

Circuit Court for Frederick County  
Case Nos. C-10-JV-18-000185  
C-10-JV-18-000186

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2297

September Term, 2018

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IN RE: A.E. AND A.E.

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Wright,  
Reed,  
Friedman,

JJ.

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Opinion by Friedman, J.

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Filed: May 3, 2019

\*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, Father of A.E. and A.E., seeks to reverse the decision of the Circuit Court of Frederick County that found his two children to be CINAs (“children in need of assistance”). He advances two theories: (1) he did not neglect his children; and (2) he received ineffective assistance of counsel at the adjudicatory stage of the CINA proceedings because his lawyer had a conflict of interest. Because we hold the circuit court did not abuse its discretion in finding that he neglected his children and because he waived any potential conflict of interest his attorney had, we affirm.

### **BACKGROUND**

Child Protective Services, accompanied by police officers, visited the home of A.E., A.E., Father, and Mother. CPS worker Kelly Lawson observed the uninhabitable condition of the house: human and animal excrement coated the floors and bathroom; thousands of flies and maggots swarmed the living room and kitchen; decaying food and trash covered the floors; and the refrigerator contained no edible food. Both children were extremely dirty. One of the children had matted hair that contained living and dead insects, a band-aid, and other unidentified debris.

The children were removed from Mother and Father’s care. Five days later, the county code enforcement authorities condemned the condominium. A few weeks later, Lawson returned to the home to find the house was clean, repainted, newly carpeted, and had new bedding. A week later, the circuit court, sitting as a juvenile court, conducted CINA adjudicatory hearings.<sup>1</sup>

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<sup>1</sup> CINA proceedings are comprised of two stages: (1) the adjudicatory stage at which testimony is heard and the circuit court decides whether the allegations in the petition,

Mother and Father chose to be represented by the same private attorney for the adjudicatory hearings. At the start of the case, both Mother and Father affirmatively waived any potential conflict of interest caused by the dual representation. That waiver was confirmed in writing and given to the hearing judge.

At the hearing, Lawson testified to the condition of the house and about past allegations of domestic violence made by Mother against Father. One of the allegations concerned an incident in which Mother reported that Father had held a gun to her head.

Before testifying, the circuit court informed Mother of her right against self-incrimination but she chose to testify regardless.<sup>2</sup> On cross-examination, Mother admitted that she had previously sought a protective order against Father. When Mother was asked why she sought the protective order, a discussion ensued over whether Mother could avoid answering the question by invoking either her right against self-incrimination or the marital privilege. The circuit court ruled that Mother could not invoke the right against self-incrimination because her testimony would be that Father, not her, committed a criminal act. Then, Mother was advised of, but decided not to invoke her marital privilege. Mother then described the incident during which Father had held a gun to her head.

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submitted by the Department of Social Services, should be sustained; and (2) the disposition stage when the circuit court determines whether the child needs the court's assistance. Md. Code, Cts. & Jud. Proc. ("CJ"), §§3-817, 3-819.

<sup>2</sup> Because criminal charges were pending against Mother relating to the care of the children, she had a constitutional right against self-incrimination.

Before closing arguments, Mother and Father both retained new counsel. Father's new counsel moved to strike the testimony of Mother concerning the gun incident. He argued that the attorney who had previously represented Mother and Father had a conflict of interest, which created an incentive for the attorney to allow Mother to testify about the incident. The circuit court denied the motion, finding: (1) Mother and Father had waived any potential conflict; (2) the testimony was proper because Mother could not invoke her privilege against self-incrimination as to this statement and did not invoke marital privilege, so the lawyer did not act unreasonably in failing to object; (3) and any error was harmless because the statement would have come in through Lawson's testimony any way.

Because the circuit court sustained the allegations in the CINA petition, the court then moved on to the disposition stage. At the disposition hearing, the circuit court found the children to be CINA because they had been neglected. The circuit court found that it was in the children's best interests to be removed from Mother and Father's care. The circuit court based this decision upon finding that the house was unlivable, and because the parents had let the house get to such a deplorable condition:

[T]he home . . . was uninhabitable. The home was filthy. The home was condemned on the day that the children were removed from the home. I find that although the house is now clean, the parents failed to address the mental health concerns and issues which allowed the house to become in such a state and I find that the parents appeared to be oblivious to the dangers that the children were suffering while they were in the house to include the unsanitary conditions, the feces, the urine, the flies and other insects everywhere in the house.

Father timely appealed.

## DISCUSSION

### I. The Circuit Court appropriately found the children to be CINA

Father challenges the finding that his children are CINAs because, he argues, he did not neglect his children. For these purposes, a CINA is a child who has been abused or neglected and whose parents are unable or unwilling to provide proper care and attention. Md. Code, Cts. & Jud. Proc. (“CJ”), §3-801(f). “Neglect” stems from “fail[ing] to give proper care and attention to a child,” by either active or passive conduct, that causes “harm” or a “substantial risk of harm” to the child. CJ §3-801(s); *In re Priscilla B.*, 214 Md. App. 600, 621 (2013). Critically, neither the trial nor the appellate court must “wait until [a] child suffers some injury before [finding neglect].” *In re Nathaniel A.*, 160 Md. App. 581, 596-97 (2005).

Father argues in 3 steps: (1) he admits that the house was previously uninhabitably filthy; (2) he notes that the house is now clean; and (3) he argues that by cleaning the house, he has rendered moot DSS’s claim that the house was previously uninhabitable and that he neglected his children. The circuit court did not buy this theory and neither do we. In reaching its determination, the circuit court is not limited to the conditions as they exist at the moment of the hearing. Rather, the circuit court is entitled to consider the whole context, including that Father participated in creating the uninhabitable conditions and that he did nothing to clean them up until the authorities forced him to. Most tragically, even today Father seems not to realize that he cannot allow the place where his children live to become so dirty and revolting. The circuit court did not abuse its discretion in finding that Father neglected his children. We affirm.

## II. Father was not denied effective assistance of counsel

Father next argues that he was denied the effective assistance of counsel in the CINA adjudicatory hearings due to the existence of a conflict of interest caused by the attorney's dual representation of both Mother and Father. We hold that any conflict of interest is capable of waiver and that Father did, in fact, waive, so his ineffective assistance of counsel claim fails.

A parent's right to counsel in a CINA case is a statutory, not constitutional, right. *In re Adoption/Guardianship of Chaden M.*, 422 Md. 498, 509-510 (2011). The right to counsel does not just require representation by a lawyer, but by a lawyer who provides "effective assistance." *Id.* To succeed, a person asserting that he or she received ineffective assistance of counsel must prove: (1) that counsel's performance was deficient and (2) that the claimant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *In re Adoption/Guardianship of Chaden M.*, 189 Md. App. 411, 433 (2009) (adopting the *Strickland* standard for ineffective assistance of counsel claims in CINA proceedings). Parents of alleged CINAs who claim that the deficiency prong is fulfilled because their lawyer had a conflict of interest must establish that an actual conflict of interest existed and that the conflict of interest adversely affected the lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). If they fulfill the deficiency prong, however, we assume prejudice. *Id.* But, a claimant has the power to waive an attorney's conflict of interest. *Holloway v. Arkansas*, 435 U.S. 475, 483 n.5 (1978).

Father argues that his right to effective assistance of counsel was violated because his lawyer had a conflict of interest. The State argues that Father waived any conflict

interest, and therefore, his claim of ineffective assistance of counsel based on a conflict of interest is also waived. Whether an actual conflict of interest existed on the facts presented is a complicated question.<sup>3</sup> Because we hold that any conflict of interest was capable of waiver and was waived, however, we need not decide whether this has ripened into an actual conflict of interest.

The rules governing the ethical behavior of lawyers state that a conflict of interest may be waived if:

- (1) the attorney reasonably believes [he or she] can provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client in the same proceeding; and
- (4) each affected client gives informed consent, confirmed in writing.

Md. Rule 19-301.7(b).

Applying this rule to these facts reveals that any conflict of interest that arose from one lawyer representing both Father and Mother in the CINA action was capable of waiver. Here, the attorney signified to the court that he believed he could represent both Mother and Father, that the representation was not prohibited by law, and that neither client had claims adverse to one another. If there was an actual conflict of interest, Father effectively

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<sup>3</sup> Whether an actual conflict of interest existed is a complicated question because there is no precise test for when a potential conflict of interest ripens into an actual conflict of interest. *Austin v. State*, 327 Md. 375, 386 (1992). Because we do not need to make that determination to solve the appeal, we decline to do so.

waived it when he gave informed consent confirmed in writing, waiving any conflict, to the circuit court before the case begun.<sup>4</sup> Therefore, the conflict, if it was an actual conflict, was capable of being waived and was, in fact, waived.

Because Father waived any conflict of interest, he has not shown that his lawyer was deficient, and we affirm the decision of the circuit court.

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<sup>4</sup> Although not clearly made, lurking behind Father’s argument is a suggestion that counsel’s performance was ineffective not solely because of the existence of a conflict of interest, but because the lawyer failed to properly advise Father and Mother as to their legal strategies. Specifically, as argued below but not here, Father asserted that counsel was deficient because he failed to persuade Mother to invoke her marital privilege and failed to object to her testimony regarding the incident in which Father held Mother at gunpoint. We do not reach this argument. *Moosavi v. State*, 355 Md. 651, 660 (1999) (holding that this Court need not consider arguments that are not adequately made in the appellant’s brief).

Nevertheless, if we were to reach the claim, we would hold that the circuit court did not err in finding it fails on both the deficiency prong and the prejudice prong. The deficiency prong would fail because the lawyer did not act unreasonably. Mother chose not to invoke her marital privilege after being advised of its existence and she could not have invoked her right against self-incrimination because the incident did not involve anything that would subject her to criminal liability. *Jung Chul Park v. Cangen Corp.*, 416 Md. 505, 513 (2010) (“[T]he privilege may be asserted by anyone who expects that responding to the information sought would tend to incriminate him or her in a subsequent criminal case.”). Therefore, any objection the lawyer would have made would not have been meritorious. The prejudice prong would also fail because the admission of Mother’s testimony, even if by error, was merely supplemental. *Fullwood v. State*, 234 Md. App. 57, 68 (2017) (holding that the prejudice prong is fulfilled when there is a substantial possibility that, but for the deficiency, the result of the proceeding would have been different). The testimony that Father argued prejudiced the outcome—that Father held a gun to Mother’s head—was also introduced through the testimony of Lawson and was properly admitted. Therefore, the admission of Mother’s testimony, even if by error, did not prejudice the outcome of the proceeding. *Potts v. State*, 231 Md. App. 398, 408 (2016) (holding that the admission of improper evidence does not harm the outcome of a case when the same evidence was introduced in an independent and proper manner).

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