

Circuit Court for Baltimore City
Petition No. 818127

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2564

September Term, 2018

IN RE: K.D.

Fader, C.J.,
Kehoe,
Battaglia,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: April 18, 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.

We are asked to determine whether the Circuit Court for Baltimore City, sitting as a juvenile court, erred or abused its discretion when it determined that the infant K.D. was a Child in Need of Assistance (“CINA”)¹ and committed her to the care and custody of the Baltimore City Department of Social Services (“the Department”). Finding no error or abuse of discretion, we affirm.

BACKGROUND

The appellant, A.H. (“Father”), and N.D. (“Mother”)² are the parents of K.D., who was born April 30, 2018. Seven days after K.D.’s birth, the Department filed a petition to

¹ A “child in need of assistance” is one who requires court intervention because the child has been abused or neglected, or has a developmental disability or mental disorder; and his or her “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) (Repl. 2013; Supp. 2018).

² Mother did not appeal from the juvenile court’s order that is under review. Under Rule 8-111(a)(1), “the party first appealing the decision of the trial court shall be designated the appellant and the adverse party shall be designated the appellee.” Md. Rule 8-111(a)(1). Mother fits neither of these descriptions in that she did not file an appeal and, because she supports the relief sought by Father, she is not an “adverse party” to anyone who did file an appeal. She nonetheless filed what she styled an appellee’s brief, in which she argued that the order under review should be reversed. The Department moved to strike her brief as improper for an appellee. Mother opposed and argued, in the alternative, that we should treat her filing as an amicus brief.

This Court has previously observed that parties “cannot properly cast themselves as appellees if they are supporting the position of” the appellant. *Matta v. Bd. of Educ. of Prince George’s County*, 78 Md. App. 264, 267 n.1 (1989). Because she did not file an appeal, and therefore is not an appellant, Mother is not permitted to argue for reversal as a party. *Id.* However, she just as clearly has an interest in these proceedings that we may consider as an amicus curiae party. Md. Rule 8-511. Therefore, we granted in part the Department’s motion, treated Mother’s response as a belated motion for permission to file an amicus brief, and considered her brief as though it had been filed as an amicus brief. In the future, such filings should be made in compliance with Rule 8-511.

have her found to be a CINA, accompanied by a request for shelter care. The juvenile court granted the Department's request for shelter care.

CINA Adjudicatory Proceedings

On July 9, 2018, the parties submitted a document titled "Recommendation of the Parties: Adjudication," in which the parties jointly stipulated to the following facts:

- Mother tested positive for marijuana use twice while pregnant with K.D., in November and February, but denies using marijuana during the second or third trimesters of her pregnancy;
- On April 30, mother admitted to hospital staff that she was "referred to rehab treatment" for marijuana use, but failed to enroll. She "recently engaged in treatment at A Step Forward" for mental health and substance abuse treatment;
- Mother and Father both admitted to using marijuana "for pain control";
- Mother and Father both "have CPS history dating back to 2014 for Neglect and Physical Abuse." Mother has two other children who are not in her care. Custody and guardianship of those two children "was granted to the maternal great aunt" and the case was closed on February 20, 2018, a little more than two months before K.D.'s birth;
- Father has one other child "who is not in his care." Custody and guardianship of that child was granted to the child's maternal grandmother and the case was closed on April 9, 2018, less than one month before K.D.'s birth. Father "was uninvolved in [the child's] daily care and was not involved in working towards reunification" during the CINA proceedings;
- "[M]other was diagnosed with Depressive Disorder and Post-Partum Depression" and the Department has concerns about her "compliance with mental health treatment";
- "[F]ather has a history of untreated mental health issues and has been committed pursuant to criminal matters to Rosewood Hospital in the past";³

³ The stipulation does not identify when Father was committed to Rosewood. However, as the Department acknowledges in its brief, that facility has been closed since 2009.

- After K.D.’s birth, hospital staff reported to the Department that Mother and Father were “improperly feeding” K.D. and that K.D. “had to be monitored for stomach issues relating to the parents’ overfeeding”;
- The Department had concerns about the housing stability of both parents;
- Although both parents identified a relative resource for the children, neither was able to provide care for K.D. “due to a lack of space.”

The document also includes recommended findings and determinations of the court, including: (1) a finding “that the allegations in the CINA petition have been proved by a preponderance of the evidence and that the facts recommended by the parties as stated herein were sustained”; (2) a determination “that continued residence in the home is contrary to the welfare of the child and it is not now possible to return [K.D.] to the home because the following reasons: Mother is unable to provide care for [K.D.] due to having substance abuse issues and mental health issues. Father is unable to provide care for [K.D.] due to having substance abuse issues and mental health issues”; and (3) a finding of good cause to delay the disposition hearing to allow for further investigation.

The document, which contains signature lines for all parties, is signed by both Father and his counsel under a provision stating that all parties had reviewed the recommendation, consented to immediate issuance of an order consistent with it, and waived their right to take exceptions to such an order. The magistrate issued such a recommended order and no party took exceptions.

CINA Disposition Proceedings

On August 21, 2018, following a disposition hearing, a magistrate recommended that the juvenile court find K.D. to be a CINA and place her in the care of the Department. Father filed exceptions and requested a de novo hearing, which took place on October 17

and 18, 2018. Two witnesses testified at the de novo hearing: Adrian Bristol, the Department’s assigned case worker, and Father.

On the first day of the hearing, Ms. Bristol testified regarding the conditions of the homes in which Mother and Father, respectively, were living. She testified that the home where Mother was living “did not meet the basic health/sanitation standard” due to a cockroach infestation, mold in the basement, “broken cupboards” and drawers, and a lack of smoke detectors. Even though Father’s position until recently had been that he wanted K.D. to live with Mother, and not with him, Ms. Bristol had also assessed the home where Father was living. Father slept in an unfinished basement and told Ms. Bristol that K.D. would sleep there as well if she were placed with him. Ms. Bristol’s assessment was that “[t]he house did not meet the basic health/sanitation standard” due to exposed plumbing, exposed wiring in the basement, dirty carpet, and “pads of animal urine that was laid out in the hallway” She testified that Father told her that he is on a wait list for public housing and was “looking to move because where he is currently was temporary.” When Ms. Bristol subsequently asked Father whether the housing situation had been improved since that initial visit, he told her that “nothing has [been] done to the home.”

Ms. Bristol also testified regarding Father’s compliance with the terms of a service agreement he entered into with the Department, which required him to obtain substance abuse and mental health treatment. Although she had provided a different referral, Father chose to receive treatment at a facility called A Step Forward, which is the same facility

Mother was attending. Ms. Bristol had not yet been able to obtain confirmation from A Step Forward regarding Father's compliance with the program.

Near the end of Ms. Bristol's direct testimony, when she stated the Department's recommendation that shelter care be continued, Father interrupted, saying: "Can I leave now? This people making me mad, yo." Father continued: "You all's crazy, yo? Really fucking crazy. I don't give a fuck, man." The court took a break in proceedings, after which Father returned to the courtroom and Ms. Bristol's testimony continued.

Father also testified regarding his living situation. He did not dispute any of Ms. Bristol's description of the house in which he was then living, including the condition of the basement and the pads containing dog urine on the floor. However, he testified that if he were given custody of K.D., he would clean out a spare bedroom upstairs and she could sleep there. He also claimed to have a car seat, rocking chair, crib, and clothing for K.D. Although he acknowledged that he was looking for another place to live, he stated that he could stay in his current home, which was owned by his own father, as long as necessary.

Father confirmed that three weeks earlier, pursuant to a service agreement he had entered with the Department, he had enrolled in a mental health and substance abuse treatment program at A Step Forward. He claimed to be compliant with the program—including attending individual sessions with a therapist twice a week and group sessions every weekday—but stated that he had forgotten to bring with him to court a paper that would confirm his participation. Although he originally claimed that he did not know what mental health issues he was being treated for, he acknowledged that he has "anger issues."

He also acknowledged that he had received treatment at a psychiatric hospital for six months, but claimed the hospital had not recommended any follow-up treatment. Father denied having a substance abuse problem and stated that he had not yet begun that part of his treatment at A Step Forward.

Ms. Bristol and Father both testified about Father's weekly visits with K.D. Ms. Bristol agreed that Father had consistently attended the weekly visits, had acted appropriately, and had never appeared to be under the influence of drugs or alcohol. Father testified that at the visits he and Mother both play with K.D., that he sometimes helps Mother feed K.D., but that Mother is usually the parent who changes K.D.'s diaper.

At the conclusion of Father's testimony, the juvenile court continued the hearing until the following day so that (1) Father could prepare the spare bedroom and Ms. Bristol could conduct another visit to the home, and (2) the parties could obtain and present information about Father's compliance with treatment at A Step Forward.

When the hearing resumed the following day, Ms. Bristol testified that she had been back to the home, observed the spare bedroom, and found it satisfactory. She testified that the room had been cleared of the bags that had previously been stored there and now contained a bassinet, bouncer, baby bottles, and clothing.

Ms. Bristol also presented a letter received from A Step Forward explaining that Mother and Father were both enrolled in a treatment program there, but that each "routinely miss[ed] at least one day of treatment per week," that as a result of their "sporadic attendance . . . they have been unable to fully utilize the[program's] services," and "that

they could reap the benefits of treatment” with more consistent attendance. After that documentation was presented, Father testified and acknowledged that he had not attended all of the treatment sessions, but pledged to do so going forward. Asked about his plan for childcare for K.D. during the two-and-a-half-hour daily group therapy sessions and twice-weekly individual therapy sessions at A Step Forward, Father testified that he had an aunt who had a daycare and that he had had a preliminary conversation with her about “putting [K.D.] in the daycare for right now until I find out a better one.” He had not yet shared that plan with the Department.

At the conclusion of the testimony, the Department and counsel for K.D. argued that K.D. should be found a CINA and not placed with Father because doing so “would place her at a substantial risk of harm given the fact that he has been only sporadic in his treatment.” Father and Mother both argued that K.D. should not be found a CINA and that even if she were, she should be placed with Father.

The juvenile court found K.D. to be a CINA and granted limited guardianship to the Department. The court rejected Father’s position that the Department had not shown any neglect by Father, concluding that “[t]here is clearly a showing of neglect by omission. Not abuse by more concerning acts, but neglect by omission which has not today on this record been addressed to the degree that would give the Court confidence” that K.D. could safely live with Father.⁴ The court noted that the letter from A Step Forward indicated that Father had not attended all of his therapy sessions, which was different from what Father

⁴ Father left the courtroom prior to the court’s oral ruling.

had testified to the day before, and did not report any urinalysis results. The court also observed that Father had stipulated to having untreated mental health issues and had both “admitted” and “displayed” his “anger issues” during the hearing. Finally, the court noted “the absence of a safe, stable home for” K.D. because Father is living with his own father “as a guest” and had no solid plan in place for childcare for K.D. The court found that particularly relevant given Father’s commitment to attending daily therapy sessions that would require him to be out of the home for hours at a time.

The court did, however, express its view that “Father is . . . very close to achieving” a stable home for K.D. In that context, the court noted that there would be a six-month review hearing coming up in less than two months at which Father would have the opportunity to present evidence of regular attendance at therapy sessions and negative weekly urinalysis tests. At the conclusion of the hearing, the court agreed to increase both parents’ supervised visitation from once a week to twice a week, progressing to additional daily supervision and, upon successful completion of four weeks of that, to “overnight supervised visits in Father’s home.” The court reiterated that “[t]he goal here is reunification.”

A written order followed that reviewed and summarized the proceedings, overruled Father’s exceptions, and found both parents’ neglect to be “proved on the facts sustained . . . resting on the untreated mental illness, CDS use and most critically lack of stable housing in which to care for infant [K.D.]” The order noted that the parents had made “some effort” on receiving treatment, visiting with K.D., and, with respect to Father,

“toward achieving safe housing for [K.D.],” but concluded that sheltering K.D. with Father under an order of supervision was “premature.” The order acknowledged the parents’ opportunity to provide additional evidence at the upcoming review hearing and included the same provisions regarding expanded visitation as stated at the hearing.

Father appealed.⁵

DISCUSSION

The standard of review applicable to CINA proceedings is well-established: (1) we review factual findings of the juvenile court for clear error, (2) we determine, “without deference,” whether the juvenile court erred as a matter of law, and if so, whether the error requires further proceedings or, instead, is harmless, and (3) we evaluate the juvenile court’s final decision for abuse of discretion. *In re Adoption/Guardianship of H.W.*, 460 Md. 201, 214 (2018). An abuse of discretion occurs only when a juvenile court’s decision is “well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *In re Adoption/Guardianship of C.A. & D.A.*, 234 Md. App. 30, 45 (2017) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 313 (1977)). While we review the facts supporting the court’s neglect finding for clear error, determining whether a child has been neglected is a legal conclusion that we review for correctness. *See In re Priscilla B.*, 214 Md. App. 600, 625 (2013) (explaining

⁵ Father presents two questions for our review: (1) “Was it improper to find a child CINA where there was a parent ready willing and able to take custody and there were no allegations of wrongdoing against that parent?” and (2) “Was it improper to refuse to place the child with a parent absent any demonstrated danger to the child[?]”

that a neglect determination requires us to interpret the statutory definition of neglect); *see also Simbaina v. Bunay*, 221 Md. App. 444, 448 (2015) (“[W]here an order involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court’s conclusions are ‘legally correct’ under a *de novo* standard of review.”) (quoting *Schisler v. State*, 394 Md. 519, 535 (2006))). Whether a parent is unable or unwilling to care for his child “is a factual determination that an appellate court reviews for clear error.” *In re E.R.*, 239 Md. App. 334, 338 (2018).

THE JUVENILE COURT DID NOT ERR BY FINDING NEGLECT AND DID NOT ABUSE ITS DISCRETION BY DETERMINING THAT K.D. IS A CINA AND PLACING HER IN THE CARE OF THE DEPARTMENT.

A CINA includes a “child who requires court intervention because (1) [t]he child has been . . . neglected . . . and (2) [t]he child’s parents, guardian or custodian are unwilling or unable to give proper care and attention to the child and the child’s needs.” Md. Code Ann., Cts. & Jud. Proc. § 3-801(f). The juvenile court “must look at the totality of the circumstances . . . and must find the child a CINA by a preponderance of the evidence.” *In re Priscilla B.*, 214 Md. App. at 621 (internal citation omitted).

Neglect occurs when a parent fails “to give proper care and attention to a child . . . under circumstances that indicate . . . [t]hat the child’s health or welfare is harmed or placed at substantial risk of harm.” Cts. & Jud. Proc. § 3-801(s). Neglect is “part of an overarching pattern of conduct.” *In re Priscilla B.*, 214 Md. App. at 625. As such, “[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.” *Id.* (quoting *In re Adriana T.*, 208 Md. App. 545, 570 (2012)) (alteration in *In re Priscilla B.*). Courts “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.’” *In re Priscilla B.*, 214 Md. App. at 626 (quoting *In re William B.*, 73 Md. App. 68, 77-78 (1987)) (alteration in *In re Priscilla B.*). A “child may be considered ‘neglected’ before actual harm occurs, as long as there is ‘fear of harm’ in the future based on ‘hard evidence’ and not merely a ‘gut reaction.’” *In re Nathaniel A.*, 160 Md. App. 581, 601 (2005) (quoting *In re William B.*, 73 Md. App. at 78).

The juvenile court did not err in finding that Father had neglected K.D. in light of the evidence establishing that (1) at the time K.D. was born, neither Father nor Mother had safe housing or a plan to provide safe housing for her, (2) Father, who did not initially seek custody of K.D., did not have suitable housing for her until at least the morning of the second day of the de novo disposition hearing, and even then only in a place he had claimed was temporary, (3) although Father had committed to the Department and to the court that he would attend two-and-a-half-hour therapy appointments every weekday and other individual therapy appointments each week, he had not finalized a plan for K.D.’s care in his absence,⁶ and (4) until recently, Father had been content to leave K.D.’s custody to

⁶ The trial court expressly acknowledged that an absence of a concrete childcare plan will not necessarily be a problem in many cases, but concluded that it was here in light of Father’s commitment to be absent from the home for significant periods of time every day to attend therapy sessions that were deemed critical to his ability to care for K.D.

Mother, who was not willing and able to care for her. Moreover, although Father had stipulated that he had untreated mental health issues and had entered a service agreement with the Department that required him to obtain treatment for mental health and substance abuse problems, he had not sought treatment for either until three weeks before the disposition hearing, had not attended therapy sessions regularly during those three weeks, and still had not started treatment for substance abuse by the time of the hearing. Together, these facts establish a lack of proper care and attention to K.D.’s well-being demonstrating that she had been at substantial risk of harm.

Father argues that the court erred by finding that he neglected K.D. because the juvenile court never made any findings about how his marijuana use, mental health issues, or the CINA proceedings involving his other child might affect his ability to care for K.D. Based on the facts presented, we disagree. As to substance abuse and mental health issues, the court’s determination of neglect was not based on a specific instance arising from a specific substance abuse or mental health issue, but the totality of the circumstances identified above, including most significantly Father’s inability, and lack of preparedness, to provide a safe environment for K.D. either at the time she was born or by the time of the disposition hearing. *See In re Priscilla B.*, 214 Md. App. at 621 (“In determining whether a child has been neglected, a court may and must look at the totality of the circumstances.”). In that context, the juvenile court did not err in concluding that K.D.’s “health or welfare [was] . . . placed at substantial risk of harm” in Father’s care. Cts. & Jud. Proc. § 3-801(s).

With respect to Father’s argument that the juvenile court erred in considering the fact that Father’s older child had been found CINA, it is not at all clear to us that the court took that into account. Indeed, the court did not mention that prior determination in either its oral ruling or its written order. Nor did the parties address the matter beyond the stipulation that the child had been found CINA and that Father had been “uninvolved” in her care. Although we agree that such information was of limited relevance in the absence of further details, we see no indication that the juvenile court based its decision on any improper considerations regarding the prior CINA case.

For all of the same reasons that we conclude that the court did not err in finding neglect, as well as Father’s acknowledged, demonstrated, and still mostly untreated anger issues, the juvenile court also did not clearly err in finding that Father was not yet willing and able to care for K.D. Moreover, at the adjudication phase, Father himself had signed on to a recommendation that the court find him to be “unable to provide care for [K.D.] due to having substance abuse issues and mental health issues” that, by the time of the disposition hearing, remained largely untreated. Although he denied having a substance abuse issue at the de novo disposition hearing, the court was nonetheless entitled to rely on the earlier stipulation, which had also been accepted and acted upon by the magistrate and as to which no party had taken exceptions.

Finally, Father contends that even if the juvenile court properly found K.D. to be a CINA, it abused its discretion in placing K.D. with the Department rather than with Father. Again, we disagree. For the reasons already discussed, there was ample evidence in the

record to support the court’s exercise of discretion in determining that the absence of progress in obtaining treatment for stipulated mental health and substance abuse issues and an absence of a “commitment on record for safe necessary daycare for [K.D.] in Father’s care, make shelter to Father under an [order of protective supervision] premature.” We also find it notable that the juvenile court, recognizing that Father was making positive strides, (1) identified how Father could demonstrate he is complying with obtaining appropriate treatment in time for the next review hearing, and (2) in the meantime, increased visitation and created a plan for yet more visitation, including overnight visits, going forward. The court did not abuse its discretion in its ultimate determination that K.D. was a CINA and in granting limited guardianship to the Department.

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