

Circuit Court for Garrett County
Case No. 11I174577; 4578; 4759; 4580

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2463

September Term, 2017

IN RE: E.R., T.R., J.R., AND D.B.

Friedman,
Fader,
Eyler, James, R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 31, 2018

*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 case requires us to decide what a local department of social services must plead in a CINA¹ petition in a circumstance in which it believes that a child’s custodial parent is not capable of caring for the child, but it lacks sufficient information regarding the fitness of the noncustodial parent. In this case, the Garrett County Department of Social Services (“GCDSS”) filed a bare bones petition alleging both parents to be unfit, even though it only had factual support for the allegations against mother, the children’s custodial parent. On the basis of that petition, the juvenile court held a hearing at which it found mother unfit, but found the children’s respective fathers, the noncustodial parents, fit. Thus, it awarded custody to the fathers, and dismissed the CINA cases. Mother now challenges that award. The simple answer is that the remedy she seeks—the return of the custody of her children—is not available in this appeal, given that she was found to be unfit. The more complete answer is that the local department’s bare bones petition, incomplete as it was, complied with the governing law.

BACKGROUND

Appellant, T.P., is the mother of four children: J.R., E.R., and T.R. by one father, and D.B. by another. Mother is no longer involved in a relationship with either father and, at the time of the events leading to this appeal, she had primary physical custody of all four children. After GCDSS received notice of an incident involving mother and the children,

¹ A CINA is a “child in need of assistance.” Md. Code, Courts and Judicial Proceedings (“CJ”) Article, §3-801(g). Maryland defines a CINA as a “child who requires court intervention because: (1) the child has been abused, [or] has been neglected ...; 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.” CJ § 3-801(f).

it filed four identical petitions alleging that each of the children was a CINA. The petitions began with a formulaic recitation that: “[t]he State of Maryland alleges that the above-named ... child is a child in need of assistance because the child has been: abused; neglected; and the child’s parents ... [are] unable or unwilling to give proper care and attention to the child and the child’s needs.” The petitions then included eleven paragraphs detailing the facts of an incident involving mother and her then-boyfriend² and of GCDSS’s efforts to work with mother. The petitions did not contain any allegations regarding the children’s fathers other than their respective names and addresses and the bare bones allegation that they were “unable or unwilling to give proper care and attention” to the children. It is conceded by all parties to this appeal that at the time it prepared the petitions, GCDSS had no information about whether these noncustodial fathers were, in fact, unable or unwilling to care for the children.

After a shelter care hearing, a family law magistrate placed the children with their respective fathers until the adjudication and disposition stages of the proceedings. In so doing, the magistrate noted that there were “no allegations against the dads in either petition” and Mother consented to the placements. At the adjudicatory hearing, the magistrate sustained almost all of the allegations made against the mother in the CINA petitions. The disposition hearing immediately followed, after which the magistrate made the following conclusions with respect to each child:

² We have omitted the details of this incident as they are not relevant to our consideration of the case.

As there were no allegations sustained (or even made in the Petition) against the Father, the Magistrate cannot conclude that this child is a Child in Need of Assistance. Courts & Judicial Proceedings § 3-819(e). In re Russell G., 108 Md. App. 366 ... (1996).^[3]

Accordingly, the family law magistrate recommended that the juvenile court exercise its discretion to grant primary physical custody of the children to their respective fathers with joint legal custody between each father and mother. After concluding that it could not “be assured [that mother] is able to act in the best interests of her children on a daily basis,” the juvenile court ratified the magistrate’s recommendations. Mother noted these timely appeals, in which she principally challenges the juvenile court’s authority to award custody to the children’s fathers at the CINA disposition.

ANALYSIS

I.

Mother’s first contention is that the juvenile court erred in its determination that she is unable or unwilling to care for her children. This, however, is a factual determination, which an appellate court reviews for clear error. *In re Ashley S.*, 431 Md. 678, 704 (2013). Our review reveals that this finding was amply supported in the record, the finding was not clear error, and therefore must be affirmed.

II.

³ As will be explained below, both the statutory and caselaw references in the magistrate’s ruling are to the prohibition on finding a child to be CINA if the child has at least one parent who is willing and able to provide care.

Mother’s remaining contentions center on the CINA petitions prepared by GCDSS. Specifically, she alleges that because GCDSS failed to include facts in the CINA petitions to support the allegation that the fathers were unable or unwilling to care for the children, the children were therefore not “in need of assistance,” and custody cannot be awarded to the fathers under CJ § 3-819(e).⁴ We note, first, that mother’s theory of the case cannot result in the relief she seeks. Even if we were to find that there was a fatal defect in GCDSS’s CINA petitions that prevents the juvenile court from awarding custody to the fathers, the result would not be to return custody to the mother, who has been found to be unfit. This defect dooms mother’s remaining arguments from the outset.

III.

In spite of the fact that we cannot grant the relief that she seeks, we nevertheless address mother’s contentions, so as to provide guidance to local departments and juvenile courts on how to proceed in cases where a local department believes that one parent of a child is unfit, but lacks information about the other parent. *Taylor v. State*, 388 Md. 385, 399-400 (2005) (exercising discretion to address a secondary issue to provide guidance to the lower court even though the secondary issue was not dispositive and did not affect the outcome of the case on appeal). Mother argues that the CINA petitions filed in this case were fatally defective, because they contained no facts to support GCDSS’s allegations that the fathers were unable or unwilling to assume care and custody over the children.

⁴ The text of CJ § 3-819(e) is included below.

A.

Mother’s argument proceeds from two fundamental assumptions. *First*, she notes, correctly, that Maryland law prohibits a court from finding a child to be a CINA if the child has at least one parent available to assume custody. CJ § 3-819(e). *Second*, mother seems to assume that the general civil pleading rules apply to CINA petitions. From these two assumptions, mother proposes a rule that would hold that a local department may not file a CINA petition unless it has facts to support the contention that both of a child’s parents are unfit or unavailable.

We agree with mother’s first contention. Maryland law is clear that a child may only be found to be a CINA if neither parent is available:

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.

CJ §3-819(e). The legislative history reveals that this provision was added to the Code in 2001 to codify the result this Court had already adopted in *In re Russell G.*, 108 Md. App. 366 (1996). S. JUDICIAL PROCEEDINGS, FLOOR REPORT S.B. 660 (2001). This prohibition, both in statute and in the caselaw that preceded it, reflects Maryland’s strong preference that children be placed with a parent rather than in shelter care. *In re Yve S.*, 373 Md. 551, 574-75 (2003) (discussing Maryland’s “statutory hierarchy” of placement options,

prioritizing placement with the natural parents followed by placement with a relative, with placement in foster care as a last resort). Thus, as to her first point, mother is right.

We disagree, however, with mother’s second contention, that a CINA petition must comply with all of the general civil rules and, thus, that a local department cannot file a CINA petition unless it has and can plead facts that demonstrate that *neither* parent is fit. Under the normal rules, mother would be right: a lawyer cannot file a civil complaint without conducting a reasonable investigation to ensure that there is a factual basis for the claim, Rule 1-311(b), and that without that factual predicate, a complaint is subject to dismissal, Rule 2-303(b), and the attorney who files it may be subject to sanctions. Rule 1-341(a). For several reasons, however, we think the better view is that CINA petitions are subject to a “looser” pleading requirement. *First*, the requirements of a CINA petition are enumerated in their own statutory provision, in which the legislature merely requires that a “CINA petition ... shall allege that a child is in need of assistance and shall set forth in clear and simple language the facts supporting that allegation.” CJ §3-811(a). *Second*, unlike in ordinary civil litigation, a juvenile court need not dismiss a defective or incomplete CINA petition. *In re Najasha B.*, 409 Md. 20, 40 (2009) (A local department is not prohibited from maintaining a CINA petition “through the adjudicatory hearing stage of a case, despite changed circumstances that throw doubt on the facts that supported the original petition.”). Rather, a local department can amend—even in fundamental ways—allegations in a CINA petition all the way through the adjudication stage. *Id.*; Md. Rule 11-108(a) (stating that, with permission of the court, a juvenile petition may be amended “at any time prior to the conclusion of the adjudicatory hearing.”). *Third*, we think this result

is necessary to allow a local department to protect child safety by instituting proceedings immediately upon receiving a credible report of abuse or neglect by a custodial parent. CJ § 3-802(a), (b). *Finally*, we are confirmed in our view by reference to the minimalist CINA petitions filed and approved by this Court in *In re Russell G.*, 108 Md. App. 366 (1996). There, the sole allegation against the noncustodial parent was that the noncustodial parent “acquiesced” in the custodial parent’s conduct by allowing the child to remain in the dangerous environment. *Id.* at 377-78. In that case, we held that even that minimalist pleading satisfied the local department’s obligation under CJ § 3-811(a).

We hold, therefore, that the normal civil pleading rules do not apply to CINA petitions at least so as to permit a local department to file a CINA petition alleging that both parents are unfit even though at the time of filing it only has factual support for those allegations against the custodial parent.⁵

B.

Mother’s second attack on GCDSS’s bare bones CINA petitions is that they allowed GCDSS to accomplish a change in custody without the procedural safeguards that normally apply in custody modification cases. Mother correctly observes that, ordinarily, a

⁵ Our holding should not, however, be read to endorse a local department filing a CINA petition alleging that both parents are unfit when it has actual knowledge that one parent is fit. The Legislature may wish to consider revising the statute so that it allows a local department to plead that only a custodial parent is unfit, and permit it to: (1) investigate to determine whether there is a fit noncustodial parent, and, if so, permit the award of custody to that parent; or (2) if it already knows there is a fit noncustodial parent, pursue transfer of custody to that parent.

noncustodial parent must demonstrate a material change of circumstances before a court can consider whether a change in custody is in the best interests of the child. Md. Code, Family Law (“FL”) Article, §8-103; *Wagner v. Wagner*, 109 Md. App. 1, 29 (1996) (a circuit court’s inquiry must cease unless it finds that a material change in circumstances exists).⁶ She therefore contends that if GCDSS’s bare bones CINA petitions are allowed to stand here, local departments will be able to manufacture situations where CJ § 3-819(e) will apply so as to “to strip [a custodial parent] of her custody and award it to the other parent” without having to satisfy the strict test that typically governs custody modification proceedings.

We think, however, that mother’s argument misses the mark. It seems obvious that the 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 circumstance. Thus, we doubt that it is an easier standard to prove.

Further, it is clear that the legislature intended to provide juvenile courts with the discretion to transfer custody from an abusive custodial parent to an appropriate, willing, and able noncustodial parent in a CINA proceeding:

⁶ In fact, mother’s argument attributes these procedural safeguards to a parent’s constitutional right to the care and custody of the parent’s children. Ordinarily, however, those constitutional concerns don’t arise from the transfer of custody between a child’s parents but rather to a non-parental third party. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000) (holding that “the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”); *McDermott v. Daugherty*, 385 Md. 320, 353 (2005) (holding that parents have a fundamental, constitutionally-protected right to the care, custody, and control of their children).

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.*

CJ § 3-819(e) (emphasis added).⁷ Thus, the legislature envisioned a change in custody of the type that occurred in this case, where the allegations were sustained against only one parent—mother—and another willing and able parent—the fathers—existed to provide proper care for the children.

⁷ The legislature enacted CJ § 3-819(e) in response to this Court’s decision in *In re Russell G.*, which held that a child cannot be a CINA if it “has at least one parent willing and able to provide the child with proper care and attention.” 108 Md. App. at 377; S. JUDICIAL PROCEEDINGS, FLOOR REPORT S.B. 660 (2001). At the time *Russell G.* was decided, no statutory provision existed granting a court the express authorization to modify custody if a child could not be declared a CINA because the allegations could only be sustained against one parent. The Maryland Judicial Conference recommended that the legislature enact CJ § 3-819(e) to fill this void, explaining that:

This provision **allows the court to award custody to a non offending, non custodial parent even when there has not been a CINA finding.** This new provision prevents the situation that occurred in the *Russell G.* case where the custodial parent abused or neglected the child, but the court could not make a CINA finding and transfer custody because the non custodial parent was physically willing and able to care for the child, but for the legal custody of the offending parent.

MARYLAND JUDICIAL CONFERENCE, THE FOSTER CARE COURT IMPROVEMENT PROJECT (FCCIP) IMPLEMENTATION COMMITTEE, *Summary of Senate Bill 660 and House Bill 754* (Feb. 14, 2001) (emphasis added). The legislature accepted that recommendation. 2001 Md. Laws ch. 415 (S.B. 660).

We therefore hold that the juvenile court did not err by accepting the GCDSS's bare bones CINA petitions and granting custody to the children's respective fathers when the allegations in the petitions were sustained only against mother.

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