UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2679

September Term, 2015

IN RE: A.F.

Berger,
Arthur,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: July 7, 2016

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Juvenile Petition No. 6-I-15-165, filed, on November 25, 2015, in the Circuit Court for Montgomery County by the Montgomery County Department of Health and Human Services (the "Department"), alleged that A.F., an infant, was a Child In Need of Assistance (CINA)[1] due to neglect by his parents, Nicole F. (the Mother) and William E. (the Father). After an adjudicatory hearing on January 14, 2016, the court, (Smith, J.) found the facts sustained. A disposition hearing took place immediately afterwards and the court found A.F. to be CINA and committed him to the Department for placement in foster care.

Appellant, Nicole F., filed the instant appeal in which she raises the following issues[2] for our review:

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[1] *See infra*, Discussion, Part II.

[2] Appellee, A.F., frames the issues, on this appeal, as follows:

1. Did the trial court err when it admitted testimonial and documentary evidence through the Department's social worker, which was cumulative of previously properly admitted evidence and was permissible under hearsay exceptions?

2. Did the trial court err or abuse its discretion when it determined that A.F. was a CINA based on evidence that clearly established that Ms. F. placed him at substantial risk of harm and was unable to provide proper care and attention to him and his needs?

Appellee, the Department, frames the issues, on this appeal as follows:

1. Did the juvenile court properly admit public records when Ms. F. did not demonstrate they lacked trustworthiness and the records were cumulative in light of other evidence before the court?

2. Did the juvenile court correctly determine that A.F. was a CINA when the evidence demonstrated that Ms. F. could not safely care for him?

1. Did the court err in admitting prejudicial hearsay evidence?

2. Did the court err in declaring A.F. to be a CINA, where the evidence did not support a finding of parental neglect or inability to provide ordinary care for the child?

FACTS AND LEGAL PROCEEDINGS

Department Intervention on Behalf of Appellant's First Child

A.F. has an older sibling, two and one-half years old Au. F., born premature at 26 weeks gestation in August 2013. Au. F. remained in the neo-natal intensive care for approximately two months, until mid-October 2013. Appellant had resided in a group home for adults with mental disabilities through the Developmental Disabilities Association (DDA) from the age of 19. One week prior to Au. F.'s birth, the staff at the group home petitioned for an emergency psychiatric evaluation of appellant due to her "disruptive behavior." Children were not permitted to reside at the group home and the Department began to work with appellant to seek stable housing and employment for her and her new infant.

On October 18, 2013, at a shelter care hearing, the court placed Au. F. in appellant's care, dependent upon her continued residence with a specified friend. Within two weeks, however, appellant left the residence after a verbal altercation with her friend and moved to live with another friend. Within two weeks of the new move, appellant was again involved in another verbal altercation and the police were called. Appellant left the second friend's residence with Au. F. and called the Department from a Metrorail station requesting foster care placement for the infant. On December 6, 2013, the court found Au. F. a CINA and

placed him into foster care. Au. F. was eventually reunified with his father,[3] in July 2014 and his CINA case was closed. Both the adjudication and disposition order in Au. F.'s CINA case,[4] became evidence in the instant case after the court took judicial notice, including where appellant stipulated to facts pertaining to her mental disabilities, *i.e.,* her residence in a group home for adults with mental disabilities, her diagnosis with Adjustment Disorder with Mixed Anxiety and Depressed Mood, untreated without prescribed medication, her disruptive interactions with the group home staff and her non-compliance with the program. At one point, appellant stated that the counselors were threatening to poison her if she continued to be non-compliant.

Background to the Instant Case

Approximately two years after the Department's intervention on behalf of Au. F., A.F. was born, September 2015, to appellant, his biological mother, and William E.,[5] who has been identified as his biological father. Appellant tested positive for marijuana at A.F.'s birth; however, because she subsequently tested negative, the Department did not require her to undergo a substance abuse evaluation or to submit to further urinalysis.

[3] **A.F. and Au. F. have biologically different fathers.**

[4] In the Matter of Au. F., Petition No. 06-I-13-161.

[5] According to briefs for appellant and appellees, William E. has been uncooperative with the Department; refusing to speak in person or via telephone with a social worker regarding whether he might be a resource for his son.

At the time of A.F.'s birth, appellant was residing in a single woman's shelter, which did not permit children residents. Appellant moved in with William E., after discharge from the hospital, but left after two weeks because of his domestic abuse. A crisis center directed her and the baby to the Betty Ann Krahnke (BAK) Domestic Violence Shelter, a 60-day, time limited shelter for victims of domestic violence.

A Child Protective Services report on September 16, 2015 was submitted regarding BAK staff member concerns about appellant's ability to care for A.F., including leaving him on the bed unattended and removing his umbilical cord after being advised by a nurse not to do so. Appellant informed staff members at BAK that she was diagnosed with bipolar disorder and schizophrenia but was neither taking medication nor seeing a psychiatrist. Staff also reported that appellant appeared to have cognitive delays that impeded her ability to care for A.F. Staff members reported that appellant was unwilling to accept help with financial budgeting to address prior problems with overdrafts and that she was going away overnight without preparing supplies for A.F. Staff members expressed concern that appellant might be seeing the person who had physically abused her. By late September, the investigations unit had transferred appellant's case to Nathaniel Tipton, an in-home social worker, who was to assess the ongoing safety of A.F. and assist appellant in developing a plan for herself and A.F. after their stay at BAK.

Concerns for A.F.'s safety increased by late October 2015. Appellant stopped working with the Department and missed meetings that had been scheduled to discuss

housing and long-term options. Appellant also refused to sign a release to allow the Department to obtain A.F.'s medical records. She was seeing a therapist at BAK, however, her progress was reportedly "shallow" and she refused medication for her mental health issues.

On October 26, 2015, a Department meeting was held concerning housing options for appellant after her stay at BAK. There were extra difficulties in finding applicable housing for appellant due to her past non-compliance with DDA services. Additionally, due to past non-compliance with housing services, as well as her lack of supports in the community, appellant was not eligible for Montgomery County Special Housing. Appellant's response was that she would "get a basement apartment" if housing was not approved. Her source of income was Social Security Disability Insurance (SSDI), along with assistance from Women, Infants and Children (WIC). The Department, however, was concerned with appellant's demonstrated inability to manage her finances, her refusals to accept budgeting counseling, that her bank account was constantly overdrawn and that appellant had a history of using her disability benefits on "lottery tickets" and "getting her hair done." BAK eventually agreed to extend her stay at the shelter for an additional week while she worked with the Department to find housing and receive other in-home services.

After the meeting, appellant's communication with the Department significantly decreased. She did not respond to Infants and Toddler's offer to provide services, even after knowing A.F. had a twenty-five percent cognitive deficit. She also did not participate in a

discharge planning meeting with BAK on November 20, 2015. Tipton was unable to reach appellant by telephone or by in-person visits at BAK to inform her that she had not been approved for DDA housing. Because of concerns for A.F.'s safety, the Department sought shelter care authorization for A.F. Appellant left BAK with A.F. on November 24, 2015. The Department's social worker testified that appellant's leaving BAK was what ultimately led to the decision to remove A.F. because leaving BAK meant appellant would no longer have access to the shelter's support services; however, appellant left BAK before the Department could remove A.F. from her care.

Appellant arrived at the Montgomery County Crisis Center at 5:10 p.m., on November 24, 2015, seeking emergency housing services. The Department, which had issued a shelter authorization due to concerns that A.F. was in serious, immediate danger, served appellant with that authorization. Colleen Bokman, the Juvenile Court Liaison and assessment social worker, who was qualified as an expert social worker, testified to the incident that ensued after appellant's arrival to the crisis center. Appellant engaged in a struggle with the child welfare services worker and police, resisting their efforts to remove A.F. from her care. The struggle resulted in the case worker and police officer pinning appellant's arms and legs against a wall in order to allow the security guard to wrest A.F. from her. Appellant, kicking and screaming, was placed in a cage in a police car. The police officer then filed a Petition for an Emergency Psychiatric Evaluation and transported

appellant to the hospital. At a shelter care hearing,[6] on November 25, 2015, the court granted an Order of Shelter Care for A.F.

During the visits, appellant was "affectionate and sweet" towards A.F. She held him, talked to him, smiled at him, and laughed with him. She changed his diapers and fed him. The only time she was "inappropriate" at a visit was when one of her case workers attempted to talk to her about budgeting issues, she began to shout while A.F. was in her arms. However, threatened with cancellation of the visit, appellant stopped yelling.

In late December 2015, appellant's case was transferred from Tipton to social worker, Victoria Davis. Between late December 2015 and mid-January 2016, Davis offered appellant a total of eight visitations with A.F.; appellant attended three. Although appellant continued to be appropriate and loving with A.F., she continued to be uncooperative and noncompliant with Department recommendations. Appellant would hang up on Davis, complain that the Department was "playing games with her," and she refused to participate in court ordered services such as evaluations for substance abuse and psychiatric/ psychological assessments. Since A.F.'s placement in shelter care, the Department offered seventeen visits to the parents. Appellant attended eight visits and William E. attended four visits.

[6] According to appellant's brief, the father was not present at the shelter care hearing and did not participate in the case until December 15, 2015, when he appeared at a mediation session and requested legal representation. He refused to speak with the social worker regarding being a prospective placement resource.

Appellant testified that she presently was living with a friend, a supervisor at her trade school, in a three-bedroom apartment in Prince George's County. Her friend has two young daughters who live there as well. Appellant testified that she is attempting to follow the court's orders to effectuate unification with her child and that she is willing to do whatever is asked of her.

January 14, 2016 - Juvenile Court Adjudication and Disposition Hearing

In concluding that A.F. was a CINA, due to neglect, the Court issued its oral ruling:

> In making the determination that [A.F.] has been neglected by [appellant] and that [appellant] is not able at this point to make sure that he is safe and not placed in substantial risk of harm, the Court is considering largely the fact that [appellant] really isn't able to take care of herself, let alone take care of [A.F.] The fact that she isn't able to manage her monetary affairs—even if she was to obtain housing by herself, would she be able to continue to pay the rent and not end up evicted and be on the street?
>
> With respect to Infants and Toddler, this is a baby who we know is not meeting all of his developmental goals or standard, yet he wasn't immediately enrolled into Infants and Toddlers by [appellant]. [Appellant] hasn't been able to maintain a stable living environment. The reason—and I know [appellant's counsel] keeps pointing to the reason this is happening is because [appellant] has lost her housing. However, the reasons she was able to care for [A.F.] in the way that she was able while she was at Betty Ann Krahnke was because there were people all around her making sure and inquiring and asking her to [go] to therapy and assisting her in having diapers for him and different things.
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> Once she's out trying to care for [A.F.] on her own, she's proven—or she's established that that's not going to be a possibility. And then add in the fact that there is a mental health issue, that there really isn't a grasp on exactly what it is, but that [appellant] is not open to the idea—at least at this point, to medication, *that gives the Court great*

> *concern with respect to the safety of [A.F.] and whether or not there's a risk of harm to him or a substantial risk of harm to him.*

(Emphasis supplied).

The court then declared A.F. to be a CINA due to parental neglect and inability of appellant and inability and unwillingness on the part of the father, William E., to give proper care and attention to A.F. and his needs. Consequently, A.F. was committed to the Department for placement in foster care. Appellant appeals this ruling.

STANDARD OF REVIEW

The standard of review in cases involving a CINA was articulated in *In re: Yve S.,* 373 Md. 551, 586 (2003):

> There are three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-13J(c)] applies. [Secondly,] if it appears that the [juvenile court] erred as to matters of law, further proceedings in the [juvenile] court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id.. at 586, *(quoting Davis v. Davis,* 280 Md. 119, 125–26 (1977)).

A circuit court's CINA adjudication will not be set aside unless clearly erroneous. *In re Nathaniel A.,* 160 Md. App. 581, 595 (2005). *See also* MD. RULE 8–131(c).

DISCUSSION

I

Admission of Hearsay Evidence

Appellant contends that, because the declarants from BAK and DDA were neither identified by the witness, Nathaniel Tipton, nor were they present for cross-examination, there was no way for the court to assess their credibility regarding whether they had sufficient knowledge of the subject matter they related to the court. Therefore, testimony concerning their statements, appellant maintains, constituted inadmissible hearsay.

Appellee, the Department, cites Md. Rule 5–803(b)(8) in support of its assertion that the juvenile court was well within its discretion to properly admit these statements under the public records exception to the hearsay rule. Appellee, A.F., through counsel, notes that the hearing at issue was both an Adjudication and Disposition hearing. The Rules of Evidence, A.F. asserts**,** are applicable at a CINA adjudication hearing, but are not strictly applied at disposition hearings.

Md. Rule 5–101(a) provides that the Rules of Evidence apply to all actions and proceedings in the State unless "as otherwise provided by statute or rule[.]" Evidentiary rules govern hearsay testimony or testimony concerning out-of-court statements offered to support the truth of the matter for which they are asserted. Generally, hearsay is not admissible as evidence. MD. RULE 5–802. This is true because of hearsay's "inherent untrustworthiness." *Marquardt v. State*, 164 Md. App. 95, 123 (2005) (citing *Parker v. State*, 365 Md. 299, 312

(2001)). Typically, "hearsay must fall within an exception to the hearsay rule or bear 'particularized guarantees of trustworthiness' in order to be admitted into evidence." *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

"In general, the rules of evidence, including the rules regarding hearsay, apply in juvenile adjudicatory hearings." *Michael G.*, 107 Md. App. 257, 265 (1995) (citing *In re Rachel T.*, 77 Md. App. 20, 30–32 (1988)). However, "[d]isposition hearings under Rule 11–115" are afforded *discretionary application* of the Rules of Evidence. MD. RULE 5–101(c)(6) (Emphasis supplied).

Md. Rule 5–803(b)(8) governing exceptions to the general prohibition against hearsay evidence, provides, in part, that public records and documents are not excluded by the hearsay rule, even though the declarant is available as a witness.

> (8)(a) except as otherwise provided in this paragraph, a memorandum, report, record, or data compilation made by a public agency setting forth
>
> (i) the activities of the agency;
>
> (ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report, or
>
> (iii) in civil actions and when offered against the state in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law.

In the instant case, the juvenile petition filed against appellant was based on the allegation that appellant was rendered incapable of caring for A.F. once she was no longer surrounded by people who would insist that she undergo therapy and take medication to deal

with “a mental issue.” Appellant contends that the statements made by unnamed persons from BAK were prejudicial in that “the court relied upon them to find that [she] was unable to provide proper care for her child.” The statements cited by appellant, as related by Nathaniel Tipton, were as follows:

> It had been reported to me by shelter staff that [appellant] might have been leaving A.F. on a bed under a cover sometimes . . . and stepping away from the bed, and also that his crib was too full of items to actually put him in the crib. They were a little bit concerned about co-sleeping.
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> * * *
>
> [Appellant] had stopped accepting any kind of budgeting help at the shelter and was sort of resistant to that help. They were concerned that her checking account was in a constant state of overdraft and an example that I remember that was brought up in the meeting was that her account would be in overdraft, and she would swipe her card at the soda machine, so she would spend a dollar, but really spend $36 on a soda.
>
> * * *
>
> They expressed substantively the same concerns they had been expressing all along that [appellant] had stopped engaging with them as well, that she was not accepting any financial planning help from them, that they hadn't been able to plan with her for any kind of emergency housing plan, that she was leaving overnights and not taking—I didn't see her take supplies for A.F., such as diapers. They weren't sure, but they suspected that she might be going to see the person she was domestically abused by.[7]
>
> * * *

[7] Appellant's brief notes that her objection to Tipton's testimony concerning the suspicion that she was seeing her abuser was sustained but that, nevertheless, the court found that fact, alleged in the Petition, to be true.

> DDA explained that she had been—[appellant] had not been compliant with her services in the past and that the chances of her getting re-approved for services might be slim, but they were willing to try that. Special needs housing basically said that there was A) no housing available in which to house [appellant], and B) that even if there were, they were so concerned about the lack of lateral supports and community supports and past non-compliance with the DDA that they did not feel that she was a good fit for special needs housing. [BAK] staff expressed basically some of the same concerns that I have already stated in terms of supervision issues . . . .

Appellant cites *Ellsworth v. Sherne Lingerie Inc*., 303 Md. 581, 612 (1985), acknowledging that the Public Records Exception "permits the reception of reliable facts otherwise difficult to bring before the finder of fact." Appellant's retort, however, is that the presumption of reliability in a public record may be rebutted by showing that the source of the information in the record or the method of circumstances of their preparation lacks trustworthiness." Appellant further acknowledges that the *Ellsworth* Court imposed upon the party, opposing the admission of the public records, the burden to show its lack of trustworthiness and the fact that "any level of hearsay" does not, by itself, make the record untrustworthy. *Ellsworth,* 303 Md. at 608.

Appellant further imputes motive to provide false information to the Department, reasoning that (1) many of the declarants were never identified; (2) she had contentious relationships with many of those involved in providing services to her; and (3) there was "no way to assess the skill and experience of the actual declarants." The glaring defect in appellant's argument is the sheer absence of any factual basis to support her mere conjecture of inadequate skill and training of the staff and social workers or the possibility of a motive

to provide false information. In fact, there is evidence to support the fact that social workers and service providers made extra efforts to help and accommodate appellant's needs, *e.g.*, BAK extending appellant's stay at the shelter to aid her in developing a transition plan and multiple agencies partnering together to support appellant and ensure A.F.'s safety.

The evidence overwhelmingly demonstrates, as the court observed, that appellant "isn't able to take care of herself, let alone take care of A.F." Stated otherwise, pursuant to the Public Records Exception, the record, *sub judice*, is devoid of any evidence that the reliability of the hearsay evidence adduced was rebutted by showing that the source of the information or the method of circumstances of their preparation lacks trustworthiness. *Ellsworth,* 303 Md. at 604.

We also note that, if the statements made by DDA and BAK staff, were erroneously admitted into evidence through Tipton's testimony, any error is harmless because it is substantially the same as other evidence properly received by the court and not objected to by appellant.

II

The Court's CINA Determination

Appellant contends that there is insufficient evidence to support a finding that A.F. is a CINA. Appellant asserts that the "meager facts that the Department had proven by a preponderance of the evidence were legally insufficient to support . . . governmental intrusion into the Constitutionally-protected right of [appellant] to parent [A.F.]."

Specifically, appellant argues that a history of changing residences is insufficient and that there is no evidence that "unstable housing" has an effect on a child of A.F.'s age. Furthermore, appellant argues, history of her financial habits was also insufficient, especially when there was no evidence that she or A.F. ever went without food, clothing, medical care or shelter, although appellant acknowledges that she has requested emergency housing assistance.

Appellees, the Department and A.F., through counsel, respond that, under the totality of the circumstances, the undisputed evidence clearly establishes that appellant neglected A.F. and supports the juvenile court's finding that A.F. was a CINA.

Md. Code Ann., Cts. & Jud. Proc., § 3–801 provides:

> (f) *Child in Need of Assistance*. - " Child in need of assistance" means a child who requires court intervention because:
>
> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder, and
>
> (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.
>
> (g) *CINA* - "CINA" means a child in need of assistance.
>
> * * *
>
> (s) "Neglect " means the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or individual who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate:

> (1) that the child's health or welfare has been harmed or placed at substantial risk of harm; or
>
> (2) that the child has suffered mental injury or been placed at substantial risk of mental injury and attention to the child and the child's needs

"The purpose of CINA proceedings is 'to protect children and promote their best interests.'" *In re Priscilla B.*, 214 Md. App. 600, 622 (2013) (quoting *In re Rachel T.,* 77 Md. App. 20, 28 (1988)). "It has been long established that a parent's past conduct is relevant to a consideration of the parent's future conduct." *In re Adriana T.*, 208 Md. App. 545, 570 (2012) (citing *In re Dustin T.*, 93 Md. App. 726, 731 (1992)). "Reliance upon past behavior as a basis for ascertaining the parent's present and future actions directly serves the purpose of the CINA statute." *Id.* (citing *Dustin T.,* 93 Md. App. at 732). Furthermore, actual harm is not required under the CINA statute; that the child is at risk of substantial harm is sufficient to declare the child CINA. *Tamara A. v. Montgomery Cty. Dep't of Health & Human Servs*., 407 Md. 180, 183–84 (2009). A child may be found to be at "substantial risk of harm" if *another* child in the family has been harmed and the reasons for the abuse or neglect are still present. *Id.* at 184.

"Neglectful behavior toward a child may seem more passive in character, but a child can be harmed as severely by a failure to tend to her needs as by affirmative abuse." *Priscilla B.*, 214 Md. App. at 621. "In determining whether a child has been neglected, a court may and must look at the totality of the circumstances . . . and must find the child a CINA by a preponderance of the evidence." *Id.* (citing MD. CODE ANN., CTS. & JUD. PROC., § 3–817(c)).

"The burden of proof here, a preponderance of the evidence, is lower than the burden the State bears when seeking to terminate parental rights, where the 'much more drastic and permanent interference' justifies the higher burden of proof of clear and convincing evidence." *Id.* at 622 (quoting *In re Colin R.,* 63 Md. App. 684, 697 (1985)).

> It makes sense to think of 'neglect' as part of an overarching pattern of conduct. Although neglect may not involve *affirmative* conduct (as physical abuse does, for example), the court assesses neglect by assessing the *inaction* of a parent over time. To the extent that inaction repeats itself, courts can appropriately view that pattern of omission as a predictor of future behavior, active or passive . . . .

Id. at 625. "Courts should be most reluctant to 'gamble' with an infant's future; there is no way to judge the future conduct of an adult excepting by his or her conduct in the past. *Id.* at 626 (quoting *McCabe v. McCabe*, 218 Md. 378, 384 (1958)).

In the instant case, the evidence of the neglect of A.F. and appellant's inability and/or unwillingness to give A.F. the proper care and attention is replete. By way of background, appellant's bipolar disorder and schizophrenia are clearly conditions contributing to her failure to give proper care and attention to A.F. She has a history of mental health problems and, at age 19, had been asked to leave the home of her former foster mother and take up residence at a group home for adults with mental disabilities, administered by DDA. These mental health issues, although clearly affecting her ability to fulfill her obligation to care for A F. do not absolve her from the obligation to take her medication and comply with the court Order that she obtain psychiatric and psychological evaluations. After a troubled history

regarding her parenting of her first child, Au. F, the court declared the child a CINA and granted custody of Au. F. to his father.

Furthermore, as it pertains to her youngest child, A.F., appellant has consistently refused to comply and cooperate with court orders and Department recommendations. Her refusal to comply with a court order to obtain a psychological evaluation resulted in the termination of services from the DDA. In addition, she refused services for A.F. to address his twenty-five percent cognitive deficit. She has a history of unstable housing and has made little to no effort to secure stable housing, employment or services for herself and A.F. Even when assistance was offered, appellant was uncooperative with shelter staff and refused services such as budgeting and housing supports. Appellant was also documented leaving the BAK shelter, sometimes all night, without adequate provisions to care for A.F. During her shelter stay, appellant would leave A.F. unattended in a bed, despite the fact that a crib was provided for her use in the same room. Moreover, in light of appellant's prior behavior, shelter staff could not guarantee that appellant was not seeing her previous abuser while A.F. was in her care.

It is evident that the juvenile court did not base its decision on a "gut reaction" or "erring on the side of caution." The evidence presented clearly illustrates appellant's neglect of A.F. and supports the court's decision to declare A.F. a CINA.

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