Circuit Court for Baltimore County
Case No. C-03-JV-22-000133

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1404

September Term, 2022

IN RE: I.W.

Graeff,
Arthur,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: May 25, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

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.

This appeal arises from an order by the Circuit Court for Baltimore County, sitting as a juvenile court, which adjudicated I.W. a child in need of assistance ("CINA"),[1] and placed him in the custody of the Baltimore County Department of Social Services (the "Department"), appellee. I.W.'s adoptive mother, S.W. ("Mother"), appellant, noted a timely appeal of the court's order.

On appeal, Mother presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err in ruling that I.W.'s purported out-of-court statements were admissible pursuant to Md. Code Ann., Crim. Proc. Art. ("CP") § 11-304 (2018 Repl. Vol.), the "tender years" exception to the hearsay rule?

2. Did the circuit court abuse its discretion in committing I.W. to the custody of the Department?

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

FACTUAL AND PROCEDURAL BACKGROUND

I.

Background and CINA Adjudication

I.W. was born in March 2017 with intrauterine substance exposure. Shortly after birth, he was removed from his biological parents and placed with Mother, his paternal

[1] "CINA" is an acronym for "child in need of assistance." Md. Code Ann., Cts. & Jud. Proc. Art. ("CJ") § 3-801(g) (2020 Repl. Vol.). A CINA is "a child who requires court intervention" because he or she "has been abused, has been neglected, has a developmental disability, or has a 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." CJ § 3-801(f).

aunt, who later adopted him.

When I.W. was approximately 15 months old, it became apparent to his pediatrician, Dr. Elias Gouel, that the child suffered from developmental delays due, in part, to being born substance exposed. Dr. Gouel referred I.W. to the Infants and Toddlers Program and the Kennedy Krieger Institute for services.

Danielle Rorarty, a service coordinator for the Infants and Toddlers Program, began working with I.W. in December 2018. After only one month, Mother started keeping I.W. home from the daycare facility where he received the services, saying that he was sick. Mother did not want I.W. to receive services at home, and she asked that services be put on hold. Mother did not respond to Ms. Rorarty's several messages about resuming services.

Ms. Rorarty scheduled a home review for August 16, 2019. When Ms. Rorarty went to the apartment, she smelled what she believed to be marijuana and urine.[2] After an evaluation, Ms. Rorarty determined that I.W. no longer required physical therapy services for his motor skills, but he still showed delays in communication.

After I.W. missed many more sessions because Mother did not send I.W. to daycare, Ms. Rorarty contacted a social worker, who scheduled a family involvement meeting with Mother and the Department to discuss removing I.W. from Mother's care. Ms. Rorarty opined that all the missed sessions halted I.W.'s progress in closing the gap in his delays,

[2] Mother said that her neighbors were "regular marijuana users," and the smell emanated from their apartment.

and she did not believe Mother's participation in the Infants and Toddlers program was sufficient to meet the needs of the child.

In March 2020, Mother elected to switch I.W.'s services to a school-based Individualized Education Plan ("IEP"). The IEP entitled I.W. to services in a full-day pre-kindergarten program, but Mother elected a half-day program.

The Kennedy Krieger Institute evaluated I.W. in April 2020. The evaluation determined that he had "global developmental delays," including delays in cognition and speech/language, along with difficulty with distractibility and paying attention.

Mother's adoption of I.W. was delayed due to concerns by his teacher and the Baltimore City Department of Social Services regarding her ability to care for the child.[3] Mother had sent I.W. to daycare dressed inappropriately for the weather and wearing multiple diapers, and she exhibited confusion about dates and times of court hearings and meetings. The court ordered a medical examination of Mother, and the court evaluator noted the concerns, but did not report any mental health issues or find Mother unable to care for I.W.[4] Mother legally adopted I.W. in July 2021, and he remained in her physical

[3] I.W. was born in Baltimore City, and it was the Baltimore City Department of Social Services that had placed him with Mother after working unsuccessfully with his biological parents. The CINA proceedings at issue here, however, involved the Baltimore County Department of Social Services.

[4] During the CINA disposition hearing, Mother's attorney acknowledged that the Baltimore City evaluation, completed remotely during the COVID-19 pandemic, was based mostly on Mother's self-reporting and did not involve a comprehensive psychological test.

and legal custody until March 2022.[5]

Despite electing to have I.W. receive services through an IEP in school for the 2021–22 academic year, Mother did not send I.W. to his pre-kindergarten class when it started on September 8, 2021. When he did not show up to school for several weeks, his teacher, Kristin Cleaveland, removed him from her class roster. In February 2022, Mother left Ms. Cleaveland a voicemail advising that she was trying to enroll I.W. in school. Ms. Cleaveland heard I.W. in the background say: "I'm not dead," and she then heard a loud noise, crying, and screaming.

On February 24, 2022, the first day I.W. attended his pre-kindergarten class, both the school nurse and the school social worker reported to the Department that I.W. had arrived at school with a "profoundly distended stomach." He also had visible ribs and dried stool on his buttocks, which "appeared to indicate an imminent health concern." The school's staff further reported that I.W was often hungry at school, asking for and rapidly ingesting large quantities of food. He also displayed unidentifiable injuries to his wrist and lower back, but, because of language delays, he was unable to explain how he was injured. He ultimately indicated that Mother made marks on his wrists and head with her fingernails. The administration expressed concerns about Mother's mental health after her "random and unreasonable explanations" about I.W.'s near total absence from school that

[5] I.W. was named K.J. by his birth parents, but Mother changed his name upon his adoption. Some record documents refer to him as K.J. (or mistakenly as C.J.).

year, her withholding and restricting of food from the child, and her placement of him in a car seat to attend virtual school and to sleep.

On March 1, 2022, Breena Radke, the Department's social worker, interviewed I.W., who said that the injuries on his wrists were caused by Mother digging her nails into his skin. Ms. Radke asked what Mother would do if he got hurt, and I.W. said: "[S]he would leave me to die." The school nurse was very concerned about I.W.'s stomach.

That night, Ms. Radke transported I.W. to the Greater Baltimore Medical Center ("GBMC") for evaluation by Dr. Sara Eleoff.[6] A skeletal survey indicated "multiple growth arrest lines" on I.W.'s arms and legs, periods when he exhibited no growth, which could have been caused by trauma, disease, or malnourishment. I.W.'s colon was moderately distended due to constipation. Dr. Eleoff ordered an enema, and I.W. then had multiple bowel movements over the next six hours. Dr. Eleoff found that the injuries to I.W.'s wrist and back were consistent with child abuse from fingernails. His stomach was much softer and not distended after the enema. Dr. Eleoff explained that, if I.W.'s constipation had remained untreated, it potentially could have led to a bowel blockage.

On the evening of March 1, 2022, the Department removed I.W. from Mother's home and placed him in shelter care. On March 2, 2022, the Department filed a CINA

[6] Dr. Eleoff was employed by the Baltimore County Child Advocacy Center and worked in partnership with GBMC.

petition with a request for continued shelter care, alleging that Mother had neglected and abused I.W.[7]

The juvenile court granted the Department's request for shelter care and placed I.W. in the custody of the Department pending further disposition before the court. The Department sheltered I.W. in a treatment foster home with the L. family.

Ahead of a scheduled March 31, 2022, adjudication hearing—later rescheduled to May 10, 2022—the Department filed a report requesting commitment. The report relayed the GBMC evaluation findings and explained that I.W. was doing well in his foster placement, although the foster parents stated that he rushed through meals and continued to have challenges with bowel movements and constipation. I.W. had also expressed fear and hesitancy toward eating food, having his hair touched, playing on the playground, and interacting with other children. He continually asked permission to eat and constantly sought approval to undertake developmentally appropriate activities, such as playing with toys or other children. He used inappropriate and vulgar language for his age and told his foster parents that Mother "beat [his] ass" and hit him with a stick. The Department recommended a CINA finding, along with a referral of Mother for a psychological evaluation to assess for mental health concerns.

[7] Baltimore County Police also opened a criminal investigation into the concerns raised by I.W.'s school's staff.

On April 28, 2022, the Department filed a notice to introduce into evidence statements I.W. made to his teacher, two social workers, and Dr. Eleoff.[8] According to the Department, the hearsay statements, explained in more detail, *infra*, were admissible pursuant to CP § 11-304, the "tender years" exception to the hearsay rule.

On May 2, 2022, the Department filed its report in support of its request for commitment of I.W. as a CINA. The Department detailed Dr. Eleoff's opinion that the injuries the school staff had observed on I.W.'s wrist were consistent with fingernail marks and that the bruising/abrasions on his spine was "concerning for non-accidental injury." The totality of the medical findings, including I.W.'s distended stomach caused by severe constipation, were, to Dr. Eleoff, indicative of medical neglect.[9] Mother declined to discuss with Child Protective Services ("CPS") the concerns about her abuse and neglect of I.W.

The court held a CINA adjudication hearing on May 10, 2022, July 19, 2022, and July 26, 2022.[10] The following evidence was adduced.

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[8] The Department filed an amended notice to introduce victim statements on July 18, 2022, on the ground that one such statement, initially believed by the Department to have been overheard by I.W.'s teacher during a phone call with Mother, had actually been heard in a voice mail message from Mother.

[9] The Department filed an amended CINA petition incorporating Dr. Eleoff's medical report on May 4, 2022.

[10] When the adjudication hearing was not completed on May 10, 2022, the juvenile court found "extraordinary cause" to go past time standards and continue it until July 19 and July 26, 2022, if needed. The court did not find it in I.W.'s best interest to be returned to Mother's home and ordered him to remain in placement.

Although I.W.'s IEP made him eligible for services in a full-day kindergarten, Mother wanted I.W. to participate in a half-day class. Mother did not participate in several conferences scheduled with his teacher, Ms. Cleaveland, prior to the start of the school year in September 2021, saying that she was ill.

The day before school was scheduled to begin, Mother notified Ms. Cleaveland that I.W. was congested and would not be starting school for a couple of weeks. Ms. Cleaveland next heard from Mother in February 2022, when Mother left her a voice mail message about attempting to re-enroll I.W. in school. On the voice mail, which was played for the court and transcribed on the record, Ms. Cleaveland heard I.W. in the background saying: "I'm not dead." Afterward, Ms. Cleaveland heard a loud noise, then crying and screaming before Mother "rushed off the phone." The message made Ms. Cleaveland uncomfortable.

On February 24, 2022, Ms. Cleaveland received a long and "very confusing" text message from Mother.[11] Mother's explanation that she had told I.W. that he was not

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[11] The transcript of the text message read as follows:

> Good morning so [I.W.] is in rolled now those people in that office is a trip now i did ask if i could bring [I.W.] to school a few minutes early they Know because I had Dr appointment know was the answer so I was also told that he can't come until you things ready for hem and that cam from the board of Education because I called the because of the way I treatment I going to fill a complaint this makes no since at do you know that I've been trying to get hem back in since October or November of last year and know call or email me back but because I walked up there and crazy lady in that office making it seems like [I.W.] never came there at all this is a shame and every body word is So Moving to brush under the rug of way we both was treated a shame before god I do know people and I am going to report this and that principal I've been email and leaving massage since that know reply I g[u]ess

wanted at the school and that "God doesn't like ugly according to our school" concerned Ms. Cleaveland.

I.W. attended school for the first time on February 24, 2022. At drop-off, Mother told Ms. Cleaveland that I.W. had a scratch on his head from "one of his tantrums," and he wore underwear over a Pullup at his pediatrician's direction, but he used the toilet.

In the classroom that day, I.W. "asked permission for everything," including sitting in his chair, opening his drink, and touching his food, which was "a big red flag" for Ms. Cleaveland. I.W. continued to say he was hungry, eventually eating more than three sandwiches.

As he was eating, Ms. Cleaveland noticed marks on I.W.'s wrist that looked like cigarette burns, so she notified the school nurse, who said she would have a social worker interview him. When asked about the marks, I.W. said they were made by his mother's fingernails when she found him eating applesauce, which he was not allowed to have. When asked about the scratch on his head, I.W. said it was his mom and showed his fingernails but did not say more. Upon lifting his shirt, the teacher, nurse, and social worker

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a. Child like with a iep is crap to her his not good enough for her to care of have a hart god don't like ugly this is a shame now I not aloud to walk him because he can't come in shame and we walking back home he was crying I told her the truth that he was not wonted there and he can't start until the bus pick and the school is ready for hem to come his very up sit to treated like that I am going to ly to hem when it's in his face so just letting u know what going on they wont make there self look good to ly they don't know that i had some one that was herein get every thing on my phone because I was the phone waiting hope u have a good day you call me.

observed bruises and two scabs on his spine, more marks on his arm, and his distended belly.

I.W. and Ms. Cleaveland returned to the classroom, where I.W. told his teacher "out of nowhere" that he did not like baths and that his mom hit him. He also said that Mother is a liar, and she had told him that Ms. Cleaveland was a liar and she was going to punch the teacher in the face. The school made a referral to CPS that day. I.W. did not attend school the next day.

At school on Monday, February 28, 2022, I.W. continued to ask Ms. Cleaveland for food. When Ms. Cleaveland changed his Pullup, she noticed dried stool on his underwear, the same pair he had been wearing the previous Thursday, and on his buttocks and pants.

On March 1, 2022, when I.W. arrived at school, he immediately asked for a sandwich. Ms. Cleaveland obtained permission from Mother to give I.W. graham crackers, and she provided him with a hot meal. He asked permission before eating anything.

Ms. Radke responded to Ms. Cleaveland's February 24, 2022 report about concerns relating to I.W. On March 1, 2022, she met with I.W. at school.[12] She observed an "extremely shy and scared" child with bruising near his spine, a distended abdomen, and marks on his wrist and forehead. During the meeting, I.W. seemed uncomfortable, rocking and growling. He drew some pictures, including one of his mother bleeding.

[12] Ms. Radke stated that CPS is permitted five days to respond to referrals for child neglect.

When I.W. did not provide Ms. Radke an explanation about his injuries, other than the ones to his wrist, which he explained were caused by his mother digging her nails into his arm until it bled, she asked what he liked and disliked about Mother. I.W. did not offer anything he particularly liked, but he said that Mother was sick and would let him die if he got hurt.

Ms. Radke expressed her concerns about I.W. to her supervisor, Tracey Bosick. Ms. Radke and Ms. Bosick determined that I.W. should be removed from Mother's home and transported to GBMC for examination of his severely distended abdomen. When Ms. Radke arrived at the home, Mother stated that she was in the middle of preparing dinner, but Ms. Radke observed no dinner preparations.

Mother packed a bag for I.W., advising Ms. Radke that the child had numerous food restrictions or sensitivities, which later was proven to be untrue. While at the hospital, I.W. repeatedly stated that he was hungry and asked for food and drink on several occasions.

Dr. Eleoff, who was accepted by the court as an expert in pediatric medicine, with a concentration in the detection of suspected child abuse and neglect, examined I.W. when the Department brought him to GBMC. I.W.'s abdomen was "moderately distended." After several bowel movements in a six-hour period following an enema, his belly was softer and no longer distended. Dr. Eleoff diagnosed I.W. with severe constipation, which, if left untreated, could have led to a bowel obstruction requiring surgery. In Dr. Eleoff's opinion, the injuries to I.W.'s wrist and back were consistent with child abuse, and the

totality of her findings, especially Mother's lack of treatment for the severe constipation, raised concern for neglect.

Ms. Radke found no basis to indicate Mother for child abuse, but she did indicate Mother for child neglect based on "obvious signs of hunger, physical injury to the child, poor school attendance, signs of obvious distention of the stomach that seemingly went unnoticed and unaddressed by [Mother], mental health concerns for [Mother] and [I.W.]'s behavior being indicative of a child who has experienced isolation." Ms. Bosick agreed that I.W.'s needs were not being met, and that, despite loving I.W. and doing the best she could, Mother's best was not good enough to identify his continuing health and developmental needs or keep him safe in her home, as her ability to care for him was inconsistent. Ms. Bosick recommended that I.W. remain in foster care.

Dr. Gouel, I.W.'s pediatrician, who was accepted by the court as an expert in pediatric medicine, testified that Mother had brought I.W. in for all his pediatric well visits, and the child was current on his vaccinations. Dr. Gouel's impression of Mother was that she was "a very caring mother" and "concerned parent." Although he, on occasion, believed that Mother may have been "overwhelmed" with caring for a new baby that was not biologically hers, he had no concerns for her mental health.

Dr. Gouel did not recall any "red flags" of abuse or neglect and did not believe that Mother had abused or neglected I.W. He agreed, however, that had he been made aware of the marks on I.W.'s back, that would have warranted a discussion with Mother. Dr. Gouel was surprised by the severe distension of I.W.'s abdomen, which he opined would occur

after approximately one week of constipation, because Mother did not raise any concern with him. Dr. Gouel denied having advised Mother to restrict I.W.'s diet in any way.

Temiloluwa Kolawole, a foster care social worker for the Department, came into contact with Mother after I.W. was sheltered in March 2022, when Mother reached out about visitation. While supervising a March 22, 2022 visit, Ms. Kolawole became concerned about I.W.'s use of profanity and his report that Mother had dug her fingernails into his arm and wanted to hurt him. I.W. also reported to Ms. Kolawole that a "bump on his butt" had occurred when Mother hit him, but Mother chastised him for lying. During calls to set up visits, Mother expressed to Ms. Kolawole that she believed her phone had been tapped.

I.W.'s foster mother, I.L., testified that, when I.W. was initially placed with her family in March 2022, he looked "very sick." He was thin with a swollen stomach. In his first few days in the home, he would not talk or play with I.L.'s biological son and asked permission to do anything. At first, I.W. ate until he threw up, but by the time of the hearing, he was eating three meals and snacks, although he remained a picky eater.

Although I.W. had trouble having bowel movements, after a doctor's recommendation to remove rice, cheese, bananas, and chocolate from his diet, his bowel movements were regular and his stomach was no longer swollen. Upon his arrival in the L. home, I.W. was afraid to use the toilet because he thought he might fall in, but once I.L. purchased a smaller potty seat, he learned to use the toilet.

According to I.L., I.W. did sometimes regress and soil himself after phone conversations with Mother. He said he did not want to talk with Mother and was disrespectful to her on the phone. During in-person visits, however, he seemed excited to see Mother. I.L.'s only concern with I.W. was that he knew to tell the truth, but he kept asking what he was supposed to say, concerned that if he told the truth, he would get in trouble.

Lacy Allen, Mother's therapist, testified that she had been seeing Mother as a patient since April 2022. In performing a mental health evaluation, she found Mother to be forthcoming with answers to her questions, and it was Ms. Allen's opinion that Mother was honest in her responses. At the initial evaluation meeting, Mother cried and was anxious, wanting to self-isolate at home. Thereafter, though, she had not missed a session, always talking about I.W. in loving and caring terms.

Ms. Allen diagnosed Mother with major depressive disorder and separation anxiety, but she said the diagnosis could change once she had more information. It was her opinion that Mother had the ability to care for I.W. if he were returned to her care, although she acknowledged that she had not met I.W., nor observed Mother caring for him, and she had not been privy to the CPS file.[13]

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[13] Ms. Allen's testimony was taken out of order due to her availability. The juvenile court agreed it would not consider her testimony unless and until the case reached the disposition stage.

Following the conclusion of the hearing on July 26, 2022,[14] the juvenile court found, by a preponderance of the evidence, that the Department had proven many of the allegations in the amended CINA petition, and it was "not possible" to return I.W. to Mother's home. The court also ordered a comprehensive mental health evaluation for Mother prior to disposition amid concerns regarding her mental health. The court found good cause to delay the disposition so the parties could prepare.

The Department referred Mother to Dr. Nelson Bentley for a psychological evaluation. Dr. Bentley noted that the information Mother provided him during the evaluation was not consistent with the information provided to him by the Department; Mother minimized and/or denied the documented allegations that led to I.W.'s removal from her care and expressed no guilt, remorse, or other emotion that he had been removed. It was "readily apparent" to Dr. Bentley that Mother's cognitive abilities were "significantly impaired." She had an IQ of 56, which would affect her ability to care for her special needs son. In Dr. Bentley's opinion, Mother was in serious denial of her limitations. He suggested that, if the Department were to consider reunification, Mother

[14] Earlier that day, the Department pre-filed an addendum to its report detailing that I.W. had graduated from pre-kindergarten and had continued to show improvements while in his foster home. He was bonded with both his foster parents and with Mother, expressing joy when he saw Mother during visits. Despite Mother's participation in weekly psychotherapy, the Department still had concerns about her ability to parent I.W. effectively, given the child's behaviors of hitting her and failing to respond to her directions during visits. The Department believed Mother might benefit from parenting classes. The Department recommended I.W.'s continued commitment until Mother was able to demonstrate that she was able to provide for his care, safety, and stability. The Department asked the court, which had not reviewed the addendum prior to the day's hearing, to consider it submitted if the court sustained the allegations in the CINA petition.

and I.W. should undergo counseling together and any reunification plan should proceed slowly.

In a September 26, 2022 addendum to its permanency plan report, the Department stated that Mother had not been consistent in her visitation with I.W. since July 2022. When visits did occur, they did not go well, with I.W. destroying property, hitting Mother and using profanity towards her. The Department was concerned about Mother's ability to manage his behaviors. Since August 2022, I.W. had expressed a desire not to visit with Mother. Nonetheless, the Department recommended a continued permanency plan of reunification with Mother.

II.

Disposition Hearing

At the October 12, 2022, disposition hearing, the Department and I.W.'s attorney requested a finding that I.W. was a CINA and that his commitment to the Department, with care by the L. family, be continued. Because I.W. has special needs that require a higher level of care, and because Mother had proven herself incapable or unwilling to work with the Department, the Department believed that reunification under an order of protective supervision ("OPS") was not practicable.

Mother sought reunification with I.W., with a finding that he was not a CINA, or reunification under an OPS, claiming that she had cooperated fully with the Department. Mother argued that she had addressed all of I.W.'s needs and would continue to do so if he were returned to her care.

The juvenile court found, by a preponderance of the evidence, that I.W. was a CINA and that it was not in I.W.'s best interest to be returned to Mother's care. The court pointed to the allegations of abuse and neglect, including the marks on I.W.'s arms, I.W.'s continued insistence on asking permission to perform any act in school, Mother's unreasonable restriction upon I.W.'s food, and her failure to address his severely distended stomach. The court also referenced the Department's concern about Mother's cognitive abilities and likely depression. The court committed I.W. to the custody of the Department.

The court explained in its order that its findings were based on the following circumstances:

> Mother was indicated for neglect and there are concerns of physical abuse by mother. Mother has reportedly withheld food from [I.W.] and failed to provide necessary care. [I.W.] has a severely extended stomach, ribs are showing and various unidentifiable injuries on his body. [I.W.] was taken to GBMC where Dr. Sara Eleoff, Physician Lead at the GBMC Center for the Protection of Children found that to [a] reasonable degree of medical certainty concerns exist regarding [I.W.'s] developmental and physical well-being. She went on to find that when considered in total, [I.W.'s] abdominal distention from constipation, significant global developmental delays (including communication), cutaneous findings, atypical behaviors in school, along with lack of ongoing developmental therapies and evaluations are concerning for medical neglect. [I.W.] was adopted by [a] single parent mother. Mother also underwent a psychological evaluation which presents concerns for her cognitive abilities as well as depression.

Mother filed a timely notice of appeal.[15]

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[15] On March 6, 2023, Ms. Kolawole submitted a report to the court for a permanency planning hearing, which indicated that, sometime after the hearing on October 12, 2022, I.W. was removed from his foster home with the L. family due to concerning behaviors of aggression and lying. He was placed in an agency home with experience working with children with challenging behavior. Since transitioning to the new location, there have

STANDARD OF REVIEW

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 is instead harmless; and (3) we evaluate the juvenile court's final decision for abuse of discretion. *In re J.R.*, 246 Md. App. 707, 730–31, *cert. denied*, 471 Md. 272 (2020). In doing so, we remain mindful that "only [the juvenile court] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [it] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.'" *Baldwin v. Baynard*, 215 Md. App. 82, 105 (2013) (quoting *In re Yve S.*, 373 Md. 551, 585–86 (2003)).

DISCUSSION

I.

Admission of Hearsay Statements

Mother's first contention is that the circuit court erred in admitting into evidence I.W.'s hearsay statements. Although she acknowledges that hearsay statements by a child victim are admissible under certain circumstances pursuant to CP § 11-304, she argues that the court failed to satisfy two statutory prerequisites before permitting the statements to be

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been "some improvements" in I.W.'s behaviors after he was prescribed medication for ADHD, although the Department maintained "multiple concerns" about his mental health.

introduced. First, she asserts that the court improperly excluded her attorney from the in-camera examination of I.W. Second, Mother argues that the court failed to comply with the requirement to make factual findings "on the record as to the specific guarantees of trustworthiness that are in the statement," arguing that the court's factual findings here, which were based on proffers, were clearly erroneous.

The Department and I.W. contend that the court properly admitted I.W.'s hearsay statements under CP § 11-304. They assert that the court properly excluded Mother's counsel from the in-camera examination of I.W. With respect to the argument that the court could not make the required factual findings about the "guarantees of trustworthiness" of I.W.'s statements because they were based on a proffer, the Department asserts that this claim is not preserved because Mother did not object below to the Department proffering the hearsay statements it sought to admit, nor to the later testimony of the witnesses about the statements I.W. made to them. In any event, the Department argues that, even if the court erred in admitting I.W.'s statements, any such error was harmless and does not require reversal.[16]

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[16] I.W. also argues that the court did not base its decision on the statutory trustworthiness factors solely on the proffer, but rather, the court based its admissibility determination on the later sworn testimony of numerous witnesses. The record does not support this argument. The court found that the statements were admissible pursuant to Md. Code Ann., Crim. Proc. Art. ("CP") § 11-304 (2018 Repl. Vol.), based on the proffers, but it stated that the weight, if any, the court would accord them would be determined after hearing all the evidence. The court did, however, later hear the testimony of the witnesses.

A.

The Tender Years Statute

Generally, an out-of-court statement offered into evidence for the truth of the matter asserted is inadmissible hearsay. *See* Md. Rules 5-801(c) (Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."), and 5-802 (prohibiting admission of hearsay in evidence, unless it is subject to an exception provided by rule, statute, or constitutional provision). "A trial court has 'no discretion to admit hearsay in the absence of a provision providing for its admissibility.'" *Vielot v. State*, 225 Md. App. 492, 500 (2015) (quoting *Gordon v. State*, 431 Md. 527, 536 (2013)), *cert. denied*, 446 Md. 706 (2016).

The General Assembly enacted CP § 11-304 as an exception to the hearsay rule. It permits, in certain circumstances, the admission of an out-of-court statement made by a child who is younger than 13 years old and is a CINA in a case concerning abuse or neglect.[17] CP § 11-304(b)(1). This statute, sometimes referred to as the tender years

[17] We explained in *Prince George's County Department of Social Services v. Taharaka*, 254 Md. App. 155, 171 n.9 (2022), as follows:

> Previously, the tender years exception applied in criminal, juvenile, and CINA cases. 1988 Md. Laws, chs. 548, 549 (criminal only); 1991 Md. Laws, ch. 399 (adding CINA); 1994 Md. Laws, ch. 169 (adding other juvenile proceedings). Because of court rulings and legislative changes, however, the tender years exception now applies only in CINA cases (unless the child victim also testifies at trial). *State v. Snowden*, 385 Md. 64 (2005) (holding that admission of testimonial statements under tender years exception in criminal cases violates federal Confrontation Clause); 2011 Md. Laws, chs. 87, 88 (restricting tender years exception to CINA cases).

exception to the hearsay rule, applies to statements that are made to social workers, teachers, and medical professionals acting in the course of their profession, CP § 11-304(c), if the court finds that the statements have "particularized guarantees of trustworthiness." CP § 11-304(e)(1). *Accord Prince George's Cnty. Dep't of Soc. Servs. v. Taharaka*, 254 Md. App. 155, 170 n.8 (2022). "The exception is intended to balance the fundamental rights of the accused with the need to protect child victims from further trauma." *Id.*

CP § 11-304(e)(2) provides that the court must consider the following factors in determining whether the out-of-court statement has particularized guarantees of trustworthiness:

> (i) The child victim's personal knowledge of the event.
> (ii) The certainty that the statement was made.
> (iii) Any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion.
> (iv) Whether the statement was spontaneous or directly responsive to questions.
> (v) The timing of the statement.
> (vi) Whether the child victim's young age makes it unlikely that he or she fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience.
> (vii) The appropriateness of the terminology of the statement to the child victim's age.
> (viii) The nature and duration of the abuse or neglect.
> (ix) The inner consistency and coherence of the statement.
> (x) Whether the child victim was suffering pain or distress when making the statement.
> (xi) Whether extrinsic evidence exists to show that the defendant or child respondent had an opportunity to commit the act complained of in the child victim's statement.
> (xii) Whether the statement was suggested by the use of leading questions.
> (xiii) The credibility of the person testifying about the statement.

The court must make a finding on the record regarding the specific guarantees of trustworthiness that are in the statement. CP § 11-304(f)(1).

CP § 11-304(g)(1) provides that, in determining whether the out-of-court statement has particularized guarantees of trustworthiness, the court must examine the child victim "in a proceeding in the judge's chambers, the courtroom, or another suitable location that the public may not attend," with some exceptions. When the court examines the child victim, the following individuals may be present: "one attorney for each defendant or child respondent, one attorney for the child victim or witness, and one prosecuting attorney." CP § 11-304(g)(3)(i).

B.

Proceedings Below

At the start of the adjudication hearing, the Department's attorney asked the court to interview I.W. in camera as part of its determination whether the statements made by I.W., in response to the investigation into child abuse, were sufficiently trustworthy to be admitted into evidence pursuant to the hearsay exception set forth in CP § 11-304. Mother's attorney asked to be present during the interview, stating that CP § 11-304 permits the parties' attorneys to be present. The court stated that the statute permits the presence of the attorney for "any [d]efendant or child respondent and the prosecuting attorney," and it asked why Mother, who was not a defendant, should be permitted to have her attorney attend the interview. Mother's attorney responded that CP § 11-304 was a criminal statute that had also been applied in CINA actions and had, in her experience,

been interpreted to permit the parents' attorneys to attend the interview because excluding one set of attorneys would be improper.

I.W.'s attorney did not object to the presence of Mother's attorney during the interview. The Department's attorney opined that only the child's attorney should be present, as the case did not involve a defendant, and she, as a representative of the Department, did not consider herself a prosecutor who was permitted by the statute to attend.

The juvenile court stated that there was neither a prosecutor nor a defendant involved in a CINA action. Mother's attorney responded:

> I guess my position would be that if the [c]ourt is going to exclude Mother's counsel, I would ask that it also exclude the Department's counsel. I understand why child's counsel would need to be present there if the child is speaking with the [c]ourt, but I think it has to go one way or another. And generally my experience has been that an attorney is allowed to be present for each parent.

The Department's attorney agreed that only the child, the child's attorney, and court personnel should attend the interview. The court ruled: "I think it's abundantly clear the only person who's allowed in the room with the [c]ourt other than court personnel is child's counsel." The court assured the parties that, following the in-camera interview with I.W., it would provide a detailed summary of what the child said and then hear argument on the potential admission of his statements.

The court's interview with I.W., which is part of the hearing transcript, lasted 14 minutes and included several minutes of attempts to resolve technical difficulties in the

Zoom proceeding. After the interview, the court accurately summarized its conversation with I.W., as follows:

> He told me that his name is [I.], he's 5 years old. In substance and in summary he told me that he ate breakfast today, he had Captain Crunch. He had eaten Captain Crunch yesterday. He likes to play games. . . .
>
> [H]is favorite toy . . . is a block [and] he said that is in a bin in his room. And I asked him if anyone ever read him stories, if he watched [television]. . . . I think he said no when I asked about [television] but . . . I asked him . . . if someone read a story to you and you heard a story, would you be able to understand what it was saying that it was a story . . . or if you heard about a neighbor in the neighborhood would you understand the difference between those.
>
> I asked him who would he ask if he was hungry and wanted to eat lunch and he said that he would ask his granny. And also I gave a scenario -- I think that the child based upon the child's age, the child was very friendly, was smiling during the interview. At one time [he] asked for a tissue and that was really the only involvement other than there were two that the foster parent had during the conversation really, where they were present.
>
> One was the child asked for a tissue and a tissue was given. And the other one was that the child had pressed a button and the foster parent said don't press that button because . . . it would affect the video camera or the connection and he asked which button? . . .
>
> And then . . . [I] asked him if he knew his colors and he said yes. And I said if I told you that pink was my favorite color and I wore pink all the time and then would I be wearing pink today and he said yes. And I said well is my outfit pink and he said no.
>
> And I think he was able to articulate that it was a black outfit and not a pink outfit.
>
> So that was the substance . . . .

Counsel for I.W. confirmed that was an accurate summary of the conversation, adding that the court also asked I.W. if he wanted to play with a toy, "would he get it himself or ask somebody else[,] and he indicated that he would ask somebody else."

The court then asked the Department for a proffer regarding the statements made by I.W. that it wished to have admitted for the truth of the matter asserted. The Department's attorney proffered the following statements:

1. "I'm not dead," overheard by Ms. Cleaveland in a voice mail message from Mother.

2. Requests for permission from Ms. Cleaveland to do virtually everything in school.

3. Explanations to Ms. Cleaveland and the school nurse that Mother caused the injuries to his wrist and forehead and that she would let him die if he got sick.

4. A similar explanation to Ms. Radke that Mother hurt his wrist with her fingernails, causing it to bleed.

5. Complaints made to GBMC staff about being very hungry, constantly asking for food, and Mother being the source of the injuries to his wrist.

6. A comment to Ms. Kolawole that Mother used her nails to hurt him "because she wanted to do it."

As discussed in more detail, *infra*, the court considered the requisite factors set forth in CP § 11-304(e)(2). The court determined that the Department had met its burden of proving that the statements were admissible under the statute. It then found that the statements were admissible under other exceptions to the hearsay rule. Mother's counsel asked for and received a continuing objection to the admission of the statements.

C.

Analysis

As indicated, Mother contends that the court erred in (1) ruling that her attorney was not permitted to be present during the in-camera interview of I.W., and (2) admitting I.W.'s statements based on the Department's proffer of what those statements would be. As explained below, we disagree.

1.

Attorney Presence at the Interview

Mother contends that the court erred in excluding her attorney from the court's in-camera interview of I.W. As indicated, *supra*, CP § 11-304(g)(3)(i) provides that, during the examination of the child, the following persons are allowed to be present: "one attorney for each defendant or child respondent, one attorney for the child victim or witness, and one prosecuting attorney." Mother asserts that she was a "defendant" because she was "the party . . . defending against the allegations" in this civil case, so her attorney "was entitled to be present during the examination."

The Department and I.W. argue that the court properly excluded Mother's attorney from the interview of I.W. They assert that the court has discretion to permit three categories of attorneys to be present during the interview, and Mother's attorney did not qualify under the statute.

In determining whether the court erred in excluding Mother's attorney from its in-camera interview of I.W. under CP § 11-304(g)(3)(i), we must interpret the word

"defendant." In construing CP § 11-304(g)(3)(i), we note well-settled rules of statutory construction:

> The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature. A court's primary goal in interpreting statutory language is to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by the statutory provision under scrutiny.
>
> To ascertain the intent of the General Assembly, we begin with the normal, plain meaning of the statute. If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to the legislative intent ends ordinarily and we apply the statute as written without resort to other rules of construction. We neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute with "forced or subtle interpretations" that limit or extend its application.

State v. Bey, 452 Md. 255, 265 (2017).

"We read the plain meaning of the language of the statute 'as a whole, so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.'" *Comptroller of Maryland v. FC-GEN Operations Invs. LLC*, 482 Md. 343, 379 (2022) (quoting *Wheeling v. Selene Fin. LP*, 473 Md. 356, 376 (2021)). "In every case, the statute must be given a reasonable interpretation, not one that is absurd, illogical or incompatible with common sense." *Lee v. State*, ___ Md. App. ___, ___, No. 1291, Sept. Term, 2022, slip op. at 52 (filed March 28, 2023) (quoting *Bey*, 452 Md. at 266), *petition for cert. filed*, Pet. No. 81, Sept. Term, 2023 (May 24, 2023).

Here, looking at the plain language of CP § 11-304(g)(3)(i), we agree with the circuit court that Mother was not a "defendant," and therefore, her attorney was not an "attorney for [the] defendant" who was authorized to be present at the in-camera interview of I.W.

The statute as a whole refers to three categories of litigants whose rights may be affected by admission of a child's out-of-court statement: "defendants" (a party in a criminal proceeding); "child respondents" (a party alleged to have committed a delinquent act in a juvenile proceeding); and "alleged offenders" (a party alleged to have abused or neglected a child in a CINA case). *See* CP § 11-304(d)(3)–(4) (granting certain rights to each "defendant, child respondent, or alleged offender"); *see also* CP § 11-101(b) (defining "child respondent"). CP § 11-304(d)(2)(ii), which applies only to CINA proceedings, refers to an "alleged offender," not a "defendant." Mother was an alleged offender in this CINA case pursuant to CP § 11-304, not a defendant.

We note that notice must be given to a "defendant, child respondent, or alleged offender," CP § 11-304(d)(3), but only attorneys for a "defendant or child respondent" are authorized to be present for a court's interview with the child. CP § 11-304(g)(3)(i). *See Lee*, slip op. at 60 ("Where language is included providing for a right in one provision, but not in a related provision, it suggests 'that the absence of comparable language . . . was by design.'") (quoting *Md.-Nat. Cap. Park & Plan. Comm'n v. Anderson*, 164 Md. App. 540, 577 (2005), *aff'd*, 395 Md. 172 (2006)). Because Mother was not a defendant, the circuit did not err or abuse its discretion in excluding her attorney from its in-camera interview of I.W.

2.

Admission of Statements Based on the Proffer

Mother next contends that the court erred in its factual findings regarding the guarantees of trustworthiness in I.W.'s statements because they were based on the Department's proffer of those statements. We agree with the Department and I.W. that this issue is not preserved for this Court's review.

The failure to timely object to the admission of evidence results in a waiver of appellate review. *Huggins v. State*, 479 Md. 433, 447 (2022). *Accord Kelly v. State*, 392 Md. 511, 541 (2006) ("When a party fails to object, the evidence normally will be admitted and, generally, that party will not be allowed to raise the issue on appeal."). This rule serves the "salutary purpose of preventing unfairness and requiring that all issues be raised in and decided by the trial court." *Conyers v. State*, 354 Md. 132, 150, *cert. denied*, 528 U.S. 910 (1999). *Accord Robson v. State*, 257 Md. App. 421, 461 (2023) (primary purpose for the preservation requirement is to avoid error at trial and preclude the necessity for appellate review).

Here, when the Department proffered the statements that it was seeking to introduce as trustworthy, Mother argued that the statements were not trustworthy, but she did not

object to the method of explaining the statements sought to be admitted.[18] Under these circumstances, the issue is not preserved for review, and we will not consider it.[19]

II.

Commitment to the Department's Custody

Although Mother does not contest the juvenile court's CINA finding, she argues that the court abused its discretion in committing I.W. to the custody of the Department, instead of returning him to her care. She asserts that she had proven that there was no likelihood of further abuse or neglect. In her view, any parenting deficits could be ameliorated by appropriate monitoring and supervision under an OPS, so commitment to the Department was too extreme a remedy.

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[18] Indeed, Mother's attorney also proffered evidence for the court to consider in determining the trustworthiness of the statements, and the court agreed to consider Mother's proffer. *See Fuster v. State*, 437 Md. 653, 673 (2014) ("A party fails to preserve for appellate review any issue as to a trial court's ruling by inviting the trial court's ruling.").

[19] Even if the issue were preserved, we likely would conclude, as argued by the Department, that Mother failed to show prejudice requiring reversal. *See In re Ashley E.*, 158 Md. App. 144, 164 (2004) ("It is well settled in Maryland that a judgment in a civil case will not be reversed in the absence of a showing of error *and* prejudice to the appealing party."), *aff'd*, 387 Md. 260 (2005); *In re Blessen H.*, 163 Md. App. 1, 15 (2005) ("CINA actions . . . are non-punitive, civil actions."), *aff'd*, 392 Md. 684 (2006). The court had significant evidence to find I.W. a CINA without his statements, many of which were admissible under other hearsay exceptions. The court heard testimony that Mother did not follow through on getting I.W. the many services he needed to address his global developmental delay, and I.W. had an obviously distended stomach, which was caused by fecal impaction that Mother had either not noticed or not sought treatment for, and which could have led to a bowel obstruction. Moreover, the court had evidence of concern for Mother's cognitive ability and mental health.

The Department and the child's attorney disagree. They argue that there was sufficient evidence for the court to determine that it was not in I.W.'s best interest to be returned to Mother because she had not proven that the child would not be subject to further abuse or neglect.

If a court, after a disposition hearing, determines that the child is a CINA, the court can "commit the child on terms the court considers appropriate to the custody of a parent, a relative or other individual subject to Md. Code Ann., Cts. & Jud. Proc. Art. § 3-819.2 (2020 Repl. Vol.), or a local department, the Maryland Department of Health, or both." *In re X.R.*, 254 Md. App. 608, 622 (2022) (cleaned up). As this Court has explained, once a court has declared a child a CINA, "the court must make a specific finding 'that there is no likelihood of further child abuse or neglect by the party,'" before the court may award custody to a party. *Id.* at 633 (quoting Md. Code Ann., Fam. Law Art. ("FL") § 9-101(b) (2019 Repl. Vol.)). If the court cannot make that finding, it "'shall deny custody or visitation,' but the court may approve some sort of supervised visitation that ensures the child's physiological, psychological, and emotion well-being." *Id.* at 633–34 (quoting FL § 9-101(b)). "The burden is on the parent previously having been found to have abused or neglected the child to adduce evidence and persuade the court to make the requisite finding under [FL] § 9-101(b)." *In re Caya B.*, 153 Md. App. 63, 76 (2003) (quoting *In re Yve S.*, 373 Md. at 587) (emphasis omitted). A juvenile court's custody decision will be disturbed only if there has been "a clear abuse of discretion." *In re X.R.*, 254 Md. App. at 618–19 (quoting *In re Yve S.*, 373 Md. at 586).

Here, Mother does not contest that the juvenile court properly found I.W. to be a CINA. Mother contends, however, that despite I.W.'s designation as a CINA, the juvenile court should have committed him to her custody. She asserts that the evidence showed that there was no likelihood of further abuse or neglect, as she had re-enrolled I.W. in school (where he could continue to receive services under his IEP), I.W.'s medical issues had been resolved during his hospital visit, and Mother had shown during visits with I.W. that she would not engage in improper behaviors that could be categorized as abuse. Moreover, she asserts that any parenting deficits could be overcome by Department supervision and monitoring. Finally, Mother argues that her diagnoses of depression and low cognitive functioning do not provide a sufficient basis for depriving her of custody of her son.

By committing I.W. to the custody of the Department, the juvenile court implicitly rejected Mother's claim that her issues with parenting I.W. were solely in the past or could be alleviated with custody and Department supervision. A finding that Mother failed to show no likelihood of abuse or neglect was well within the court's discretion to make. *See In re Adoption No. 12612*, 353 Md. 209, 238 (1999) (If juvenile court concludes there is a likelihood of a party subjecting a child to abuse or neglect, even if that conclusion is drawn from evidence of past abuse directed against the child, it is authorized to deny custody to that party.); *In re Timothy F.,* 343 Md. 371, 379 (1996) ("Judging the weight of evidence and the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact.").

The evidence adduced at the CINA hearings amply supported the juvenile court's conclusion that I.W. could not be returned safely to Mother's custody. In reaching its conclusion, the court relied upon extensive testimony by witnesses trained in mandatory reporting of suspected neglect and abuse—I.W.'s teacher, Department social workers, and a medical doctor. Their testimony was consistent in proving to the court that: (1) Mother deprived I.W. of essential services for his global developmental delays, including failing to send I.W. to school for almost an entire academic year; (2) Mother withheld food from I.W., causing him to ask for food constantly; (3) Mother failed to provide I.W. with medical care for his distended abdomen caused by impacted fecal matter, which could have caused significant injury; (4) I.W. had unexplained injuries that he attributed to Mother; and (5) Mother suffered from cognitive deficits and mental health concerns.

Moreover, the court received Dr. Bentley's comprehensive mental health evaluation, which detailed that Mother believed herself capable of making good parenting choices, despite her documented history showing otherwise and her cognitive deficits. According to Dr. Bentley, Mother minimized or denied her lack of proper care of I.W. and expressed no guilt or remorse over his documented issues. Dr. Bentley recommended, therefore, that should the Department conclude that reunification was appropriate, that it proceed slowly, with a prerequisite of family therapy. The court also heard from I.W.'s foster mother and the Department worker who supervised visits that visits did not go well,

with I.W. hitting and throwing things at Mother and using profanity, before returning to his foster home and regressing to the point of soiling himself.[20]

All the evidence, taken as a whole, supported the juvenile court's finding that I.W. could not, at that time, be returned safely to Mother's custody, even under an OPS. Based on the record, the court did not abuse its discretion in committing I.W. to the Department's custody.

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

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[20] Although not before the juvenile court at the time of the disposition hearing, and not considered in our conclusion, we do note that I.W.'s acts of aggression and lying subsequently required his removal from his foster home to an agency home with experience working with children with challenging behavior.