UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0923

September Term, 2015

IN RE: M.W. AND G.W.

Krauser, C.J.,
Wright,
Graeff,

JJ.

Opinion by Graeff, J.

Filed: December 21, 2015

Mr. W., appellant, appeals from an order of the Circuit Court for Montgomery County, sitting as a juvenile court, changing the permanency plans for Mr. W.'s children (M.W. and G.W.) from reunification to adoption by a non-relative. Mr. W. presents a single question for our review, which we have rephrased:

> Did the court err by changing the children's permanency plan to a sole plan of adoption by a non-relative? [1]

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. W. and Ms. B. are the biological parents of M.W. (born February 2011) and G.W. (born December 2013). [2] In November 2011, the Department of Social Services (the "Department") placed M.W., who was nine months old at the time, in shelter care, and it filed a Child in Need of Assistance ('CINA") petition due to allegations of neglect by the parents.[3] The petition included allegations that Ms. B. was leaving M.W. with inappropriate caregivers, including a neighbor under the influence of alcohol, leaving her in the care of the maternal grandmother without items necessary for M.W.'s basic needs, and leaving no contact information or estimated time of return. The petition identified

[1] Mr. W. presented the following question: "Did the court err by changing the children's permanency plans where the father, who has been incarcerated, has never received reunification efforts?"

[2] Ms. B. did not participate in this appeal.

[3] A "child in need of assistance" ("CINA") 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 either unable or unwilling to give proper care and attention to the child and the child's needs." Md. Code (2015 Supp.) § 3-801(f) of the Courts and Judicial Proceedings Article ("CJP").

additional concerns, including Mr. W.'s mental health issues and criminal history, Ms. B.'s substance abuse, and both parents' unstable living arrangements. The CINA case ultimately was dismissed after Ms. B. and Mr. W. agreed to give custody and guardianship of M.W. to the maternal grandmother, Marcia B.

On September 25, 2013, a couple of months before G.W. was born, Mr. W. pled guilty to two counts of second-degree assault. The charges arose after Mr. W. and Ms. B. went out for a night of "drinking and drugging." Mr. W. punched Ms. B. in the face with a closed fist, kicked her in the face, and "left flank[ed]" her several times with a karate-style kick. On October 4, 2013, he was sentenced to concurrent sentences of seven years of imprisonment, with three years suspended, and placed on five years of supervised probation following his release.

M.W. remained in the custody of her maternal grandmother, Marcia B., from November 2011 through January 11, 2014. G.W. was in the legal custody of his mother, Ms. B., and they were living with Ms. B.'s mother, Marcia B. On January 11, 2014, the paternal grandmother, Ms. M., contacted the Department when she attempted to return M.W. and G.W. to Marcia B. after a visit. Marcia B. refused to take the children back, stating that Ms. B. had moved out after she pawned Marcia B.'s laptop. The next night, Ms. B. picked up the children from Ms. M. and left them with their godmother. At 3:30 a.m. on January 13, 2014, when Ms. B. had not returned, the godmother called police, stating that she could no longer care for the children because she was not staying in her

own apartment.[4] When the after-hours social worker arrived to retrieve the children, she found the children and the godmother all sleeping on one mattress in the "cluttered" apartment.

The Department then filed a new CINA petition and request for shelter care. The juvenile court gave temporary care and custody of M.W. and G.W. to the Department for placement in licensed foster care. The Department assisted the paternal grandmother, Ms. M., with preparing her home for M.W. and G.W., and the parties agreed to placement of the children in "kinship care" with her, which the court approved on February 12, 2014. M.W. and G.W. adjusted well to the placement with their paternal grandmother.

On March 13, 2014, the court held an adjudicatory hearing regarding M.W. and G.W. Ms. B. and Mr. W. consented to the CINA finding, the facts set forth in the Department's Third Amended CINA Petition, and the placement of their children in kinship care with Ms. M. The court ordered that Ms. B. participate in substance abuse and psychological evaluations and follow all recommendations, participate in and complete parenting classes, and submit to a urinalysis and Breathalyzer twice weekly. Supervised visitation between Ms. B. and the children was permitted weekly, at a minimum of two hours, not to include overnights, at the direction of the Department. The court ordered Mr. W. to submit to a paternity test and sign a release authorizing the Department to review information about his mental health and criminal issues. The court suspended visitation between the children and Mr. W. pending Mr. W.'s release from incarceration.

[4] Ms. B said that she was in Southeast DC and could not return to get the children because the Metro was closed and she did not have money for a cab.

On June 24, 2014, the court conducted a Review Hearing.[5] The Department reported that it had not had any contact with Ms. B. since March 18, 2014. She had been incarcerated for a portion of the review period, but she was released on May 15, 2014. Mr. W. remained incarcerated at Eastern Correctional Institution (ECI) in Westover, Maryland. The Department sent Mr. W. a letter with the paternity test results (probability of paternity was 99.99%), as well as a service agreement asking him to participate in various programs, if available at ECI, including parenting classes, substance abuse treatment, and therapy. The Department advised Mr. W. that he could write to his children. Mr. W. did not sign the service agreement or otherwise respond to the Department's letter. Mr. W.'s mother informed the Department that Mr. W. notified her of the results of the paternity test and his receipt of the letter.

The court ordered that the children remain CINA, and it continued placement with the children's paternal grandmother, Ms. M. The court further ordered that, with the agreement of Ms. M., visitation between the children and Mr. W. was permitted at ECI under the rules and regulations of the facility and under the direction of the Department.

On December 8, 2014, the court held a permanency planning hearing. Both parents were incarcerated at the time. The court found that the Department had made reasonable efforts to achieve reunification, including attempts to maintain correspondence with Mr. W. to engage him in planning for the children. The court ordered, pursuant to the parties'

[5] CJP § 3-816.2 requires that the court conduct a review hearing six months after the filing of a CINA petition in order to make certain findings regarding the safety of the child and progress of the case.

agreement, that the children's permanency was a concurrent plan of reunification and custody and guardianship to a relative**.**

It soon became apparent that Ms. M. was struggling to meet the children's needs. She failed to take G.W. to the pediatrician, and he missed his 6, 8, and 10 month checkups. As a result, he was behind on his immunizations. G.W. was receiving services through the Infants and Toddlers Program for delays in his communication and gross motor skills.[6] G.W.'s case manager reported concerns to the Department regarding Ms. M.'s home, including a lack of babyproofing and available toys and books to stimulate the children's development. Ms. M. was scheduled to take M.W. for an evaluation with Child Find on November 18, 2014, but they missed the appointment, and as of November 24, 2014, Ms. M. had not rescheduled.[7] She had never taken M.W. to the dentist. Ms. M. also expressed concern regarding her ability to be a permanent resource for the children. Her plan was for Mr. W. to assume care of the children after his release.

On January 30, 2015, the court held an emergency change of placement hearing because Ms. M. was not providing necessary services for the children and had removed

[6] The Infants and Toddlers Program "[p]rovides a statewide, community-based interagency system of comprehensive early intervention services to eligible infants and toddlers, from birth until the beginning of the school year following a child's 4th birthday, and their families." Md. Code (2015 Supp.) § 8-416(a)(2) of the Education Article.

[7] The local Child Find office screens preschool children, ages 3 to 5, "to identify any areas of concern for further assessment by a multidisciplinary team." If the child is found to have a disability, he or she is "eligible for preschool services provided through the local school system." Preschool Special Education Services Program, Special Education and Early Intervention Divisions, MD. State Dept. of Educ. (MSDE 2003), *available at* https://perma.cc/M8M2-FKXM.

herself as a resource for M.W. and G.W. Because there were no other family placements available, the children were placed in foster care.

On April 30 and May 18, 2015, the court held a Permanency Plan Review Hearing. The Department requested that the permanency plan for each child be changed to a sole plan of adoption by a non-relative. Ms. B. and Mr. W. both opposed the change in permanency plan. Ms. B attended the April 30, 2015, hearing, but she did not attend the May 18, 2015, hearing. Mr. W., who remained incarcerated, was transported to attend the May 18, 2015, hearing.

Ms. Teresa Solomon, a social worker in the Kinship Unit for the Department, testified that, during the past 17 months, Ms. B. had nine visits with M.W. and G.W., and the visits were problematic. Ms. B. seemed to enjoy visiting with the children, but she became upset with G.W. because he did not recognize her, and he stayed close to the social worker's side. She played with M.W., but at her most recent visit, she became upset with M.W. for "running around and not listening." She grabbed M.W. by her arms, threw her on the sofa, and "put her in time out every two minutes."

Ms. Solomon testified that M.W. and G.W. had made an excellent adjustment to their foster home. They had been together in this pre-adoptive home for the past three and one-half months and were strongly bonded to each other, and they had a very good rapport with the foster parents. M.W.'s behavior had improved, and she was much calmer and responded appropriately when instructed to calm down. The children were very affectionate with the foster parents and their teenage foster daughter.

The foster mother took G.W. to the pediatrician, and he received all required vaccinations. The Infants and Toddlers Program transferred G.W.'s services to the foster home and evaluated him for speech delays due to the foster mother's concerns. As a result of this evaluation, the Program added biweekly speech services to his program to address his delayed speech.

Ms. Solomon wrote to Mr. W. and asked him to write or respond to her, but he did not respond. She did not go to see Mr. W. at ECI, where he was incarcerated, because it was a three-and-a-half hour drive, one-way, from Montgomery County. With respect to Mr. W.'s potential to parent, Ms. Solomon testified that, upon his release, Mr. W. would need psychological and substance abuse evaluations, he would need to attend a Responsible Fathers Program and parenting education, and follow all recommendations. He also would need to submit to a urinalysis twice per week.

Mr. W. testified that his mandatory release date was October 30, 2015, but he could be released earlier because he had started working and receiving credit toward an earlier release date. He stated that he would comply with all of the Department's requests and would do the evaluations while incarcerated, if possible. When asked whether he received Ms. Solomon's correspondence from February 2015, he responded: "No, not that I can recall. Maybe. I'm not sure."

With respect to his children, Mr. W. testified that he and M.W. were close before he was incarcerated. He described his relationship with her by saying: "I carried my daughter. I speak to her. Teach her. So me and my daughter [have] a very close relationship." The last time he saw her was around her 2nd birthday, more than two years

prior to the hearing. He had never met G.W. When asked to explain why he would like the children's plan to remain reunification rather than adoption by non-relative, he responded: "This is rock and roll. That's all. That's all I can say."

Mr. W. testified that he did not believe that his violent relationship with the children's mother could have affected the children because he and Ms. B. "never really fought in front of M.W. at all." They only fought when they "were alone or out in the street with my friends, running on the streets." Mr. W. has not taken any courses or had any counseling to help him manage his abusive relationships. He had participated in the Young Men's Ministry where he discussed "life's problems" and received advice from other participants. He also claimed that he attended Narcotics Anonymous and Alcoholics Anonymous classes and that he "passed both of those classes" and had "rehabilitated himself."

Mr. W. explained that he had changed while he was in prison. He stated that he had stopped practicing Satanism and accepted Jesus as his Savior prior to October 2012, the date of the assault on Ms. B., but he had not yet "submitted" to the Lord because he was still "drinking and drugging."

Mr. W. does not have a high school diploma. He attended academic classes while incarcerated, but he could not get his diploma because he kept "going back and forth to court." Mr. W. testified that he had a job lined up with the "Highway Administration" following his release from incarceration, and he might live with his mother or his grandmother. His grandmother had invited him to live with her, but he did not know where she lived.

The court found from the evidence presented that the Department had made reasonable efforts to achieve the permanency plan of reunification. It determined that it was in the children's best interests to change the children's permanency plan from reunification to adoption by a non-relative. This appeal followed.

STANDARD OF REVIEW

We review child custody cases under three "different but interrelated" standards of review. *In re Adoption/Guardianship of Cadence B.*, 417 Md. 146, 155 (2010). First, we review factual findings under the clearly erroneous standard. *Id*. Second, we review purely legal questions de novo, requiring further proceedings except in cases of harmless error. *Id.* Finally, we review "'the ultimate conclusion of the [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous'" for a "'clear abuse of discretion.'" *Id*. (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

DISCUSSION

Mr. W. contends that the juvenile court erred by changing the children's permanency plans from reunification to adoption by a non-relative when he "never received reunification efforts." Mr. W. asserts that the appropriate permanency plan for M.W. and G.W. is one in which they are "return[ed] to their father and, as a result, their grandmother, who cared for them in the past."

The Department argues that the juvenile court did not abuse its discretion in concluding that changing the children's permanency plan from reunification to adoption by a non-relative was in the children's best interests where Mr. W. remained incarcerated for violently assaulting Ms. B., and he still needed to address his mental health, violent

tendencies, and substance abuse. The Department contends that the evidence established that there were no relative resources available and neither Mr. W. nor Ms. B. would be able to safely care for the children in the foreseeable future.

Counsel for the children argues that the juvenile court did not abuse its discretion by changing the children's permanency plan from reunification to adoption by a non-relative "where, after a year and a half, in spite of the Department making reasonable efforts, neither parent was close to being a viable resource for the children." She asserts that the court's decision "was well-supported by the evidence," stating:

> The Department made reasonable efforts towards reuniting the children with their father; however, Father did not sign a case plan and did not respond to the Department's correspondence. [M.W.]'s bond to Father was attenuated by his absence for half of her young life. [G.W.] has never met his Father. When the children were found CINA, Father was incarcerated for a violent assault on the children's mother. The Department was concerned about his history of substance abuse, domestic violence, and mental health issues. Father had not engaged in any counseling or mental health treatment while incarcerated. When Father testified at the May 2015 Permanency Plan Review Hearing to contest the proposed change in permanency plan, he demonstrated little or no insight into these concerns, and did not present a viable plan for assuming care of the children.

When a child is removed from his or her parent's care and custody and placed in foster care, a department of social services has a statutory obligation to make reasonable efforts to reunify the child with the parent. *In re Joseph N.*, 407 Md. 278, 291-92 (2009). In making reasonable efforts to preserve and reunify families in order to make it possible for the child to safely return to the child's home, "the child's safety and health shall be the primary concern." Md. Code (2014 Supp.) § 5-525(e)(2) of the Family Law Article ("FL"). A circuit court's finding regarding whether the Department made reasonable efforts toward

reunification is a factual finding that the appellate court reviews pursuant to the clearly erroneous standard. *See In re Ashley E.*, 158 Md. App. 144, 167 (2004), *aff'd*, 387 Md. 260, 287 (2005).

In the Department's report dated April 20, 2015, it listed the following "reasonable efforts toward a concurrent plan of reunification and custody and guardianship to a relative and to meeting the children's needs":

1. Attempted to maintain contact with [Ms.] B. to engage her in planning for the children.

2. Met with [Ms.] B. at the Department offices.

3. Attempted to maintain written contact with [Mr.] W.

4. Transported the children and provided supervision for visits between the children and their mother.

5. Attempted to maintain[] written correspondence with [Mr.] W. to engage him in planning for the children.

6. Explored relative resources for the children.

7. Met with the maternal grandmother at the Department's offices.

8. Provided referrals to the mother for urinalysis and a substance abuse assessment.

9. Arranged for a parent educator to work with the mother.

10. Located a foster home for the children and transported the children for pre-placement visits.

11. Arranged for and attended a meeting between the kinship caregiver and foster parents.
12. Transported the children and their belongings to the new foster home.

13. Arranged for visitation between the children and their paternal grandmother following their move to foster care.

14. Maintained contact with the children's foster parents to monitor their care and to provide emotional support.

15. Visited the children in their placement and their daycare, minimum monthly to monitor their safety and well-being.

16. Monitored [G.W.]'s progress through the Infants and Toddlers Program.

17. Paid 100% of day care costs for both children while they were placed with the kinship caregiver.

18. Paid a portion of the children's day care costs since placed in foster care.

The Court found that the Department made reasonable efforts to achieve a permanency plan of reunification, including attempts to maintain written contact with Mr. W. The Department had offered a service agreement to Mr. W. while he was incarcerated, which included parenting classes, substance abuse treatment, and therapy. The Department also advised Mr. W. that he could write to his children. Mr. W. never signed the service agreement or responded to the Department.

Mr. W. contends, however, that the Department failed to assist him in any way with reunification efforts. He claims that the Department should have allowed for visits with the children or facilitated telephone calls or letters. He further contends that the Department could have assisted him in enrolling him in programs in the prison. He claims that his incarceration should not have served as a bar to his receiving services from the Department.

The Department's efforts to achieve reunification are not required to be perfect. *See James G.*, 178 Md. App. 543, 601 (2008) ("[T]he Department's efforts need not be perfect to be reasonable."). Rather, reasonable efforts must be considered on a "case-by-case

basis." *In re Shirley B.*, 419 Md. 1, 25 (2011). Here, the Department's ability to offer services to Mr. W. was limited due to incarceration. *See Id*. at 27 ("'reunification efforts must be judged within the context of the resources available to the agency'") (quoting Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. Tol. L. Rev. 365 (2011)). Nevertheless, the Department did attempt to communicate with Mr. W. on more than one occasion regarding his case, but Mr. W. did not respond. Mr. W. provided no evidence that he attempted to enroll in counseling or treatment programs while incarcerated or that he requested the Department's assistance to do so.[8] Based on the record here, the court's finding that the Department made reasonable efforts at reunification was not clearly erroneous.

We next turn to the juvenile court's finding that it was in the best interests of the children to change the permanency plan to adoption. The best interests of the child are the primary concern in the development of a permanency plan. FL § 5-525(f)(1). The following factors are to be used to guide the court's determination of a child's best interest when creating a permanency plan:

[8] Mr. W.'s reliance on *In re Adoption/Guardianship Nos. CAA 92-10852 and 92-10853 in the Circuit Court for Prince George's County*, 103 Md. App. 1 (1994) is misplaced. That case is distinguishable from the present case for several reasons. Initially, *Adoption 92-10852* was a termination of parental rights case, in which the court needed to find, by clear and convincing evidence, that it was in the best interest of the children to permanently sever their ties with their father. *Id.* at 10. Here, by contrast, the proceeding was not a termination of parental rights, but rather, a change in the permanency plan. Moreover, in that case, the only efforts that the Department made to contact the father was through the mother, who the Department knew was an "unreliable teenager." *Id.* at 14. The Department sent only one letter to the father while he was in jail, and no one spoke to him when he called or followed up on the call. *Id.* at 17. Here, by contrast, Mr. W. made no effort to follow up on the Department's efforts to provide services.

> (i) the child's ability to be safe and healthy in the home of the child's parent;
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> (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
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> (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;
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> (iv) the length of time the child has resided with the current caregiver;
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> (v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and
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> (vi) the potential harm to the child by remaining in State custody for an excessive period of time.

Id.

After the hearing, the court made the following findings regarding the factors outlined in FL § 5-525(f)(1):

> [M.W.] and [G.W.] cannot be safe in the home of either parent. Mr. W. is presently incarcerated. These children came to the Department[']s attention initially in part because Ms. [B.] was leaving [M.W.] with inappropriate caregivers and without adequate supplies and after [G.W.]'s birth[,] she left both children and then was unable to retrieve them when requested to do so. [Ms. B.'s] housing situation at the time was unstable. As of this date, the Department does not know where Ms. [B.] is residing or with whom. She has only submitted a urinalysis once and the results were positive for marijuana.
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> [Ms. B. has] seen the children 9 times in the past 17 months and has not demonstrated an ability to interact consistently in an appropriate manner with them, especially when they do not react as she would like or when they do not do what she would like.
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> The [c]ourt must consider the child's attachment and emotional ties to the child's natural parents and siblings. In this case, the children are attached to one another. [M.W.] knows that Ms. [B] is her mother and refers to her as mommy, but her behavior with her mother does not suggest that she looks to her mother for comfort and security. Mr. W. testified that [M.W.] knows and is attached to him, but he has had none or perhaps one contact with her in the past 17 months[,] and I say one because [there] is a suggestion that perhaps Ms. [M] took [M.W.] to see her father in jail on one occasion.

> I don't think that was ever verified or not verified. [G.W.] does not know his mother. He was only one month old when he was removed from her care. He is reticent to go with her or to interact with her during visits. [G.W.] and his father have never met.
>
> The [c]ourt must consider the child's emotional attachment to the current caregiver and the caregiver's family. The evidence reflects that the children are comfortable in their current placement and that [M.W.]'s behavior has improved while in the placement. She is calmer. [She] can be redirected when necessary and can change unacceptable behavior when asked. [G.W.] looks to his foster mother for security and comfort. Both children are attached to the teenager in the home.
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> [The] [n]ext factor is the length of time the child has resided with the current caregiver. In this case, the children have been in their current foster home since January 29th, 2015, which is about three and a half months.
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> The [c]ourt must consider the potential emotional, developmental and educational harm to the children if moved from the current placement. This is the third placement for these children. They were with their maternal grandmother then with their paternal grandmother and now are in foster care. . . . They are comfortable and secure in their current placement and the [c]ourt finds that it would be emotionally harmful to disrupt this placement and potentially developmentally harmful, as well. [N]o one is asking the [c]ourt to move the children today.

The court then addressed the final factor, "the potential harm to the child by remaining in State custody for an excessive period of time." The court noted that the children had been in care for 17 months, and their lives had been disrupted twice. It noted that Ms. B. had made limited effort to see them during this time. She had not complied with the service agreements, and she had not demonstrated any change in her lifestyle or circumstances during this time. With respect to Mr. W., the court stated:

> Mr. W. has been incarcerated since approximately January 2013. He has been present in court for several hearings in this case and is represented by counsel. However, he has not responded to the Department's correspondence regarding these children and this case. His mandatory release date is October 2015, five and a half months from now, late October 2015.

> His mental health, violent tendencies and substance abuse are issues which would have to be addressed thoroughly before he could be considered a viable resource for the children.

Accordingly, the court found that it was "in the children's best interest that the permanency plan in this case be changed to one of adoption by a non-relative." The trial court "'is in the unique position to marshal the applicable facts, assess the situation and determine the correct means of fulfilling a child's best interests.'" *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md. 661, 696 (2002) (quoting *In re Mark M.*, 365 Md. 687, 707 (2001)). The court's finding that it would be harmful to disrupt the children's current placement was supported by the record. M.W. and G.W. were in their third placement in 17 months. The circuit court properly considered Mr. W.'s history of mental health concerns, domestic violence, and substance abuse in assessing his ability to care for the children after he was released from incarceration, and it properly determined that it was not in the children's best interests to wait an undetermined time to see if Mr. W. would take the necessary steps to be able to provide them with a safe home. Given the lack of evidence suggesting that the parents had made any progress toward becoming viable resources for their children, and because there were no relative resources available, the court did not abuse its discretion by changing the permanency plan from reunification to adoption by a non-relative.

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