Circuit Court for Montgomery County
Case No. CINA-6-Z-17-0010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1434

September Term, 2017

IN RE: ADOPTION/GUARDIANSHIP OF
S.T.

Meredith,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: March 13, 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.

Mr. W., appellant, appeals the order of the Circuit Court for Montgomery County, sitting as a juvenile court, terminating his parental rights to his biological son, S.T., and granting guardianship of S.T. to the Montgomery County Department of Health and Human Services (the "Department"). S.T.'s mother, Ms. T., did not file an objection to the guardianship petition, thereby consenting to the termination of her parental rights.[1] She is not a party to this appeal.

Mr. W. presents the following question for our review:

> Did the court err by finding that Mr. W. was unfit to maintain a parental relationship with S.T. due to his incarceration and by terminating his parental rights in his son where the Department did not provide the father with any reunification efforts?

For the following reasons, we shall affirm the juvenile court's order.

BACKGROUND

S.T. was born in November 2014. A year prior to S.T.'s birth, Mr. W. and Ms. T. came to the attention of the Department due to allegations of neglect involving Ms. T.'s then three-year-old daughter, and evidence of domestic violence between Mr. W. and Ms. T. On or about November 13, 2013, Mr. W. was charged with assault, reckless endangerment, and trespass in connection with a domestic violence incident in which Ms. T. sustained a closed head injury, human bite marks, bruising, and swelling above her right eye. Mr. W. pled guilty to two counts of trespassing, which resulted in probation.

[1] Pursuant to Maryland Code (1984, 2012 Repl. Vol., 2017 Supp.) § 5-320(a)(1)(iii)(1)(C) of the Family Law Article ("F.L."), a parent will have consented to the grant of guardianship "by fail[ing] to file a timely notice of objection after being served with a show-cause order[.]"

In January 2014, Ms. T.'s daughter was placed in shelter care,[2] and the child in need of assistance ("CINA")[3] petition was dismissed when Ms. T. consented to giving custody of her daughter to the child's biological father.

On October 15, 2014, one month prior to S.T.'s birth, Mr. W. was arrested and charged with two counts of robbery, first-degree assault, false imprisonment, and theft of less than $1,000 arising from allegations that he tied up a prostitute in a hotel in Prince George's County, brandished a handgun, and stole her cell phone and $160 pre-paid Visa card. He subsequently entered an Alford plea to the robbery charge, and the remaining counts were not prosecuted. Mr. W. was sentenced to 15 years' imprisonment, with all but three years suspended, and he received credit for time served. He has remained incarcerated in state or federal prison since that time.

S.T., who was born in November 2014, tested positive for benzodiazapene, a prescription medication, at birth. S.T. suffered from respiratory distress and remained in the Neonatal Intensive Care Unit (NICU) for two days. The Department learned from Ms. T.'s psychiatrist, Dr. Ajirioghene Igbidie, that in November 2014, he had diagnosed her with Major Depressive Disorder and Post Traumatic Stress Disorder. After Ms. T.

[2] Pursuant to Md. Code (1973, 2013 Repl. Vol.) § 3-815(a) of the Courts and Judicial Proceedings Article ("CJP"), "a local department may authorize shelter care for a child who may be in need of assistance," prior to a CINA adjudication.

[3] A "child in need of assistance" ("CINA") is one who requires court intervention because the child has been abused or neglected, or has a developmental disability or mental disorder; and his or her "parents, guardian, or custodian are either unable or unwilling to give proper care and attention to the child and the child's needs." Md. Code (1973, 2013 Repl. Vol.), CJP §3-801(f).

reportedly informed Dr. Igbidie that she was not pregnant, he prescribed her a two-week supply of Zoloft, Ambien, and Xanax. Ms. T. subsequently reported to Dr. Igbidie that she had lost the prescriptions, and he provided her with a replacement prescription for a two-week supply of the medications.

While in the hospital, Ms. T. had requested pain medication at an unusually high frequency, raising hospital staff's concerns about Ms. T.'s ability to care for S.T. Ms. T. indicated to hospital staff that she had not received prenatal care for S.T. because "it's a waste of time" and she was "afraid someone would come take [her] baby away." S.T. was discharged from the hospital in Ms. T.'s care under an order for "protective supervision" by the Department, requiring that Ms. T. comply with a "Safety Plan" for S.T. [4]

On December 17, 2014, the court sustained the allegations of the first amended CINA petition, by agreement of both parents, first: that Ms. T. was taking prescription medication during her pregnancy and did not receive prenatal care. Second, S.T. tested positive for benzodiazapene at birth. Third, Ms. T. had "ongoing serious mental health issues, as well as substance abuse issues," and "a prior Child Protective Services history with another child." Fourth, S.T.'s parents had been involved in domestic violence. Fifth, Ms. T. tested positive for "other opiates" on December 11, 2014. Sixth, Mr. W. was currently incarcerated, awaiting trial on charges of armed robbery, assault, false imprisonment and theft. The court determined that S.T. had been neglected, and that his

[4] A Safety Plan is put in place when there are safety concerns in the home.

parents were unable to give proper care and attention to him and his needs. The court ordered that S.T. remain in the care of Ms. T. under the protective supervision of the Department.

In February 2015, the Department placed S.T. in shelter care after police found Ms. T. at home, intoxicated, with S.T. in her care. Following emergency shelter care hearings on March 2 and 4, 2015, the court ordered that S.T. be placed in the custody of the Department for placement in a foster home.

On April 22, 2015, the court issued a Removal Merits Order, continuing S.T.'s placement in foster care in light of Ms. T.'s "lack of compliance with the Order of Protective Supervision, and [her] mental health and substance abuse issues." The Department placed S.T. with a foster mother, Ms. C., with whom S.T. has lived ever since.

Lakisha Barksdale, a social worker for the Department, communicated with Mr. W. through correspondence and telephone calls regarding the reunification process with S.T., and also spoke with his prison case manager. Mr. W. provided Ms. Barksdale with the names of two potential relative placement resources, a paternal aunt, H.J., and a cousin, T.J., whom Mr. W. had represented to Ms. Barksdale was his sister. Ms. Barksdale contacted both resources, but neither was willing to be a resource for S.T., and neither expressed an interest in reunification services. Nor did either of Mr. T.'s family members request visits with S.T.

On November 24, 2014, the United States District Court for the Northern District of West Virginia issued a warrant for Mr. W.'s arrest on the charge that he had violated conditions of his supervised released for a 2009 narcotics distribution conviction. Following Mr. W.'s release from Eastern Correctional Institution ("ECI") in Maryland in December 2016, he was detained by federal authorities on the outstanding warrant and remanded to federal custody.[5] Mr. W.'s supervised release was revoked and he was ordered to serve 24 months' federal incarceration consecutive to his sentence for the 2015 robbery conviction. Mr. W. did not advise the Department of his detention, and the Department was not aware of Mr. W.'s continued incarceration until February 1, 2017. Mr. W. was subsequently transferred to FCI Williamsburg in South Carolina. Mr. W.'s scheduled full release date is August 2018, to be followed by 15 months of federal supervision, and three years of supervised probation.

On March 13, 2017, the Department filed a petition for guardianship with the right to consent to adoption of S.T. Mr. W. noted an objection. On August 10, 2017, the juvenile court held a trial on the Department's petition. Mr. W. participated by telephone. Ms. W. did not file a timely objection, and did not participate in the trial.

[5] The exact date on which Mr. W. was detained by federal authorities is unclear from the record. The U.S. District Court issued an Order of Detention on December 5, 2016, committing Mr. W. to confinement in a federal corrections facility. Mr. W. was credited, however, for time served beginning on December 2, 2016. According to the Department of Corrections, Mr. W. was released from ECI and placed at Chesapeake Detention Center on December 12, 2016.

Mr. W. testified that his full-term release date is August 2018. Mr. W. explained that, because he had not had any infractions, he expected to qualify for early release to a halfway house as early as January or February of 2018. While incarcerated, Mr. W. has taken one parenting class and a brick masonry class, as well as a class to prepare him for re-entry into society. Prior to his incarceration, Mr. W. had enrolled in training to be an electrical technician, and obtained his General Equivalency Degree (GED). Mr. W. said that he plans to pursue a career in carpentry upon his release.

When Mr. W. was 12 years old, his father died, and his mother died in 2007. Mr. W. lived with his aunt for most of his life and he considered her to be a parent to him. Mr. W. stated that he has a history of substance abuse with marijuana, but that he has not abused drugs since 2008. He also acknowledged that he had a history of domestic violence with Ms. T.

Mr. W. has met S.T. once, during a court consultation, and has sent S.T. three cards and a photograph. Prior to the November 5, 2015, review hearing, Ms. Barksdale communicated with Mr. W. regarding the reunification process, and provided him a photograph of S.T. The Department arranged for Mr. W.'s participation in two family involvement meetings regarding S.T., one in October 2015 and one in February 2016.

According to Ms. Barksdale, she had inquired whether ECI offered any programs to assist with reunification, in addition to the group parenting class that Mr. W. had already taken, but she was advised that there was nothing else available to inmates at that facility. After Mr. W. was transferred to federal prison in South Carolina, Ms. Barksdale

spoke with him about S.T. and potential services at that prison. Ms. Barksdale also attempted to contact Mr. W.'s counselor and case manager at the federal prison regarding available services, but her calls were not returned.

Mr. W. stated that he would complete any court-ordered evaluations and participate in therapy, if required, as well as enter into a service agreement with the Department upon release. Mr. W. requested that the court deny the Petition because he wants to be part of his son's life. Mr. W. grew up without a father, and said he wants a different life for his son. Mr. W. stated that, since becoming aware of his son, he has changed his life and has stayed out of trouble while incarcerated.

S.T.'s foster mother, Ms. C., testified that S.T. has lived with her since he was three months old, and that he was currently three years old. Ms. C. described S.T. as smart, happy, very friendly, very loving, and well-adjusted in her home. He calls her "Mommy," giving her hugs and kisses, and not wanting to leave her side. S.T. attends a preschool readiness program and is doing well in the program. Ms. C. would like to adopt S.T. She is open to future contact between S.T. and his biological parents.

The juvenile court accepted Ms. Barksdale as an expert in social work. She testified that S.T. and Ms. C. have a "loving and appropriate relationship." She observed that Ms. C. has done an "outstanding job" raising S.T. S.T. is "developmentally on track in terms of his emotional and physical ties and needs." Ms. Barksdale recommended a permanency plan of adoption for S.T. Ms. Barksdale based her recommendation on the loving, stable relationship between S.T. and Mrs. C., and the likelihood of S.T.'s

continued successful development in Ms. C.'s home and community environment. In forming her recommendation of adoption, Ms. Barksdale also considered the lack of any bond or relationship between S.T. and Mr. W., Mr. W.'s extensive criminal history, including his history of domestic violence with S.T.'s mother, and the number of unknown factors related to Mr. W.'s emotional stability, living situation, and ability to participate in programs upon his release.

On September 7, 2017, the court issued a 25-page opinion, including findings of fact and conclusions of law, and a final order terminating Mr. W.'s parental rights in S.T., and granting guardianship of S.T. to the Department with the right to consent to adoption. Mr. W. noted a timely appeal.

STANDARD OF REVIEW

We review termination of parental rights decisions under three interrelated standards of review. *In re Adoption/Guardianship of C.A. & D.A.*, 234 Md. App. 30, 45 (2017) (citation omitted). First, we review factual findings under the clearly erroneous standard. *Id*. Second, we review legal conclusions *de novo*. *Id.* Finally, we review the juvenile court's "ultimate decision" for an abuse of discretion. *Id*.

On appeal, we must decide "'whether there was sufficient evidence – by a clear and convincing standard – to support [the court's] determination that it would be in the best interest of [the child] to terminate the parental rights of [the parent].'" *Id.* at 46. (quoting *In re Adoption No. 09598 in the Circuit Court for Prince George's County*, 77 Md. App. 511, 518 (1989)). We must determine whether the court's decision was clearly

erroneous, and in doing so we "'must assume the truth of all the evidence, and of all the favorable inferences fairly deducible therefrom, tending to support the factual conclusion of the trial court.'" *Id.* (quoting *In re Adoption No. 09598*, 77 Md. at 518). The juvenile court's determination of the best interest of the child must be "accorded great deference, unless it is arbitrary or clearly wrong." *Id.* (citations omitted).

DISCUSSION

Mr. W. contends that the evidence was insufficient to support the court's finding by clear and convincing evidence that he was unfit to maintain a parental relationship with S.T., and, on that basis, it abused its discretion in terminating his parental rights. First, he contends that the court erroneously concluded that he willfully absented himself from S.T.'s life as a result of his incarceration. Second, he contends that the court erred in concluding that he was unfit where the Department did not offer him any services during his incarceration. Third, he contends that there was no evidence to suggest that S.T. would be harmed by a relationship with him.

A termination of parental rights decision involves a balancing of the fundamental right of parents to raise their children and the State's responsibility to protect children from abuse and neglect. *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 497 (2007). The "transcendent standard" governing the determination of whether to terminate parental rights is the best interests of the child. *In re Adoption of Ta'Niya C.,* 417 Md. 90, 112 (2010). Though we recognize that there is a presumption of law and fact that it is in the best interest of a child to remain in the care and custody of his or her parent, that

presumption "may be rebutted upon a showing either that the parent is 'unfit' or that 'exceptional circumstances' exist" that would make continued parental custody detrimental to the best interest of the child. *Rashawn H.,* 402 Md. at 495. A finding of parental unfitness or exceptional circumstances must be established by clear and convincing evidence. *Id*. at 499. It is "of critical significance," that the court give careful consideration to the factors set forth in Md. Code, (1984, 2012 Repl. Vol., 2017 Supp.) § 5-323(d) of the Family Law Article ("F.L."). *Id*. at 499.

In applying the statutory factors of F.L. § 5-323(d), and the requirement that "a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests," the juvenile court found that Mr. W. is not able to provide a safe environment for S.T.:

> The record with respect to [Mr. W.] reflects the Department's significant safety concerns. [Mr. W.'s] history of domestic violence with [Ms. T.] is documented in the First Amended CINA petition. Ultimately, he pled guilty to criminal charges in connection with this incident . . . .
>
> [Mr. W.'s] extensive criminal history is discussed *supra*. This record, which includes serious CDS distribution offenses, possession of a firearm, and robbery, suggest a pattern dating back over 14 years of dangerous criminal behavior that has apparently continued throughout [Mr. W.'s] adult life.[6] The record is unclear as to whether he has spent even a single calendar year since 2003 without being incarcerated at one point or another.

[6] Mr. W. is now 40 years old.

> These choices and behaviors on the part of [Mr. W.] rightfully form the basis of the [c]ourt's conclusion that **he is unable to provide a safe, stable, crime– and drug-free environment for [S.T.]**

(Emphasis added; footnote omitted.)

Mr. W. argues that, because the actions causing his incarceration occurred before S.T.'s birth, he did not willfully absent himself from S.T.'s life. We disagree with Mr. W.'s assertion that the court erred in concluding that he himself was responsible for the circumstance of being separated from S.T. since the child's birth. The evidence relied on by the court indicated that Mr. W. has an extensive criminal history, aptly described by the Department as "a criminal lifestyle," spanning at least the past 14 years, and continuing through the month before S.T. was born. Although the criminal acts that precipitated Mr. W.'s convictions pre-dated S.T.'s birth, the incarceration that had the effect of forcing his absence from the first three years of S.T.'s life was clearly the result of willful misconduct on the part of Mr. W.

One of the consequences of that criminal conduct was that Mr. W. was not available to provide care for S.T. during the early three to four years of life, with no assurances of future availability. The juvenile court found:

> Although [Mr. W.] participated in some programs in prison, the Department has been unable to engage in meaningful services with him. His unavailability is due solely to his conduct. Given his long criminal history, it seems clear that S.T. could never have been safe and stable in [Mr. W.'s] care. [Mr. W.'s] crimes were willful acts on his part and incarceration was the necessary and foreseeable consequence. A parent who willfully absents himself from any meaningful contact with the child over a period of time eventually removes himself as an option to parent his child,

> especially when the child's caregivers are willing to adopt.[7] [S.T.], by contrast, has thrived in his foster home. He is in a safe and consistent place. His foster mother has given [S.T.] all of the benefits of a stable parent, most importantly, a healthy, loving bond.
>
> [Mr. W.] has and continues to possess many barriers to reunification, *inter alia*: issues attendant to his involvement with the criminal justice system; lack of stable housing upon release; the fact that, if his plan came to pass the Department would need to complete an ICPC homestudy on the paternal aunt's home in the District of Columbia – the same aunt who refused to be a placement resource for S.T.; unresolved domestic violence issues; and most importantly, the lack of any connection whatsoever between him and S.T. The court finds that [Mr. W.] is not a [fit] parent for [S.T.] and likely will not be able to become a fit parent in the foreseeable future. [Mr. W.] is unfit because he abandoned the child through [his] actions, which resulted in his incarceration, has entrusted the child to [Ms. T.] when she was clearly incapable of being a source of reunification, and has delegated [S.T.'s] care to the Child Welfare system for the past 30 months. Even under the best outcome that [Mr. W.] suggests, S.T. would have to wait another five months just to *begin* the process of exploring reunification with Father. This is an untenable request.

(Emphasis in original)(other footnotes omitted).

In *In re Adoption/Guardianship of C.A. & D.A.*, we considered a challenge made by a father whose parental rights were terminated while he was incarcerated, and who was scheduled to be deported upon his release. 234 Md. App. at 43. In rejecting the father's argument that his inability to take immediate custody of his children due to his incarceration should not impact the decision of whether to terminate his rights, we noted that, "not only was he unable to take care of the [c]hildren immediately, or even in the

[7] The juvenile court cited *In re Adoption of Cadence B.*, 417 Md. 146 (2010), wherein the Court of Appeals said: "The previously abusive or neglectful parent shoulders the burden of proving that the past conduct will not likely be repeated." *Id*. at 157.

immediate future," there also existed "the very real possibility" that he may never be able to take care of them. *Id*. at 56.

The same is true in the present case. Mr. W.'s inability to be a resource for S.T. for the 30 months that S.T. has been in the Department's care was due to his prior convictions, violation of probation, and ultimately, his pursuit of a criminal lifestyle. We perceive no error in the court's reliance on Mr. W.'s past criminal conduct, and extensive periods of incarceration, in determining his unfitness as a parent. *See In re Dustin T.*, 93 Md. App. 726, 731 (1992) ("[A] parent's past conduct is relevant to a consideration of his or her future conduct.") (citing *McCabe v. McCabe*, 218 Md. 378, 383 (1959), and quoting the following language from *McCabe*: "In making our decision [as to the future of the infant at issue] we should not gamble about that future. We can only judge the future by the past."). Mr. W. has spent most of his adult life in and out of prison. Based on his conduct up to the time S.T. was born, there was no reason for the court to find that he will be able to provide a safe and stable home for S.T. in the immediate future, if ever, and, as a result, the court did not err in determining that he is unfit to parent S.T.

Mr. W. also argues that the juvenile court's finding of unfitness was erroneous because the Department failed to provide him with services to facilitate reunification. Again, we disagree. With respect to F.L. § 5-323(d)(1)(ii) — requiring the court to consider "the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent" — the court found:

> The Department made many efforts to serve S.T. and his family… As discussed *supra*, [Mr. W.] participated in services while incarcerated.

> Both Ms. Barksdale and [Mr. W.] testified that further services were unavailable, given his incarceration. Perhaps the most important service – visitation to build a parent-child bond – was impossible [due to the locations of the facilities in which Mr. W. has been incarcerated and the young age of S.T.].

Mr. W.'s incarceration, especially his out-of-state incarceration, limited the services that the Department could provide to him. Ms. Barksdale communicated directly with Mr. W. regarding S.T.'s permanency plans and arranged for Mr. W. to participate in family involvement meetings. Ms. Barksdale also contacted Mr. W.'s aunt and cousin, who were the only relatives he ever identified as potential family resources, but neither relative was willing to be a resource for S.T. Ms. Barksdale testified that she inquired about reunification services at ECI, but that she was aware of no services available to Mr. W., beyond the classes that he had already taken. Ms. Barksdale also attempted to contact Mr. W.'s counselor and case manager at the federal prison in South Carolina regarding available services, but she received no response.

The Department had an obligation to make "reasonable[,]" not extraordinary, "efforts … to … reunify" S.T. and Mr. W. *See* F.L. § 5-525(e)(1) (requiring that "reasonable efforts shall be made to preserve and reunify families"). We conclude that, under the circumstances, the juvenile court did not err in finding that the Department's efforts satisfied the "reasonable efforts" requirement. *See In re James G.,* 178 Md. App. 543, 601 (2008) ("the Department's efforts need not be perfect to be reasonable[.]").

Mr. W.'s final contention is that the court erred in determining that he was unfit "where there was no evidence to suggest that S.T. would be harmed by being introduced

to his father or developing a relationship with him." While Mr. W.'s expressed intent to have an opportunity to parent S.T. is noble, the reality is that he has never cared for S.T., and that he has spent the entirety of S.T.'s life in prison. Further, Mr. W. has a history of domestic violence, and was not able to present any evidence that assured the court "that the past conduct will not likely be repeated." *Cadence B., supra*, 417 Md. at 157. It was not clearly erroneous for the juvenile court to conclude "that [Mr. W.] poses an unacceptable risk to [S.T.'s] future safety." He has no bond with S.T. On the other hand, S.T. has an extremely strong bond with his foster mother, his only parent figure.

As the juvenile court noted, it is important for a child to have "real permanency." The Court of Appeals has recognized that "[a] critical factor in determining what is in the best interest of a child is the desire for permanency in the child's life." *In re Adoption of Jayden G.*, 433 Md. 50, 82 (2013). Long term foster care is the least desirable permanent placement for a child. *See In re Adoption/Guardianship No. 10941*, 335 Md. 99, 121 (1994). At the time of the guardianship hearing, S.T. had been in foster care for 30 months. The court found that "it would not be in [S.T.]'s best interests to extend the foster period in order to enable [Mr. W.] to receive further services." The "realities of the child's life" must be considered in the court's determination of the best interests of the child. *See In re Ashley S.*, 431 Md. 678, 719 (2013). "In balancing fairness to the parent and fulfilling the needs of the child, the child prevails." *Id.*

In *In re Adoption/Guardianship of C.A. & D.A.*, we noted:

> [M]aintaining Father's parental rights under these circumstances would have placed the Children's status in a state of suspended animation until a

> future date that may never occur. We cannot say, therefore, that the trial court was clearly erroneous or abused its discretion in finding that terminating Father's parental rights was in the Children's best interest.

234 Md. App. at 56.

In this case, maintaining Mr. W.'s parental rights so that Mr. W. could possibly develop a relationship with S.T. would have the effect of placing S.T.'s future in a holding pattern until some unforeseeable date. The juvenile court did not err in concluding that Mr. W.'s request to continue his parental rights was "untenable," and that S.T.'s best interest was served "by having real permanency" that would result from terminating Mr. W.'s parental rights, and granting guardianship to the Department with the right to consent to S.T.'s adoption.

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