Circuit Court for Baltimore City
Case No. 818287002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1868

September Term, 2019

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IN RE: K.A.

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Nazarian,
Beachley,
Shaw Geter,

JJ.

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Opinion by Beachley, J.

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Filed: April 2, 2020

L.A. ("Mother") appeals an order of the Circuit Court for Baltimore City, sitting as a juvenile court, which denied her exceptions to a family law magistrate's findings and recommendations, and transferred sole physical custody of her minor child K.A. to his biological father, S.C. ("Father"). Mother asserts that the juvenile court erred in transferring custody of K.A. to his noncustodial father under Md. Code (1973, 2013 Repl. Vol., 2019 Supp.) § 3-819(e) of the Courts and Judicial Proceedings Article ("CJP") because the court failed to articulate on the record that she was unwilling or unable to care for K.A., and because the court failed to consider K.A.'s best interest. Finding no error, we shall affirm.

## FACTS AND LEGAL PROCEEDINGS

On October 15, 2018, the Baltimore City Department of Social Services ("BCDSS") filed a child in need of assistance ("CINA")[1] petition and request for shelter care for three of Mother's children: K.A., K.W., and T.B. At the time, the children were twenty months old, seven years old, and twelve years old, respectively. The basis of the petition was that three days earlier, on October 12, police responded to Mother's home after receiving a report that K.A. and K.W. were observed home alone throughout the day. The BCDSS alleged that Mother had a pattern of neglecting her children in a similar manner beginning

[1] *See* CJP § 3-801(g) (stating that a CINA is a "child in need of assistance"). Maryland defines a CINA as a "child who requires court intervention because: (1) [t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) [t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." CJP § 3-801(f).

in 2009.[2] When the police arrived at Mother's home, they found K.A. and K.W. alone. K.W. was unable to provide his Mother's location or a name or telephone number for someone he could call in an emergency. Some time passed before Mother appeared, after which the children were removed from Mother's home and placed in shelter care. The

[2] In March 2009, the BCDSS requested shelter care for T.B. after receiving a report that Mother had left T.B. home alone. The juvenile court ultimately returned T.B. to Mother under an order controlling conduct ("OCC") requiring that T.B. be appropriately supervised at all times, and after about two months of compliance, the court accepted the BCDSS's request to dismiss the shelter care petition. In April 2014, the BCDSS received a report that T.B. was frequently left without supervision. The BCDSS investigated and counseled Mother. Two months later, in June 2014, the BCDSS requested shelter care for K.W. when Mother abandoned him for several days in someone's care. The court returned K.W. to his Mother under an OCC requiring that he be appropriately supervised at all times, and after about a month of compliance, the court accepted the BCDSS's request to dismiss the shelter care petition. In December 2015, the BCDSS again requested shelter care of K.W. after receiving a report that he was home alone after Mother dropped him off at a neighbor's the previous day without asking the neighbor if K.W. could spend the night. Again the child was returned to Mother under an OCC that he be appropriately supervised at all times, and after about a month of compliance, the case was again dismissed at the request of the BCDSS.

Additionally, the BCDSS alleged that it had received four additional reports of Mother neglecting her children in 2018. The BCDSS alleged that in April 2018, it received two reports that Mother left her three children unattended. In both cases the BCDSS counseled Mother about providing proper supervision. The BCDSS received a report on May 24, 2018, that K.W. had been taken to the emergency room because of his violent behavior at school, that health care workers were unable to reach Mother for about thirty minutes, and when she did finally appear at the hospital, she left without consenting to a mental health evaluation of K.W. The BCDSS also received a report on June 14, 2018, that K.W. had fallen and hit his head at school and Mother refused permission for medical treatment and sent a proxy to pick him up from school. The BCDSS investigated and ruled out neglect in both the May and June 2018 reports.

petition alleged that the identity of K.A.'s father and his address were unknown. The court granted the shelter care request.

Because the parties were not able to reach an agreement on the CINA petition at a scheduled adjudicatory hearing held in November 2018, a contested hearing was scheduled for the beginning of 2019. K.A.'s father, whom Mother had not identified at the time of the CINA petition, was subsequently identified, and in December 2018, he appeared at a preliminary hearing wherein he requested representation and a paternity test, both of which were granted. When Father learned that he was in fact K.A.'s father, he sought custody of K.A.[3]

The magistrate postponed the scheduled January 2019 adjudicatory hearing to provide newly appointed counsel for K.A.'s siblings more time to prepare.[4] The subsequent March adjudicatory hearing was also postponed. At that hearing, Mother requested that her three children be returned to her custody. The magistrate recommended and the court approved returning the two older children, K.W. and T.B., to Mother under an order controlling conduct ("OCC") that required Mother to: 1) meet K.W.'s therapeutic needs and provide documentation of his psychiatric treatment to the BCDSS and K.W.'s counsel, 2) ensure that the children attended school daily and on time, 3) meet the

[3] Father is not the father of K.W. or T.B.

[4] At the hearing, the magistrate recommended, and the court approved, expanding BCDSS's limited guardianship of K.W. to include consenting to psychiatric evaluation, treatment, and medication due to K.W.'s escalated behavior that consisted of threats to hurt himself and others, and Mother's refusal to comply with medical recommendations or sign consent forms to have K.W. evaluated.

children's educational needs, 4) properly supervise her children at all times, and 5) permit the BCDSS and children's counsel access to her home. The magistrate recommended the continuation of the shelter care order for K.A., finding that it would be "contrary to [K.A.]'s welfare at this time to return him to Mother's care[.]" The magistrate explained her recommendation, stating that despite ongoing concerns about Mother's ability to adequately care for her children, the two older children could "articulate any safety concerns" and contact an adult if left unsupervised. The court approved the recommendations. A week later, on March 19, 2019, the court placed K.A. in Father's care based on Father's home passing a home health assessment and Father's mother, with whom he lived, passing a background check. K.A. has remained in Father's care since that time.

An adjudicatory hearing was held on May 21, 2019, during which a BCDSS investigator, Mother, and Father testified. The BCDSS investigator testified that the police officer who responded to Mother's home on October 12 found K.W. and K.A. walking down the street at 9:30 p.m. with no supervision. When the investigator spoke to K.W., he said that his mother left them alone all day, but he later said she had only left them alone for about thirty to forty minutes. Mother refused to speak with the investigator. The police report of the incident was admitted into evidence.

Mother testified that she never leaves her children home unattended. She explained that on October 12 she had telephoned her grandmother, who lived approximately four blocks away, and asked her to watch her children. According to Mother, her grandmother was on her way when she left to go to the store. Mother testified that her grandmother was

at her home and met the police when they arrived. Mother stated that Father had provided no help toward raising K.A. and was not involved in K.A.'s life. Father testified that after K.A.'s birth, he had some contact with K.A., visiting him at Mother's home and buying him shoes, toys, and diapers. Father indicated that Mother called him the night the children were removed from her care, but she never said that her grandmother was present in the home when the police arrived. At the close of the adjudicatory hearing, the court held the matter sub curia.

On July 2, 2019, the court announced its adjudication findings. In its findings, the court sustained ten allegations against Mother, and did not sustain any allegations against Father. The court immediately proceeded to a disposition hearing.

During the disposition hearing, Father and K.A.'s case worker testified. Father testified that before the paternity test, he was aware he could be K.A.'s father, but Mother refused to consent to a paternity test. Father testified that K.A. now refers to him as "Daddy"; he has potty trained K.A.; K.A. is in daycare approximately a mile from his home for the five days a week he works; his mother helps with care and is a back-up resource for him; K.A. has met and greatly enjoys his paternal siblings and family members; and he has arranged for visitation between K.A. and Mother the five times she requested it.

The case worker assigned to K.A.'s case while K.A. was in Father's care testified that he had visited Father and K.A. twice a month since placement. Based on his observations of their interactions, he opined Father "is taking care of the child very well[,]" and he had no safety concerns about K.A. being in Father's care.

At the close of the hearing, Mother's attorney argued that the court should dismiss the CINA petition and leave the question of K.A.'s custody "for the parents to battle out in Family Court." The BCDSS's attorney, K.A.'s attorney, and Father's attorney asked the court to not find K.A. a CINA, but requested the court to change custody to Father pursuant to CJP § 3-819(e).

The magistrate issued a written recommendation, sustaining ten allegations against Mother. The magistrate sustained the BCDSS's allegation that Mother "has a pattern of" leaving her children unattended dating back to 2009 and that K.A. is "at risk of harm as a result of this continuous neglect." The magistrate also sustained the allegations as to the events of October 12, 2018. The magistrate took judicial notice of the BCDSS's actions in March 2009, and on June 10, 2014, December 20, 2015, April 11, 2018, and June 14, 2018, regarding Mother repeatedly leaving her young children unattended. In conclusion, the magistrate wrote:

> While mother may be ready, willing and able to resume care of [K.A.], the [c]ourt must not, and does not, ignore the fact that [M]other left [K.A.] alone and/or left [K.A.]'s very young siblings to look after him. Mother minimizes this fact.
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> In this case, the testimony is such that [F]ather, since the inception of this case, has provided appropriate care for respondent [K.A.]. DSS has not articulated any safety concerns. Respondent [K.A.] is and has been doing well in [F]ather's care. Mother and [F]ather communicate with respect to visits. Father testified that he will ensure that visits with [M]other and Respondent's siblings continue. Father has enrolled respondent in daycare. Father's mother is a backup resource. Finally, there are no sustained allegations against [F]ather.

> Given that [F]ather is providing adequate care and is ready, willing and able to give proper attention to Respondent and Respondent's needs, the [c]ourt finds that Respondent [K.A.] does not meet the definition of a CINA. Given that there are sustained allegations against only one parent, the [c]ourt will dismiss the case and make a custody recommendation: Physical custody is granted to [F]ather. Mother and [F]ather shall share legal custody.[5]

Following the magistrate's recommendations and proposed disposition order, Mother filed exceptions. In her memorandum in support of her exceptions to the magistrate's recommendations, Mother argued that a court may not modify custody when there is no finding of unfitness or abuse as to the custodial parent. She further argued that there was no material change in circumstances to justify the custody change, and that the magistrate failed to consider K.A.'s best interest. At the hearing on Mother's exceptions, the juvenile court noted that the allegations, as sustained by the magistrate, fit the definition of neglect, and accordingly affirmed the magistrate's recommendations. Mother timely noted this appeal.

## STANDARD OF REVIEW

"Exceptions to the recommendations of a [magistrate] warrant an independent consideration by the trial court." *Kierein v. Kierein*, 115 Md. App. 448, 453 (1997). "The trial court 'should defer to the fact-finding of the [magistrate] where the fact-finding is supported by credible evidence, and is not, therefore, clearly erroneous.'" *Leineweber v. Leineweber*, 220 Md. App. 50, 60 (2014) (quoting *Wenger v. Wenger*, 42 Md. App. 596, 602 (1979)). The trial court may not, however, defer to the magistrate as to the ultimate

[5] The parties agreed to the dismissal of K.W.'s and T.B.'s CINA cases.

disposition of the case. *Kierein*, 115 Md. App. at 453. We review the trial court's ultimate decision to modify custody for an abuse of discretion. *Leineweber*, 220 Md. App. at 61 (quoting *Ley v. Forman*, 144 Md. App. 658, 665 (2002)).

## DISCUSSION

Mother argues that the juvenile court erred in transferring primary physical custody of K.A. from herself to Father under CJP § 3-819(e) for two reasons: 1) the court was required to find that she was unable or unwilling to care for K.A. before transferring custody and 2) the court failed to consider K.A.'s best interest before modifying custody. We reject these arguments in turn and affirm.

### A. The Juvenile Court Is Not Required To Find That A Parent Is Unfit Before Modifying Custody Under CJP § 3-819(e)

Mother first argues that the juvenile court erred in modifying custody because it was required to find that she was unfit to care for K.A. According to Mother, "because the magistrate never found that [she] was unwilling or unable to give her son proper care and attention, both parents were still available to have care and custody of K.A." We reject this argument for two reasons. First, the plain language of CJP § 3-819(e) mentions no such "fitness" requirement. Second, in determining custody claims between parents, the fitness of a parent to care for a child is a relevant factor for consideration within the "best interest analysis," but there is no requirement that the court make an initial finding as to parental unfitness before evaluating the child's best interest.

It is well-settled in Maryland that, when construing the terms of a statute, "we typically 'begin with the normal, plain meaning of the language of the statute.'" *Lockett v.*

*Blue Ocean Bristol, LLC*, 446 Md. 397, 421 (2016) (quoting *Lockshin v. Semsker*, 412 Md. 257, 275 (2010)). "If the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written." *Walzer v. Osborne*, 395 Md. 563, 572 (2006) (quoting *Jones v. State*, 336 Md. 255, 261 (1994)).

With these principles in mind, we note that CJP § 3-819(e) provides:

> If the allegations in the 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.

Under the plain language of CJP § 3-819(e), a juvenile court may, in its discretion, award custody in a CINA proceeding to a non-offending parent if two elements are met: 1) the court sustains CINA allegations against only one parent, and 2) the non-offending parent is available, able, and willing to care for the child. Here, Mother concedes that the court sustained allegations only against her, and that the court found that Father was able and willing to care for K.A. The court therefore complied with the statutory mandate. Contrary to Mother's assertion, there is no requirement that the court "further find that [Mother] was unwilling or unable to give K.A. proper care and attention" before proceeding to its best interest analysis. We decline Mother's invitation to include a requirement that is not encompassed within the statute's plain language.

Our interpretation of the statute is consistent with established principles of custody law. In contested cases, the fitness of the parents is a factor—to be sure, an important

factor—in the best interest analysis. But there is no requirement that the court find Mother unfit before modifying custody as Mother alleges.[6]

When contemplating a change of custody, a juvenile court must follow a two-step analysis. *McMahon v. Piazze*, 162 Md. App. 588, 594-95 (2005). First, the court must assess whether there has been a material change in circumstance. *Id*. at 595. If there is a material change, then the court turns to step two and considers the best interest of the child. *Id*.

At the outset, we note that there was clearly a material change in circumstances in this case—the juvenile court sustained the magistrate's findings that Mother neglected K.A. In *In re E.R.*, we explained that a finding of neglect constitutes a material change in circumstances. 239 Md. App. 334, 343-44 (2018). There, we stated that "[t]he kinds of traumatic events that must be proven to demonstrate that a parent is unfit and the child is a CINA, such as abuse and neglect, are, by definition, material changes of circumstances." *Id*. Here, at the exceptions hearing, the juvenile court sustained the magistrate's findings and decision, stating, "But the allegations that create the foundation of this petition were sustained. And based on those allegations, it fits the definition of neglect." As in *In re E.R.*, there was a material change in circumstances here. Given the material change in

[6] Unlike in a custody matter between two parents, when a third party seeks to intervene, that party must make a *prima facie* showing either that the parents are unfit or that exceptional circumstances exist such that the child's best interests are served in the custody of the third party. *Burak v. Burak*, 455 Md. 564, 623-24 (2017). This situation does not apply here.

circumstances, the court could properly proceed to engage in a best interest analysis. *McMahon*, 162 Md. App. at 595.

While it is true that the fitness of the parents is a factor in deciding the best interest of a child, it is not the only factor. In *Montgomery Cty. Dep't of Soc. Servs. v. Sanders*, this Court announced ten non-exclusive factors to be considered in analyzing the best interest of the child:

> 1) Fitness of the parents; 2) Character and reputation of the parties; 3) Desire of the natural parents and agreements between the parties; 4) Potentiality of maintaining natural family relations; 5) Preference of the child; 6) Material opportunities affecting the future life of the child; 7) Age, health and sex of the child; 8) Residences of parents and opportunity for visitation; 9) Length of separation from the natural parents; 10) Prior voluntary abandonment or surrender.

38 Md. App. 406, 420 (1977) (internal citations omitted).[7] Although these factors function as guideposts for custody determinations, courts should "not weigh any one to the exclusion of the others." *Id*. at 420. Rather, "[t]he court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor such as the financial situation . . . ." *Id*. at 420-21. Indeed, this Court has previously upheld decisions to modify custody where we concluded that both parents were fit. *See Viamonte*

[7] In *Taylor v. Taylor*, 306 Md. 290, 304-11 (1986), the Court of Appeals provided thirteen additional factors for consideration in custody disputes, some of which overlap with the *Sanders* factors. These factors are: 1) the capacity of the parents to communicate, 2) willingness to share custody, 3) fitness of the parents, 4) relationship established between the child and each parent, 5) preference of the child, 6) potential disruption of the child's social and school life, 7) geographical proximity of parental homes, 8) demands of parental employment, 9) age and number of children, 10) sincerity of parents' request, 11) financial status of the parents, 12) impact on state or federal assistance, and 13) benefit to parents. *Id*.

*v. Viamonte*, 131 Md. App. 151, 159 (2000) (noting that the trial court did not abuse its discretion in finding both parents fit and proper to have custody, but nevertheless awarding custody to father); *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 502-03 (1992) (noting the special difficulty in correctly deciding custody "where the chancellor did not find that either parent was unfit").

Thus, we hold that CJP § 3-819(e) was fully satisfied because: 1) the court sustained CINA allegations against Mother only; and 2) the court found that Father was able and willing to care for K.A. Having made those prerequisite findings, a juvenile court should proceed to engage in a best interest analysis; a court is not required to find a parent unfit before undertaking that analysis.

### B. The Juvenile Court Did Not Fail To Consider K.A.'s Best Interest

Finally, Mother argues that the juvenile court erred in transferring custody to Father because it failed to consider whether doing so was in K.A.'s best interest. We disagree. That the court did not use the words "best interest" in its decision does not mean that it failed to consider K.A.'s best interest. On the contrary, the record shows that the juvenile court implicitly determined it was in K.A.'s best interest to transfer physical custody to Father.

At the outset, we note that although CJP § 3-819(e) does not specifically state that a court must consider the best interest of the child before transferring custody, "the child's best interest has always been the transcendent standard in adoption, third-party custody cases, and TPR proceedings." *In re Adoption of Ta'Niya C.*, 417 Md. 90, 112 (2010). A

juvenile court does not err in modifying custody, however, simply by failing to use the words "best interest" in its decision. Rather, "we presume judges know the law and apply it 'even in the absence of a verbal indication of having considered it.'" *Marquis v. Marquis*, 175 Md. App. 734, 755 (2007) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 50, *cert. denied*, 343 Md. 334 (1996)). Indeed, this Court has expressly held that a juvenile court did not err in terminating parental rights where it failed to specifically use the words "best interest" in its decision.

In *In re Adoption/Guardianship of Jasmine D.*, 217 Md. App. 718, 738 (2014), Jasmine's mother ("Ms. N.") argued that the juvenile court erred in terminating her parental rights because "there was no evidence that severing Jasmine's ties to her natural mother was in her best interests." We disagreed, noting that although the juvenile court failed to explicitly mention Jasmine's best interest in either its oral opinion or written order, the facts adduced demonstrated that the court contemplated Jasmine's best interest before terminating Ms. N.'s parental rights. *Id.*

There, the record thoroughly demonstrated Ms. N.'s longstanding struggle with alcoholism. *Id*. at 721-28. On several occasions, Jasmine was placed in foster care when Ms. N. "was found to be intoxicated and unable to care for [her]." *Id*. at 721. After approximately six years in which Ms. N. failed to comply with treatment, the Howard County Department of Social Services sought to terminate Ms. N.'s parental rights. *Id*. at 726.

At trial, the juvenile court received evidence concerning Ms. N.'s extensive history of alcohol abuse, as well as her continued denial of alcohol abuse. *Id*. at 727. The court noted "that Jasmine had been placed in foster care three times prior to her most recent removal from Ms. N.'s home in 2009. Each of Jasmine's removals was due to Ms. N.'s intoxication and consequent inability to take care of Jasmine." *Id*. at 729. After a careful consideration of the record, the juvenile court terminated Ms. N.'s parental rights. *Id*. at 733.

On appeal, Ms. N. argued, among other things, that there was no evidence that terminating her parental rights was in Jasmine's best interest. *Id*. at 738. In rejecting this argument, we stated, "Although the juvenile court made a determination as to the unfitness of Ms. N. as Jasmine's parent, it did not explicitly state that a termination of Ms. N.'s parental rights would be in Jasmine's best interest in either its oral opinion or written order."[8] *Id*. Nevertheless, we affirmed the court's decision, stating that "a juvenile court in making a [termination of parental rights] determination 'is not required to recite the magic words of a legal test[.]'" *Id*. (quoting *In re Adoption/Guardianship of Darjal C*., 191 Md. App. 505, 532 (2010)). Instead, "the facts adduced in the juvenile court and language of the court's oral decision make clear that the court determined that Jasmine's best interests would be served by ending Ms. N.'s parental rights." *Id*. Relying on Ms.

[8] In a footnote, we observed that, "At the beginning of its oral opinion, the juvenile court did state that 'the [c]ourt has to review this [case] under [the applicable statutory] standard, as I said, as clear and convincing evidence that terminating the parental rights of [Ms.] N. is in Jasmine's best interest." *In re Adoption/Guardianship of Jasmine D*., 217 Md. App. at 738 n.4.

N.'s extensive substance abuse history and her failure to accept treatment, we readily concluded that "[t]he juvenile court's decision was based on ample evidence that it would be in Jasmine's best interest to terminate Ms. N.'s parental rights." *Id.* at 739.

Similarly here, although the juvenile court failed to use the words "best interest" in its disposition, its decision to transfer custody was based on ample evidence that doing so was in K.A.'s best interest. In this case, the juvenile court sustained the magistrate's findings that Mother's history of neglect dated back to 2009. On numerous occasions, Mother either left K.A. alone, or left him in the care of his "very young siblings." Indeed, the magistrate noted that K.A. was at a risk for harm due to Mother's "continuous neglect."

Whereas Mother's history of caring for K.A. indicated a pattern of neglect, the evidence showed that Father had been providing appropriate care for K.A., and that the BCDSS had "not articulated any safety concerns" regarding Father. The juvenile court sustained the magistrate's findings as to Father's fitness, noting that no allegations were sustained against him, and that he had been caring for K.A. since March 2019 with BCDSS indicating no concerns for K.A.'s safety. Although the juvenile court failed to specifically mention K.A.'s best interest, as in *Jasmine D.*, "[t]he juvenile court's decision was based on ample evidence that it would be in [K.A.'s] best interest" to transfer custody to Father. *Id.* Accordingly, we perceive no error.

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