior to closing arguments but after all evidence was heard, is harmless error?
>
> 3. Whether the court committed error or abused its discretion when it found D.J. CINA and committed him to the Department for relative placement?

The Department lists two Questions Presented:

> 1. Did the juvenile court properly determine that D.J. is a CINA because [Mother] physically assaulted him at his school, did not wish to participate in reunification services, had not engaged in family counseling services, had not completed anger management treatment, and did not want D.J. to return to her home?

In child custody disputes, we apply three different but interrelated standards of review. *First*, when "the appellate court scrutinizes factual findings, the clearly erroneous standard applies." *In re Adoption of Cadence B.*, 417 Md. 146, 155 (2010) (*quoting In re Yve S.*, 373 Md. 551 (2003)) (cleaned up). *Second*, if the trial 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." *Id. Third*, when the ultimate conclusion of the trial court is "founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion." *Id.* An abuse of discretion occurs when "no reasonable person would take the view adopted by the trial court" or when the court acts "without reference to any guiding rules or principles." *In re Yve S.*, 373 Md. at 583 (cleaned up).

A. The Circuit Court Did Not Err In Finding D A CINA

Maryland Code (1973, 2013 Repl. Vol., 2018 Cum. Supp.) § 3-801(f) of the Courts and Judicial Proceedings Article ("CJ") defines a "child in need of assistance" 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.

The Department bears the burden of proving these elements by a preponderance of the

> 2. Did the juvenile court apply the correct legal standards in permitting [Mother] to make closing arguments and in declining to compel a 14-year-old D.J. to testify?

evidence. CJ § 3-817(c). In this case, the juvenile court found that Mother's abuse of D and her inability and unwillingness to create a safe environment for her son satisfied both elements. Mother does not challenge the finding that there was abuse.[6] Instead, she challenges the court's conclusions on the second CINA element.

Mother argues *first* that there was insufficient evidence to support a finding that D "required" the assistance of the court. But that argument is based on the incorrect premise that "requiring court intervention" is a separate element of a CINA finding. It isn't. Proof of the two elements demonstrates that a child is a CINA and, by definition, requires court intervention—intervention follows from the finding itself.

Second, Mother contends that the evidence was insufficient to prove that she was unwilling and unable to create a safe environment for D. She argues that because she herself "could handle" D's placement with a relative, as well as D's therapy and family therapy, the evidence was insufficient to support a finding that she was unwilling or unable to care for him. She points to exhibits showing that she completed a parenting class, the testimony of the Department social worker that "[Mother] already had things in place for him to go with other relatives" before the incident at the school had occurred, and the Department's

[6] CJ § 3-801(b) defines "abuse" in relevant part as:

> (2) Physical or mental injury of a child under circumstances that indicate that the child's health or welfare is harmed or is at substantial risk of being harmed by:
>
> (i) A parent or other individual who has permanent or temporary care or custody or responsibility for supervision of the child . . . .

delays in setting up therapy services.

We see no abuse of the court's discretion in finding as it did. The court found at the July 31 *de novo* hearing that Mother refused to enter into an agreement with the Department, seemed motivated primarily by the pending proceedings to take any steps, and still had not completed anger management counseling or arranged therapy for D:

> The Court [] finds that [Mother] is unable and unwilling to create a safe environment for her son. That was established by testimony not only by [the Department social worker], but also testimony by Ms. B and Mr. [W], as well as the exhibits.
>
> With regard to the exhibits, what the Court found instructive was, yes, she has completed the parenting class, but what was more persuasive was the fact that the mother refused to participate in an agreement with the Department because she believed that she could take care of this on her own. It was since the initiation of this petition that she took care of it on her own and while she has completed parenting classes, she has not completed [] the anger management component. [D] hasn't participated in individual counseling, and there hasn't been any family counseling at all, all of which the Court believes is essential to this family moving forward in a healthy way.
>
> [D] seems to be in a loving and caring home with his maternal aunt [Ms. B] and her husband. So the Court's position is that he has a father figure that can impress upon him the way that he should go.
>
> ***
>
> At the initiation of the petition, there was limited interaction between [D] and mother, which meant family gatherings were awkward, but based on Ms. B's testimony, mother regularly talks to [D] on the cellphone and now they attend family gatherings together and that's evidenced in the court order by Magistrate Brown, when she indicates supervised visitation would be appropriate.
>
> Ms. B. didn't indicate whether she had an opinion either way about her sister's parenting her children, but she did make it

> clear that [D] feels safe in her home, that since he's been in her home, he's done very well, and that counseling, although it seems like intake may have started, but there was no initiation of counseling sessions.
>
> As to Mr. [W]'s testimony, it was hard for the Court to discern what, if any, opinion he had regarding his nephew, and the Court did hear testimony that gave the Court concern about his characterization of what he believed to be the facts in this case and how he would've handled it and expected it to be handled if he was similarly situated, which gives pause to this Court.
>
> So for those reasons, the Court will find [D] CINA, commit [D] to the Department for the purposes of relative placement. Mother is to complete anger management. [D] is to participate in individual counseling and the parties are to participate in family counseling together.

The juvenile court is in a much better position than we to assess Mother's ability and motivation to provide a safe environment for D:

> 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.

In re Yve S., 373 Md. at 583–84 (cleaned up). Mother does not dispute that she refused to participate in services the Department offered, nor does she dispute the Department's social worker's assessment that Mother was unwilling to have D in her home at that time:

> [Mother] stated that before [] the Department bec[a]me involved, that [D] wouldn't have been in her care and that she wasn't looking forward to [D] being in her care at this time, that he would've been with other relatives.

In short, Mother has identified nothing in the record, nor have we found anything

ourselves, revealing the court abused its discretion in finding that the Department proved that Mother was unwilling or unable to care for D.

B. The Circuit Court Did Not Err In Declining Mother's Request To Call D As A Witness

Mother argues *next* that the trial court erred when it denied her request to call D as a witness. In a custody dispute, the court "has discretion to decide whether to conduct a child interview." *Karanikas v. Cartwright*, 209 Md. App. 571, 595 (2013). In addition, Maryland Rule 11-110(b) provides that the court may exclude from the courtroom "a child who is the subject of the proceeding" if it finds that doing so "is in the best interest" of the child.

After hearing argument from counsel on this issue, the juvenile court found that it would not be in D's best interest for him to testify, and that the other evidence and testimony before the court was sufficient to support a decision:

> With regard to [D] testifying the Court has heard from [the Department's social worker] and Ms. B. and Mr. [W]. Counsel for mother now wants to call [D].
>
> The Court finds that it is not in [D]'s best interest. Based on the testimony that the Court has heard, the Court believes it has enough information to make a decision absent any other witnesses called by any of the other parties."

Mother argues that the court's denial of her request denied her due process, and relies on *Wagner v. Wagner*, 109 Md. App. 1 (1996), which addressed parents' due process rights in custody proceedings under Article 24 of the Maryland Declaration of Rights.[7] We

[7] Article 24 of the Maryland Declaration of Rights states "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled,

observed there that a parent "has a protectible liberty interest in the care and custody of her children, and when a state seeks to affect the relationship of a parent and child, the due process clause is implicated." *Id.* at 25 (internal quotations and citations omitted). Even so, due process "does not mean that a litigant need be satisfied with the result." *Id.* at 23. And we went on to hold that due process "is sufficient if there is at some stage an opportunity to be heard *suitable to the occasion* and an *opportunity* for judicial review at least to ascertain whether the fundamental elements of due process have been met." *Id.* at 23–24 (emphasis in original).

Mother argues that the court's denial of her request for D to testify deprived her of the opportunity to present her defense "effectively" because there were two conflicts in the evidence that D's testimony could have resolved. *First*, she argues that "[D]'s hopes and wishes for the disposition were in dispute" because of a purported conflict between D's counsel's representation to the court and the Department social worker's testimony on that subject. D's counsel represented to the court that D wanted to remain with his aunt for the present ("So my client is not ready to go home. That's not saying that he won't be ready in the future."). The social worker testified that "in the near future, he do[es] wish to go back home." *Second*, Mother asserts that there is a conflict between, on the one hand, the social worker's testimony that D "appears to be happy in [Ms. B's] home" and D's counsel's representation that D is "happy where he's at," and, on the other hand, Ms. B's testimony

or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

that "I can't say whether he appear [sic] happy or sad." Mother argues that "[t]he hearsay evidence and attorney proffers about [D]'s wishes are not substitutes for the finder of fact actually observing the witness give testimony under oath."

But even if the testimony did conflict in the way in which Mother asserts it does—and it is far from clear that the witnesses' representations actually conflict—neither D's wishes about where he would like to live nor his relative level of happiness are relevant to the ultimate CINA determination. And in any event, the juvenile court did consider D's best interests, and expressly noted that D "seems to be in a loving and caring home with [Ms. B] and her husband." The testimony of Ms. B and the Department social worker sufficiently supported that determination, and in making her request for D to testify, Mother did not proffer any additional testimony by D that would help the court resolve whether D is a CINA.[8] Mother had the right, of course, to defend her parental rights, and she had an

[8] Mother did not identify anything that she would ask D other than to learn about D's wishes and his view on "how the disposition of this case would affect him and his relationship with his own mother":

> Your Honor, I don't think it's clear that there's a lot of tension between a mother and her son. I think there's a lot of tension that this Court has caused, a lot of unanswered questions going on in this family who doesn't really understand, but this is all the more reason why I think it's important for the Court to hear from [D] himself.
>
> I mean, this is a 14-year-old boy. We're not talking about an infant, a toddler, even a child who can't speak or understand what's going on. You've heard testimony today that he understands this whole court -- he understands why we're here, but you haven't heard from him what he wants. You haven't heard from him how it's affecting him. You haven't heard that he didn't even want to be here today.

opportunity to be heard suitable to the circumstances. *See Wagner*, 109 Md. App. at 23–24. Moreover, Mother did not subpoena D nor provide notice to D's or the Department's counsel of her desire to call D as a witness in advance of the hearing, so granting Mother's request would have required a mid-hearing postponement that would have delayed further the resolution of D's custody. We see no abuse of discretion in the court's decision to deny Mother's request for D to testify.[9] *See Karanikas*, 209 Md. App. at 595; Maryland Rule 11-110(b).

C. The Magistrate Did Not Err In The Handling Of Closing Arguments.

Finally, Mother argues that the magistrate erred when she stated views on the merits before closing arguments at the June 28, 2018 disposition hearing. Mother does not dispute that she presented closing argument at both the June 28 disposition hearing before the

> I mean, let's get to the basis of why we're here and if there's healing that needs to be done, I think the Court can hear from that because my client's position that if the Court would hear from [D], that would assist the Court in making a decision about what actually needs to be done and healing can be done without -- with him being here testifying. Nobody wants to fight him or make him uncomfortable, but I think it is important. He's a huge part of why we're here and he's old enough to weigh in and inform the Court about his own situation and whether or not the disposition of this -- how the disposition of this case would affect him and his relationship with his own mother.

[9] Mother relies as well on *In re Maria P.*, 393 Md. 661 (2006), but that case does not apply here. In that case, the Court of Appeals held that a trial court erred when it excluded a parent from the courtroom during her child's testimony. *Id.* at 670, 679. This case presents the opposite situation. Mother was present throughout the proceedings and participated fully. Her due process rights, if any, depend on whether his absence interfered unfairly with her ability to put on a defense, which it didn't.

magistrate and at the July 31 *de novo* hearing before the juvenile court. Instead, she argues that the magistrate erred at the June 28 disposition hearing when she stated—before closing arguments had taken place—that "I think that this should be a CINA finding and a commitment for relative placement." Here is the full exchange:

> THE COURT: Is the only thing remaining argument?
>
> [Counsel for Mother]: Yes.
>
> THE COURT: Okay. I would have to say to you that we probably should come back at 2:00 and I'll hear your argument. Is there any reason why you can't come back at 2:00?
>
> [Counsel for Department]: I have a status conference, but I'll be here.
>
> [Counsel for D]: I do have a contested matter before Magistrate Hill which will likely be moving forward at 1:30. And I have a visit scheduled this afternoon as well. So I will be here, but I don't know how available I'm going to be.
>
> THE COURT: Can you come back at 2:00, Ms. Johnson?
>
> [Counsel for Mother]: Yes. I have a contested disposition at 1:30. And I have another disposition set at 1:30.
>
> THE COURT: Well, I can actually tell you that I think that this should be a CINA finding and a commitment for relative placement. That I think that the Department, as much as possible, needs to get working with Mother. She would have to be careful what she says and that could easily be handled by just not addressing any of the facts of the case.
>
> [Counsel for Department]: Right.
>
> THE COURT: And only addressing how we're going to work on a relationship issue and getting the family counseling in place. As far as visitation, based on the testimony of Ms. B., if she would allow visitation in her home.
>
> [Counsel for Department]: Supervised.
>
> THE COURT: Or under her supervision in the community, that would certainly be fine with me. I just don't know -- it sounded like from her possibility that would be a possibility.

> [Counsel for Mother]: Your Honor, can we -- I'm still asking that arguments be heard in this case.
>
> THE COURT: Say that again.
>
> [Counsel for Mother]: I would ask that arguments be heard. I would like to be heard.
>
> THE COURT: Well, then you've got to come back at 2:00. Because I have to give my staff a lunch break, okay?
>
> [Counsel for Mother]: No, I understand completely Your Honor.

According to the transcript, the court reconvened at 2:08:20 p.m., and all parties presented closing arguments.

A party in a CINA proceeding has a common law right "to have an opportunity to make closing argument." *In re Emileigh F.*, 353 Md. 30, 41 (1999). The Court of Appeals has explained that a closing argument "may correct a premature misjudgment and avoid an otherwise erroneous verdict." *Id.* (*quoting Herring v. New York*, 422 U.S. 853, 893 (1975)). And Mother had the opportunity to present closing argument at the disposition hearing. She cites no authority—and we found none—holding that a factfinder's pre-argument statements about the merits of the case infringes on a party's right to a closing argument. Still, we recognize that Mother may have felt that her argument was ineffectual; it's possible that argument might have swayed the magistrate to rule the other way, but we obviously cannot know that with certainty. Even if we assume, without deciding, that the magistrate's statements effectively deprived Mother of her right to argument, though, the error was cured. After Mother filed exceptions, she was entitled to, and had, a full *de novo* hearing. *See* CJ § 3-807(c). The juvenile court wasn't required to defer to the magistrate's findings or recommendations—Mother had a full and fresh opportunity to make her case

to the juvenile court, including a full and fresh opportunity to offer closing argument.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.