

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0415

September Term, 2016

IN RE: J. B.

Kehoe,
Reed,
Beachley,
JJ.

Opinion by Kehoe, J.

Filed: November 30, 2016

*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. *See* Md. Rule 1-104.

This is an appeal from a judgment of the Circuit Court for Baltimore City, sitting as the Juvenile Court, which dismissed a child in need of assistance action involving J.B., who was five years old at the time of the court’s order. The appellants are J.B.’s mother, M. B, and J. B. himself. The appellees are the Baltimore City Department of Social Services (the “Department”) and J. F., J.B.’s father. Ms. B. presents two issues:

1. Were the magistrate’s findings of first-level facts from adjudication, with respect to the father’s abuse of J.B., both so legally insufficient and so lacking in assessing the father’s credibility that they failed to support the second-level factual conclusions and any basis for a subsequent disposition; and did the court err by failing to undertake an appropriate level of scrutiny of the first-level facts before exercising its prerogative to conclude that J.B. was not a CINA and dismiss the case?

2. Did the trial court err by concluding that the facts did not support a CINA finding against dad?

J.B. presents the essentially the same issues, albeit in somewhat different terms. We will vacate the juvenile court’s judgment and remand this case for further proceedings because one of the critical findings of the court, namely that an evaluation by the Juvenile Court Early Intervention Program had ruled out alcohol abuse on Mr. F.’s part, is clearly erroneous.

I. Preservation

(A)

Although J.B. now challenges the circuit court’s judgment, he did not file a notice of appeal or cross-appeal. As a general rule, and subject to rather narrow exceptions that aren’t applicable in this case, a party that does not file an appeal (or cross-appeal as the case may be) is precluded from challenging the trial court’s judgment. *See Cottman v.*

State, 395 Md. 729, 738 n.6 (2006); *Joseph H. Munson Co. v. Secretary of State*, 294 Md. 160, 168 (1982). Because this case involves the welfare of a child, we will overlook this problem and treat J.B. as an appellant. *Cf. Flynn v. May*, 157 Md. App. 389, 410 (2004).

(B)

Maryland Rule 2-541(h) authorizes a court in an exceptions hearing to remand a case to a magistrate “to hear the additional evidence and to make appropriate findings or conclusions[.]” Many of appellants’ contentions center on their assertion that the magistrate failed to make findings of fact that were sufficiently clear to enable the trial court to reach a proper resolution of the issues raised by the Department’s petition.

The difficulty with these arguments is that neither Ms. B. nor J.B. asked the juvenile court to remand the case to the magistrate, nor did they express any reservations whatsoever to the court about the adequacy of the magistrate’s findings.¹ As a result, they are barred from raising this issue for the first time on appeal. *See* Md. Rule 8-131(a) (Other than matters of jurisdiction, appellate courts will not ordinarily consider any issue “unless it plainly appears by the record to have been raised in or decided by the trial court[.]”). *See also Cousins v. Cousins*, 97 Md. App. 506, 518 (1993) (“Appellant cannot complain that the court was missing vital information when he did not bring it to the court’s attention earlier.”). This leaves us with appellants’ second contention, namely,

¹ In the exceptions hearing, Ms. B.’s counsel stated that “Your Honor... I don’t believe you’ve heard anything today in terms of proffer that would rise to the level that [the Magistrate] by clear and convincing evidence made an error either in terms of fact or law.” Ms. B.’s counsel also asked the court to “sustain the facts of [the Magistrate]...”

that the juvenile court erred when it concluded that the facts did not support a finding that J.B. was a CINA.

II. Standard of Review

A child in need of assistance is

one 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.

Courts and Judicial Proceedings Article (“CJP”) § 3-801(f).

Courts need not wait until a child has suffered actual abuse or neglect but may intervene when there is a “substantial risk of harm.” *In re Andrew A.*, 149 Md. App. 412, 419 (2003).

We exercise a tripartite standard of review in CINA cases. *In re Ashley S.*, 431 Md. 678, 704 (2013) (“In CINA cases, factual findings by the juvenile court are reviewed for clear error. An erroneous legal determination by the juvenile court will require further proceedings in the trial court unless the error is deemed to be harmless. The final conclusion of the juvenile court, when based on proper factual findings and correct legal principles, will stand unless the decision is a clear abuse of discretion.”).

In this case, the first-level factual disputes were resolved—or in the eyes of appellants, not resolved—by a magistrate. If a party takes exceptions to a magistrate’s findings, the trial court must review the record and resolve the disputed issues through the exercise of the trial court’s independent judgment. *Kierein v. Kierein*, 115 Md. App.

448, 454 (1997). Then, once those issues are settled, the court, again exercising its independent judgment, must decide the proper result. *Domingues v. Johnson*, 323 Md. 486, 496 (1991).

III. Facts

The facts of this case are known to the parties and their counsel. We will discuss specific facts as necessary for our analysis.

In a 2013 CINA proceeding, the Circuit Court for Baltimore City, sitting as the Juvenile Court, awarded Mr. F. custody and guardianship of J.B., then aged three. Mr. F. was awarded custody because Ms. B. was suffering from a serious mental disorder that interfered with her ability to care for J.B. The custody order² provided that Mr. F. would provide regular visitation for Ms. B. and that Mr. F. could reschedule a visit if Ms. B. appeared to be unable to care for J.B. at the time.

On April 24, 2015, Ms. B. failed to appear at Mr. F.'s apartment to pick up J.B. for a pre-arranged overnight visitation. She arrived the next evening. Mr. F. asked her to leave, but she refused. She went into J.B.'s room and took him from the apartment. At some point while she was trying to leave with J.B., Mr. F. attempted to stop her, and she responded by kicking and striking him in front of J.B.

² The Department filed a motion to supplement the record with the petition and orders from the first CINA case. The magistrate took judicial notice of the petition and orders, as she had a right to do. *See, e.g., In re Nathaniel A.*, 160 Md. App. 581, 598 n.1 (2005). However, the records were not transmitted to this Court. We grant the Department's motion.

After Ms. B. left with J.B., Mr. F. called the police and filed criminal charges against Ms. B. for assault and child abduction by a relative. (These charges were later steted.) Ms. B. filed a petition for an emergency *ex parte* protective order for herself and J.B. against Mr. F. The court granted a temporary protective order. Two weeks later, Ms. B. dismissed her petition and the court dismissed the protective order.

The matter was referred to the Department because one of the allegations in the protective order petition was that Mr. F. had physically abused J.B. The Department filed a petition to declare J.B. a CINA together with a request for shelter care. The court granted the shelter care request and J.B. was placed in the custody of the Department to reside with Pamela M., Mr. F.'s aunt.

The CINA petition contained the following pertinent allegations:

1. On 11/19/13, respondent father, [Mr. F.], was granted custody of respondent by this Court under Petition 813212007.
2. On 4/25/15, father filed a complaint against mother for, inter alia, assault and child abduction by a relative.
3. On 4/30/15, mother filed and obtained a temporary protective order for herself and respondent, against father. As a result, there is at this writing believed to be) [sic] a 'no contact' order between father and respondent. Hearing in a final protective order is scheduled today, 5/7/15, in the Circuit Court for Baltimore City.
4. Mother has alleged that father has neglected and physically abused respondent by leaving respondent unattended and striking respondent.
5. Father has been observed in the community while intoxicated. Father has been referred for substance abuse assessment, but has not complied...

. . . .

8. Mother has [Child Protective Service] history around neglect of respondent and his sibling. . . . The neglect of respondent and sibling was related to mother's mental health and her non-compliance with recommended treatment and medication. It is reported that mother's current

mental health needs prevent her from providing appropriately for respondent's daily needs.^[3]

The shelter care, adjudication and disposition proceedings were conducted in five separate hearings occurring over a four month period. At the shelter care hearing, Troy Robinson, the permanency worker with the Department assigned to J.B.'s case, testified that he had observed J.B. with Mr. F. and never saw or found any indication of Mr. F.'s being intoxicated. Tonnie Crocker, a family service worker for the Department's Child Protective Services, testified that she had investigated Ms. B.'s allegations of physical abuse and concluded that Mr. F. had not abused J.B. (This conclusion was supported by J.B.'s testimony at the adjudication hearing.)

There were also allegations of neglect by Mr. F., namely, that he had no utility services to his apartment, and that J.B. was failing to attend school regularly. The evidence showed that Mr. F. in fact had adequate utilities. The Department resolved the school attendance issues by counseling with both parents.

Mr. F. was evaluated by the Juvenile Court Early Intervention Program ("JCEIP") in July 2015. The report diagnosed Mr. F. as exhibiting "Alcohol Abuse, Moderate stage evidence[d] by continued use despite negative consequences"⁴ as the term was used in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, (DSM-IV)

³ The petition also alleged that J.B.'s half sibling was placed in the custody of his father.

⁴ The DSM-IV divided alcohol use disorder into two categories: "alcohol abuse" and "alcohol dependence." See <https://perma.cc/2FCD-GEVB> (last visited on November 5, 2016).

because Mr. F. continued to use alcohol “despite negative consequences” and that his “potential for relapse is high due to [Father’s] lack of recovery tools.” The report stated that there was “no treatment recommendation at this time.”

After the adjudicatory hearing, the magistrate made the following findings:

(1) There was no dispute as to allegations contained in ¶¶ 1–4 of the petition. (The magistrate clarified that there was no dispute as to the abuse and neglect allegations in ¶ 4 only because the paragraph was phrased as “Mother has alleged.”) In the magistrate’s written recommendations dated August 27, 2015, she stated that “Neglect of [J.B.] was found to be unsubstantiated by BCDSS.”

(2) As to ¶ 5 of the petition, which raised allegations regarding Mr. F.’s use of alcohol, the magistrate found that “Father has been observed in the community under the influence of alcohol. The extent of alcohol consumed is unclear.” The magistrate also noted that “Mother testified that she has never seen Father ‘not drunk’ and that when Father is drunk he displays malicious behavior.” However, the magistrate took judicial notice of the orders entered in the 2013 CINA proceeding and “that none of these facts are mentioned” in the adjudication and disposition orders but that those orders “mention a diagnosis of delusional behavior” on Ms. B.’s part.

Nonetheless, the magistrate concluded that there was a sufficient basis for the court to move to the disposition phase of the proceeding. One basis for the magistrate’s decision was that she wanted the Medical Services Division (“MSD”) of the Circuit Court for Baltimore City to perform mental health evaluations for both Mr. F. and Ms. B.

in light of the “serious allegations flying back and forth between them[.]” The magistrate posed the following questions to the MSD: (1) do parents have any DSM-IV diagnoses? If so, are there any treatment recommendations?” and (2) “Do the diagnoses impact the ability to provide care for a five-year-old? Are there any recommendations to assist with parenting skills?”

Brenda Harriel, LCSW-C, performed the evaluations. She concluded that Mr. F.:

has a lengthy history of drinking alcohol and states that he attended two Alcoholics Anonymous meetings in 2005 at the request of his grandmother. He likely minimizes the negative impact that drinking alcohol, which makes him feel ‘relaxed,’ has on his personal functioning and capacity to adequately parent [J.B.].

Ms. Harriel recommended that Mr. F. “should be referred for treatment of alcohol abuse.” At the disposition hearing, Ms. Harriel testified as to her report. When asked for her views as to the length of a treatment program for Mr. F., she stated that she would defer to the “treatment people.” In its brief, the Department states that the “treatment people” to whom Ms. Harriel referred was the JCEIP. No party contests this assertion.

At the conclusion of the disposition hearing, counsel for the Department noted that the case had been referred to it for investigation because Ms. B.’s petition for a protective order alleged that J.B. had been physically abused. Counsel pointed out that there was no evidence of physical abuse by Mr. F. The neglect allegations had been resolved by the time of the hearing. Counsel continued:

And with father there’s been a concern about alcohol. . . . JCEIP said he didn’t need any treatment. . . . And [Ms. Harriel, a caseworker for] the Court Medical Office, both recommended treatment and when asked more

specifically said she would defer to the experts, which is JCEIP. So I'm not really sure where that falls.

. . . .

[J.B.] is a little boy who is being put in a position where he doesn't need to be. He needs two parents, two parents who can figure out how to get along. And it is that conflict, if anything, that makes this child a child in need of assistance.

. . . .

If the Court finds him to be a child in need of assistance, and the Department sees no reason not to retain custody in the father . . . , although there are some questions raised about his alcohol use—perhaps the Court to issue an order that he abstain from the use of alcohol when the child is in his care. . . . But I think if the Court finds this child in need of assistance, the assistance he needs is for the Court to make decisions that his parents to date have not been able to make together.

J.B.'s counsel stated to the magistrate that his client "has been consistent in his desire to be in his mother's care [and] I believe it's in his best interest to listen to him[.]"

Counsel continued:

[There has] been some question on whether or not there actually has been abuse . . . or neglect in this matter. But what I believe [is that] everyone realizes that this child does need some assistance. The family does need assistance.

Therefore I'm asking for [J. B.] to be placed in his mother's care under an [order for protective services]. The terms of the OPS is that mother shall continue with her mental health treatment, ensure [that J. B.] is enrolled in school and attends regularly.

Ms. B.'s counsel's argument was also focused on transferring custody of J.B. from Mr. F. to MS. B.:

If you look at the totality of the evidence that was presented to the Court, at least in mother's case in chief, . . . it's in the best interest of [J.B.] to be placed with his mother. How the court gets there, well the court could sustain facts. The Court heard testimony and evidence was introduced on

mother's behalf the disposition that, that would rise one could say to the level of a CINA finding and then the Court could, based on those facts against father, transfer custody to mother and find the child not CINA. Or the court could say . . . there's enough facts and evidence that was presented that the Court could still stay involved to a certain extent— and DSS to a certain extent— but under an OPS to mother.

Mr. F.'s counsel stated:

I agree with the Department of Social Services. I think they're right. I think we need to realize that we are lawyers, this is the court and we have to restrict our comments to what's in the record and look at what the law says about the facts in the record.

. . .

We have all this talk about my client may be drinking. [Mother's counsel] says that he has, he likes the taste of alcohol. . . . Ms. Harriel really couldn't say how much as to what was the basis of, of her conclusion that he had an alcohol problem. When I asked her . . . what did he say about alcoholism? She said he had a beer two weeks before meeting with her and maybe a week before that a beer. That's not much of a record to support a finding of alcohol. And even if he has an alcohol problem, there is no, there is no showing that problem has interfered in any way, in a negative way, with the raising of this child.

In response to all of this, the magistrate found that J.B. was a child in need of assistance. She explained her reasons in detail:

I think this is a difficult case.[T]here's no way based on these facts, and the fact that this is petition number two, that I would not find him to be a child in need of assistance. So the dismissal requests are off the table. That's not an option.

[Q]uite frankly I struggled with the OPS suggestion for a number of reasons and I'll just tell you what they are. I think both parents have done a good job of explaining to me how, I won't say how bad, I guess pointing out the flaws of the other person in great detail.

I think father has pointed out that mother has a history of mental health issues, her family is concerned about it, she could snap at any minute. Mom says dad wasn't meeting [J. B.'s] needs. That he is a rapist, I guess, at least in respect to her. And he's drunk and she sees him drunk all the time and he

used to stalk her and all sorts of other things which I hope that everybody gave me information that is based on fact, based on what they know to be correct. However, because you all have put all that out there, I can't ignore that and I have to factor that into my decision now.

Both mother and father said they would do whatever I asked them to do if it meant that they were working toward getting their son back. So I have a whole list for you. And I'll say that because my concern with family court is this, I think the services that can potentially be offered here [that] are going to be different from what could be offered there.

This is already petition number two for a five-year-old My concern is that if I were just to pick a parent and send him off today you would be back down here again if there's nothing done to address the issues that are being raised. So I'm putting it all out there and then we're going to see where we are in a minute.

So what I'm going to do is find that he's a child in need of assistance. I'm actually not granting anybody's requests. He's going to be committed to the Department of Social Services for relative placement with limited guardianship[.]^[5]

. . . .

With respect the father, so that we can take this, the alcohol issue off the table once and for all, I am going to ask you to go to a substance abuse program, outpatient, it doesn't need to be anything that conflicts with your work schedule but let's get it over with and we don't need to keep talking about this for the next couple of years. I've already said no drinking around [JB].

. . . .

One of my other issues is that he, at five, feels like he's been pulled between both of you, that's not a healthy place for a child to be regardless of whatever else it is that's going on. And I don't know, I mean, I don't know I mean whether he's trying to keep his parents and dad both love him dearly. That's not my concern at all.

⁵ At this juncture, the magistrate discussed the evidence pertaining to Ms. B.'s mental illness. The magistrate found the evidence to be contradictory in parts but ordered Ms. B. to continue with therapy.

I have no doubt about that but I am concerned about the relationship between the two of you and how that impacts them, which is just natural for any couple that had been together and is now separated. Some people make it through without any issues, most people don't. So we'll see what we can do to work on that.

Mr. F. filed exceptions from the magistrate's findings and recommendations on the grounds that "no allegations were sustained against the father to justify a finding that the child is a child in need of assistance." Neither Ms. B. nor J.B. filed exceptions.

At the exceptions hearing, and relevant to the issues raised to this Court, the Department contended that there was an insufficient evidentiary basis for the court to decide that J.B. was a CINA. Ms. B. contended that the case should not be closed because the magistrate had ordered another referral to JCEIP for both parents. J.B.'s counsel asked the court "to sustain the facts as found by" the magistrate.

The court granted Mr. F.'s exception. The court stated (emphasis added):

Allegations of physical abuse have been ruled out. The Magistrate basically ordered that the father. . . should not drink alcohol. . . when he has the Respondent in his care. And JCEIP has ruled out alcohol abuse [H]aving read the record, I have to agree with the Department[,] I don't know that there are enough facts here to rule a CINA finding.

. . . .
And I've considered [J.B.'s counsel's] indication to the Court that the Respondent wishes to return to the care of his mother. And having considered [Mother's counsel's] proffer to the Court that the Magistrate did not err in fact or law and to sustain the facts.

In this case there is speculation, there is allegations, and some suppositions. The Court again concerns itself with the father's allegation of alcohol abuse, but it's a mere allegation at this point. The Court does not find that there are enough facts to find that the child is a child in need of assistance pursuant to its reading of the record and even the ruling of the Magistrate.

So the exception is granted and the child is NOT a child in need of assistance subject to [CJP § 3-]819. Thank you.

The Merits

The magistrate’s findings of fact in the adjudicatory phase of this case were not models of clarity. They consisted largely of recitations of the parties’ allegations and summaries of evidence, as opposed to specific findings about disputed issues. However, the magistrate’s comments during the disposition phase of the hearing made it clear that (1) she had serious concerns about Ms. B.’s mental health status and Mr. F.’s alcohol use; (2) both Ms. B. and Mr. F. needed treatment for their problems in order to be effective parents; and (3) neither parent was at that time an appropriate custodian for J.B., with or without an order of protective supervision. From this, we surmise that the magistrate was of the view that there was a substantial risk of harm to J.B. if placed with either parent. This is an appropriate basis to determine that a child is a CINA. *In re Andrew A.*, 149 Md. App. 412, 418 (2003). But our focus is not on the magistrate’s findings but whether the juvenile court abused its discretion when it dismissed the CINA petition.

Domingues, Kierein, and other cases require the juvenile court to undertake a two-step independent evaluation of the magistrate’s findings. In undertaking this process in this case, the court stated that the abuse allegations had not been proven. There is certainly evidence in the record to support this finding. However, with regard to Mr. F.’s alleged alcohol problems, the court stated that “JCEIP has ruled out alcohol abuse.” This was not correct—in fact, JCEIP diagnosed Mr. F. with moderate stage alcohol abuse and noted that his “potential for relapse is high due to [his] lack of recovery tools.” Ms.

Harriel, the witness for the Medical Services Division who had conducted a separate assessment of Mr. F., also concluded that Mr. F. exhibited symptoms of alcohol abuse. The only relevant difference between the two expert opinions was that Ms. Harriel recommended a referral for treatment of alcohol abuse but JCEIP did not. The juvenile court's finding that JCEIP had ruled out alcohol abuse on Mr. F.'s part is clearly erroneous.

At this point, and in light of the record before us, the issue is not whether Mr. F. has a history of alcohol abuse but whether there is a substantial risk that this problem will interfere with his ability to parent J.B. and, if so, what support services are necessary to alleviate this risk. Resolving these questions is a matter for the juvenile court's exercise of discretion but that exercise cannot be based on an incorrect finding about a critical issue.

We vacate the juvenile court's judgment and remand the case for the court to reconsider its decision in light of the fact that both mental health agencies that evaluated Mr. F. concluded that he has alcohol abuse problems.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS VACATED AND THIS CASE IS REMANDED TO IT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEES TO BEAR THE COSTS EQUALLY.