

Circuit Court for Baltimore County
Case No. 03-I-17-000343

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 991

September Term, 2018

IN RE: I.R.

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Fader, C.J.,
Wright,
Shaw Geter,

JJ.

Opinion by Fader, C.J.

Filed: January 29, 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.

In a Child in Need of Assistance (“CINA”)¹ proceeding, the Circuit Court for Baltimore County, sitting as a juvenile court, awarded sole legal and physical custody of then-seven-year-old I.R. to her biological father (“Father”). The juvenile court also adopted a visitation agreement reached between Father and I.R.’s biological mother (“Mother”). Neither the court’s award of custody to Father nor its disposition of visitation to Mother has been challenged on appeal by any party.

At the same time, the court refused to grant visitation to the appellant, I.R.’s maternal grandmother (“Grandmother”), and instead left that visitation to be determined by the parties. Grandmother now challenges the juvenile court’s (1) refusal to award her visitation with I.R. and (2) failure to make a factual finding as to whether abuse or neglect would be likely to occur if the court were to award custody or visitation to her. Grandmother’s appeal is opposed by I.R., Father, Mother, and the Department of Social Services of Baltimore County (the “Department”). Finding no error or abuse of discretion, we affirm.

BACKGROUND

In a custody action initiated in 2015, the juvenile court entered a consent order giving primary physical custody of I.R. to Grandmother and joint legal custody 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).

Grandmother and Mother. Father, who at that time was unaware of his paternity of I.R., was neither notified of, nor a party to, this proceeding.

I.R. came to the attention of the Department in August 2017. At that time, a Child Protective Services investigation determined that I.R. had been subjected to physical abuse by Grandmother while living at her house and had witnessed “chronic arguments” between Grandmother and Mother, some of which became violent and resulted in police being called to the house. The investigation further suggested “active drug use” in Grandmother’s house, including reports that an individual had overdosed in the home.

In the fall of 2017, Grandmother was psychiatrically hospitalized on two separate occasions under emergency petitions because of her “erratic and out of control behaviors” while interacting with the Department and staff at I.R.’s school. During these interactions, Grandmother exhibited “demanding, combative” behavior and made “bizarre statements” about herself and others. Following Grandmother’s second hospitalization in November 2017, the Department removed I.R. from the home and placed her in the care of her maternal aunt.

The CINA Adjudication and Disposition

In November 2017, the Department filed a CINA petition with a request for shelter care in the juvenile court. The Department alleged that, in addition to allowing drug use in her home and violently fighting with Mother in the presence of I.R., Grandmother lacked “mental stability,” was “observed driving erratically,” “often harass[ed]” staff at I.R.’s school,” acted “out of control . . . while speaking with the” police department, and showed

a “lack of compliance with following through with mental health treatment.” The Department also alleged that Grandmother was “resistant to getting [I.R.] involved with mental health treatment.” The Department concluded that “[c]ontinuation in [Grandmother’s] home is contrary to the welfare of” I.R.

Father, who did not know that he had been identified as I.R.’s father until after the CINA petition was filed, appeared at the initial adjudication hearing in late November. Because the Department had just confirmed Father’s paternity, the juvenile magistrate postponed the adjudication to allow Father visitation time with I.R. and to permit the Department to further its investigation and amend its petition as to Father. The Department subsequently amended its petition to allege that Father was unable to provide care for I.R. because he had twice been convicted of driving under the influence, once recently and once years earlier.

The rescheduled adjudication hearing took place in January 2018. The juvenile magistrate recommended sustaining the allegations in the CINA petition and ordering that I.R. be placed under protective supervision of the Department. The magistrate found that Mother and Grandmother were “unwilling/unable to provide proper care” to I.R. because of “significant mental health and substance abuse issues.” The magistrate further determined that Father was “unable to provide care due to substance abuse issues”—the evidence of which was the two convictions for driving under the influence—and because he had “never had contact with” I.R. However, the magistrate nonetheless “delay[ed]

disposition” of the case to “give the father the opportunity to visit” I.R. No party filed exceptions and the juvenile court entered the order.

By the April 2018 disposition hearing, the Department had changed its view with respect to Father. As a result, the Department took the position that the court should (1) not find I.R. to be a CINA and (2) grant custody and guardianship to Father. The Department cited Father’s successful visits with I.R., a lack of safety concerns with I.R. in his care, his steady employment, and his completion of an alcohol education program. At the hearing, Mother and Grandmother opposed granting custody to Father and requested that the CINA case remain open so that they could work toward reunification with I.R. The magistrate agreed with the Department and recommended granting Father sole custody with visitation to be arranged among the parties. Grandmother and Mother both filed exceptions.

Following the disposition hearing, Mother, Father, and Grandmother attended mediation in an attempt to agree on a visitation schedule. Although they were unable to come to an agreement during the mediation, Mother and Father subsequently came to an agreement on their own that did not include visitation for Grandmother.

The Exceptions Hearing

The juvenile court held a hearing in June 2018 on the exceptions. At the outset, Mother agreed to withdraw her exceptions if the court accepted the visitation agreement, which it ultimately did.

Grandmother argued that she should be awarded joint custody with Father because she had raised I.R. for most of the child’s life. She contended that she had been actively

working toward reunification, including participating in mental health counseling, and that giving her custody would provide stability for I.R.

Father argued that he should have sole custody of I.R. because he was a biological parent who was willing and able to care for I.R., I.R. had formed a bond with him and his family, allegations of abuse against Grandmother had been sustained, and Mother had consented. The Department and I.R.'s counsel agreed with Father.

The juvenile court agreed with Father, Mother, the Department, and I.R. In its oral ruling, the court observed that all of the Department's allegations in its CINA petition had previously been sustained by the magistrate and that none of the parties had taken exceptions from that ruling. The court enumerated the relevant statutory considerations and, weighing them all, concluded that I.R.'s best interest would be served by giving Father sole legal and physical custody of I.R. The court also adopted the visitation agreement between Father and Mother and then expressly made a finding pursuant to § 9-101 of the Family Law Article "that there is no further likelihood that any abuse or neglect would occur with the custody and visitation rights granted as the Court is so ordering." The court stated that it could not make the same "finding if the child was returned to the care of the grandmother."

Grandmother then asked the court to award her visitation, including overnight visits, "to make sure that she's very involve[d] in [I.R.]'s life." In support of that request, her counsel argued that "she continue[d] to deny all the allegations contained in the [CINA]

Petition and that she very much cares for [I.R.] and wants to be able to see [I.R.] on a regular basis”

Father responded that the court could not do so in the absence of a finding, which the court had already said it could not make, that there was no likelihood of abuse or neglect if I.R. were placed with Grandmother. He further argued that daytime visitation with Grandmother should be agreed upon by the parties. Mother agreed with Father, as did the court, which ordered that “any visitation between [I.R.] and [G]randmother is to be agreed upon by the parties and arranged by same at this time.” The court later entered a written order that provided that visitation with Grandmother was “to be determined by the parties.” Grandmother appealed.

DISCUSSION

Grandmother does not challenge the court’s decision to award sole legal and physical custody to Father. Instead, she challenges the juvenile court’s decision as to visitation, claiming that the court erred in leaving the decision on visitation to Father’s discretion and failing to order a minimum level of visitation for her. She also argues that the court erred by finding a further likelihood of abuse by her without making specific factual findings to support that determination.

We apply three standards of review in CINA and custody cases: (1) we review factual findings of the juvenile court for clear error, *Davis v. Davis*, 280 Md. 119, 125-26 (1997); (2) we determine whether the juvenile court made “[a]n erroneous legal determination” and if so, whether the error requires further proceedings or “is deemed to

be harmless,” *In re Ashley S.*, 431 Md. 678, 704 (2013) (citing *In re Yves S.*, 373 Md. 551, 586 (2003)); and (3) we evaluate the juvenile court’s final decision for abuse of discretion. *Id.* “The best interest of the child standard is the overarching consideration in all custody and visitation determinations.” *Baldwin v. Baynard*, 215 Md. App. 82, 108 (2013).

I. THE COURT DID NOT ERR IN DECLINING TO AWARD VISITATION TO GRANDMOTHER.

Grandmother argues that the court erred in refusing to grant her a minimal level of visitation and, instead, leaving her visitation to the discretion of Father and Mother. In making this argument, Grandmother misunderstands her status and rights once the court determined that I.R. was not a CINA and granted Father sole legal and physical custody of her.

Grandmother does not challenge on appeal the juvenile court’s award of sole legal and physical custody to Father. The court made that award pursuant to § 3-819(e) of the Courts and Judicial Proceedings Article (Repl. 2013; Supp. 2018), which provides:

If the allegations in [a CINA] petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may award custody to the other parent.

Here, the situation at the outset of the CINA proceedings was that Grandmother and Mother shared legal custody of I.R., Grandmother had sole physical custody, and Father was unaware that he was I.R.’s father. Through the CINA proceedings: (1) Father’s paternity was confirmed and he was identified as able and willing to care for I.R.; and (2) the magistrate sustained allegations in the CINA petition as to both Mother and Grandmother

at the adjudicatory phase and neither took exception to those findings. The juvenile court thus acted within its authority under § 3-819(e) in finding that I.R. was not a CINA and in awarding custody to Father. *See In re Joseph N.*, 407 Md. 278, 293 (2009); *see also In re Russell G.*, 108 Md. App. 366, 377 (1996) (holding that a child cannot be found a CINA if he or she “has at least one parent willing and able to provide the child with proper care and attention”). That determination is, in any event, unchallenged in this appeal.

The starting point for our visitation analysis is thus that Father had sole legal and physical custody of I.R. The two parties initially seeking visitation rights were Mother and Grandmother. Mother and Father came to an agreement as to visitation, which the juvenile court accepted.²

Grandmother also sought visitation, but had not been either able or willing to come to an agreement with Father and Mother. Once the court awarded Father sole legal and physical custody of I.R., Grandmother’s status in seeking visitation was as a grandparent.³

² By the time they entered the visitation agreement, Mother was living with Mother’s own grandmother. The agreement specified that Mother’s visits would occur at the home of Mother’s grandmother unless otherwise agreed.

³ Grandmother did not argue in the juvenile court, and has not argued on appeal, that she should be treated as a *de facto* parent for purposes of considering visitation. Although the juvenile court, while stating its findings regarding custody, did refer to her at one point as “the *de facto* parent” in the course of considering the ability of I.R. to be safe and healthy in Grandmother’s home, it did not undertake the analysis required to determine whether she should be afforded that status nor did Grandmother ever ask the juvenile court to do so. Similarly, in her brief, Grandmother refers to herself once in a parenthetical as “(the former guardian/ *de facto* parent),” but she never argues that she is entitled to that status or attempts to satisfy her burden of proof in that regard. *See Conover v. Conover*, 450 Md. 51, 74 (2016) (stating that the party “seeking *de facto* parent status bears the burden of proving” the relevant factors). Because she failed to preserve that argument, we

The Court of Appeals explored in detail the respective rights of parents and grandparents with regard to visitation in *Koshko v. Haining*, 398 Md. 404 (2007). Parents have “the fundamental right . . . to direct and control the upbringing of their children,” including deciding whether to allow third-party visitation. *Id.* at 422. Indeed, a parent’s “liberty interest” in raising his or her child “looms over any judicial rumination on the question of custody or visitation.” *Id.* at 423. “Grandparents, on the other hand, do not enjoy a constitutionally recognized liberty interest in visitation with their grandchildren.” *Id.* Instead, a grandparent’s right to visitation, if any, “is solely of statutory origin implemented through judicial order.” *Id.*

In Maryland, grandparent visitation is governed by the grandparent visitation statute, § 9-102 of the Family Law Article (Repl. 2012; Supp. 2018). That statute permits a court to grant a grandparent’s petition for visitation if it finds that doing so is “in the best interests of the child.” *Id.* § 9-102(2). In *Koshko*, to avoid constitutional problems, the Court of Appeals added two judicial glosses to the statute. 398 Md. at 423, 426. First, the Court recognized a “long-settled presumption that a parent’s decision regarding the custody or visitation of his or her child with third parties is in the child’s best interest.” *Id.* Second, to overcome that presumption, a grandparent seeking custody must make “a threshold showing of either parental unfitness or exceptional circumstances indicating that the lack

do not consider here whether Grandmother would have been entitled to an award of visitation as a de facto parent.

of grandparental visitation has a significant deleterious effect upon the children who are the subject of the petition.” *Id.* at 441.

Here, in making her visitation request of the court, Grandmother did not attempt to make the required threshold showing of parental unfitness or exceptional circumstances to overcome the presumption that Father and Mother’s visitation decisions would be in I.R.’s best interest.⁴ Grandmother did not expressly invoke § 9-102 or the judicial glosses added by *Koshko* in making her request for visitation, nor did she make any argument that she satisfied the relevant legal standards for granting a request for grandparental visitation. Regardless, without a threshold showing of unfitness or exceptional circumstances, the court could not have granted her visitation request.

Grandmother also contends that the court erred by leaving any decision as to visitation between her and I.R. “to be determined by the parties,” thus essentially leaving visitation to the discretion of Father and Mother. Grandmother contends that this was an impermissible delegation of judicial authority to Father and Mother. Grandmother’s argument, again, misapprehends her role vis-à-vis Father and Mother. Once the court (1) found that I.R. was not a CINA, (2) granted sole legal and physical custody to Father, and (3) approved the visitation agreement between Father and Mother, it was appropriate for the court to leave decisions regarding third-party visitation with I.R. to the parents.

⁴ Grandmother’s request for joint custody of I.R. along with Father was an implicit concession that Father is a fit parent. *See Taylor v. Taylor*, 306 Md. 290, 304-311 (1986) (discussing factors relevant for a court to consider in awarding joint custody, including the fitness of both parties). Grandmother failed to make any exceptional circumstances argument.

Announcing that Grandmother's visitation would be determined by the parties was a recognition of Father and Mother's parental rights, not an impermissible delegation of judicial authority.

We therefore affirm the juvenile court's decision not to award visitation to Grandmother. In doing so, however, we observe that nothing about this ruling should be understood as having decided the merits of any claim that Grandmother should have been or should be afforded visitation with I.R. as a de facto parent or under the grandparent visitation statute. We offer no opinion regarding the merits of any such claim.

II. THE JUVENILE COURT DID NOT ERR IN CONCLUDING THAT IT COULD NOT MAKE THE FINDING REQUIRED BY § 9-101 OF THE FAMILY LAW ARTICLE BEFORE IT COULD GRANT CUSTODY OR VISITATION TO GRANDMOTHER.

Grandmother also contends that the juvenile court erred when it concluded that it could not make a finding that there would be no likelihood of further abuse or neglect of I.R. by Grandmother if she were to receive custody or visitation of I.R. Grandmother specifically claims (1) that the court failed to identify specific factual findings to support that conclusion and (2) that the record does not support that conclusion. For two reasons, we disagree.

First, Grandmother misunderstands the role of § 9-101(b) of the Family Law Article.

That statute provides:

(a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.

(b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

Section 9-101(b) thus applies only *after* a court has already determined that there are reasonable grounds to believe that a child has been abused or neglected, and is designed to ensure that a child in that situation is not placed back in danger. Here, the magistrate made the determination that Grandmother had abused I.R. in sustaining the allegations of the CINA petition and that determination became conclusive when no party took exceptions. Under § 9-101(b), the court was thus precluded from awarding custody or visitation rights to Grandmother—other than supervised visitation under conditions—unless it was able to “specifically find[] that there is no likelihood of further child abuse or neglect by” Grandmother. *See In re Billy W.*, 387 Md. 405, 447-48 (2005) (“[W]hen a court has reasonable grounds to believe that neglect or abuse occurred . . . custody or visitation must be denied, except for supervised visitation, unless the court makes a specific finding that there is no likelihood of further abuse or neglect.”). In other words, § 9-101 makes it the burden of the party seeking custody or visitation to show no likelihood of further abuse or neglect, not the burden of the court or any other party to show the opposite. *In re Yve S.*, 373 Md. 551, 587-88 (2003) (“The burden is on the parent previously having been found to have abused or neglected his or her child to adduce evidence and persuade the court to make the requisite finding under § 9-101(b).”). Grandmother did not satisfy that burden.

Second, the court did identify the factors that led it to conclude that it could not make the necessary finding under § 9-101(b). The court observed that in light of the absence of exceptions to the magistrate’s findings it was established that Grandmother had (1) engaged in “erratic and out of control behaviors” when interacting with police officers that led to her being hospitalized on an emergency basis, (2) failed to comply fully with mental health treatment, (3) minimized and denied the effect of her mental health issues on her ability to care for I.R., and (4) resisted getting I.R. needed mental health treatment. The court thus found it uncontested on the record before it that Grandmother was “unable or unwilling to provide proper care and attention [to I.R.] due to significant mental health and substance abuse issues.” And although Grandmother claimed to have made progress in addressing her mental health issues, the court found reason to doubt the sincerity of that progress in observing that Grandmother continued to deny that she needed any help. Although the court initially identified these factors when it was making its custody determination, and did not expressly restate them when it concluded that it could not make the requisite finding under § 9-101, that repetition was not necessary. We thus find no clear error in the juvenile court’s finding, “based upon the present circumstances today and what was found [by the magistrate], that the Court cannot make the [] 9-101 finding if the child was returned to the care of the grandmother.”

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