UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2359

September Term, 2015

IN RE: ADOPTION/GUARDIANSHIP OF

K.D. & A.B.

Meredith,
Reed,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: August 29, 2016

Following a three-day hearing in the Circuit Court for Baltimore County, sitting as a juvenile court, Judge Vicki Ballou-Watts on January 14, 2016, granted the petition of the Baltimore County Department of Social Services ("Department") to terminate the parental rights of Maryellen L. ("Mother") to her children K.D. and A.B. K.D., a son, was born in May 2009 and A.B., a daughter, was born in April 2012. The identity of each child's father is unknown. Both children had been out of the Mother's custody since July 2012, three and one-half years before the TPR order of January 14, 2016. The granting of the petition awarded to the Department the Guardianship of the two children with the Right to Consent to Adoption or Long-Term Care Short of Adoption.

On this appeal, the Mother contends:

1. That Judge Ballou-Watts erroneously accepted the conclusions of Dr. Robert Kraft;

2. That Judge Ballou-Watts erroneously failed to address the factors enumerated in Maryland Code, Family Law Article, § 5-323; and

3. That Judge Ballou-Watts was clearly erroneous in finding that it would be in the best interest of the children to terminate the Mother's parental rights.

The Conclusions of Dr. Kraft

The Mother's attack on the court's apparent acceptance of certain of Dr. Kraft's conclusions as clearly erroneous fact-finding is bizarre. In presenting its case for the termination of the Mother's parental rights, the Department presented five separate expert witnesses. Dr. Kraft was but one of them. All five experts, moreover, were in full agreement

as to their bottom-line recommendations that the Mother was unfit to perform her parenting responsibilities. The Department's case was an overwhelmingly strong one even without Dr. Kraft's testimony.

Case worker Shanae Hamlett testified as an expert in the general area of "social work, with a subset of child welfare, child abuse and neglect, children in foster care, permanency planning, and risk and safety assessment." She had worked closely with the Mother and the two children over a three-year period. Joanne Linsay also testified as an expert witness. She was the adoption worker for K.D. and A.B. and was fully aware of their then current circumstances. She had observed them in their foster home on multiple occasions. Sharon Bloom also testified as an expert witness. Her focus was on the inadequacy and unfitness of the Mother as a parent. She testified at great length and her recommendation was emphatic:

> "In light of the significant untreated mental health issues, and the lack of progress in caring for A.B, and K.D. even during supervised visits, where there have been some safety issues, my opinion is that it would be unsafe, their needs would not be met. It would be unsafe for them to return to her care."

(Emphasis supplied).

Dr. Lawrence Heller was accepted as an expert in clinical psychology. He conducted an evaluation of the Mother in December 2013. He diagnosed the Mother as suffering Mood Disorder, Borderline Personality Disorder, and Anxiety Disorder. He explained that when

Borderline Personality Disorder is combined with the mood instability of a Mood Disorder, it can severely impact an individual's ability to function and maintain relationships.

When Dr. Robert Kraft was called as a witness, he was accepted, without any objection by the Mother, as an expert in the field of "clinical psychology, clinical neuropsychology, ability to parent adequately, and risks and safety assessments of children." He administered the Wechsler Adult Intelligence Test on the Mother, as well as the Parenting Stress Index and Parental Awareness Skills Test. He also administered the Milan Clinical Multi-Axial Personality Inventory Test. All of the test results indicated that the Mother had a severe mental disorder, specifically a Mood and Personality Disorder with Narcissistic and Antisocial Traits. His testimonial conclusion was:

> "It is a persistent irresponsibility and failure to meet obligations, both financial and social, that is characteristic of her antisocial acting out behavior along with this sort of manipulative pattern of behavior deception and the ability to rationalize having hurt another person in some way either physically or emotionally.
>
> "... it is a behavioral disorder that is highly resistant and deeply ingrained. It is a long-term pattern of viewing yourself, the world around you, and other people, and it is characterized by behaving in a manner that is aggressive towards people and/or property by a pattern of lying and deception, by a pattern of being manipulative, looking at individuals as objects to serve the self rather than a relationship to be nurtured, and repeated irresponsibility in meeting social and financial obligations and maintaining work related behavior and/or completing education.
>
> "As to her ability to parent, I think the main thing that you would find, and I think what you see in her behavior as the Department has been working with her, is this sort of failure to meet the obligations that she has been required to do by the Department and the Court.

> "She hasn't maintained consistent treatment in health although this has been recommended to her. She hasn't maintained consistent visitation with her child although he has to know that this is being looked at and monitored carefully.
>
> "And what you get in response from [the Mother] is, well, this happened or I was sick on this day, or it was really cold out and I didn't want to take the bus, or there's always an excuse and an antisocial kind of characters tend to present plausible excuses, but the accumulation of all these plausible excuses leads to the one conclusion that the individual is simply failing to meet their obligations. It is just simply a pattern of irresponsible behavior."

There was no objection to this testimony being received and its admissibility in evidence is, therefore, not an issue before us. Dr. Kraft's conclusion, moreover, was neither controverted nor discredited in any way. The Mother called no expert of her own. Dr. Kraft's conclusions, moreover, were corroborated by those of Dr. Heller, although the two of them had not conferred with each other prior to their testifying.

Our primary problem in rejecting this contention is that we have no idea exactly what is being contended. There was no challenge to Dr. Kraft's qualifying as an expert witness. So that is not before us. There was no objection to any of Dr. Kraft's testimony being received in evidence on the basis of irrelevancy or any other evidentiary impediment. So that is not before us. Nor is there any contention or argument that the evidence was not legally sufficient to permit Judge Ballou-Watts to terminate the parental rights of the Mother. There has certainly been no contention framed in such terms of legal insufficiency nor would any such contention be of any avail to the Mother even if it had been made. In such a case, we would not hesitate to hold the other evidence in this case would have been abundantly

sufficient to justify the termination of the Mother's parental rights even if Dr. Kraft had never appeared as a witness in this case.

What then does this contention consist of? Defense counsel is simply arguing with the apparent reasoning of Dr. Kraft as he narrated some of his thinking process. That might make for good cross-examination or for good closing argument, but that's about it. Counsel, however, baldly alleges that Judge Ballou-Watts was clearly erroneous in her fact-finding without pointing out what findings of fact were actually found by her that were clearly erroneous. In her extremely thorough and extensive findings as she made her ruling, the judge made only a scant allusion to Dr. Kraft, joining Dr. Kraft's conclusion to that of Dr. Heller in any event and limiting both to the generic conclusion of "serious mental health disorders" without any mention of more trivial constituent subfindings.

> "Why do we know, and how do we know that mental health was so important to this case? Because the Department also made arrangements for two evaluations. Doctor Heller in 2013 and again this year in November Doctor Kraft. They both diagnosed [the Mother] with serious mental health disorders and, as was pointed out in closing argument, their conclusions and findings were very similar even though neither one saw the other's report."

(Emphasis supplied).

There was absolutely nothing clearly erroneous about that. If, on occasion, Dr. Kraft drew an ominous conclusion from what counsel deemed to be an arguably ambiguous predicate, counsel sought to offer an alternative and less sinister explanation for the ambiguity. Counsel conveniently forgets that if two opposing inferences are possible from

an ambiguous predicate, we are enjoined to accept that version of the evidence most favorable to the prevailing party (in this case, the Department and the TPR decision). Counsel's charge of clearly erroneous fact-finding, moreover, appears to be not so much directed at Judge Ballou-Watt's very limited fact-finding but at Dr. Kraft's antecedent fact-finding (actually, his reasoning process). Judge Ballou-Watts' general agreement with both Dr. Kraft and Dr. Heller does not necessarily "buy into" every jot and tittle of Dr. Kraft's reasoning process. To borrow an interesting word from Dr. Kraft's testimony, our feeling is that this contention itself is "hypomanic."

The § 5-323(d) Factors

The Mother's second contention strikes us as woefully insubstantial. The contention asserts in boldly conclusive terms:

> "The trial court failed to address the factors enumerated in [M]d. Code Family Law Art. Sec. 5-323 and to make the specific consideration and findings as to the specific statutory factors."

We fully agree with the Mother that Family Law Article § 5-323(d) does, indeed, list a number of factors that the trial judge must consider before making the decision to terminate parental rights. The trial record persuades us, however, that Judge Ballou-Watts did just that. She was fully aware of her obligation in that regard. As she prepared to announce her analysis of the case and her extensive findings of fact, covering a full 18 pages of the trial transcript, she announced that she had considered all of the required factors:

> "I have considered all the factors as required under the statute and I will make my findings as follows."

(Emphasis supplied).

She was not unaware of the statutory requirement. As she subsequently concluded her extensive analysis and fact-finding, Judge Ballou-Watts reiterated her belief that she had considered all the required factors:

> "I think that I have addressed all of the factors. I do find that the Department has met its burden by clear and convincing evidence, and I specifically find that there are exceptional circumstances in this case that make it in the children's best interests that this petition be granted."

(Emphasis supplied).

In the comprehensive brief filed by Chief Counsel for the Child Advocacy Project of the Eastern Shore, representing the respondent children, K.D. and A.B., counsel has set out, section by section and sub-section by sub-section, each of the manifold factors listed in § 5-323(d). Immediately after each of those factors, the brief then sets out Judge Ballou-Watt's express findings with respect to each such factor. It would be pointless to engage in the tedious exercise of setting them all out here. It is enough to note that we have reviewed them, factor by factor, and find § 5-323(d) to have been abundantly satisfied.

In the Mother's appellate brief, the Argument supporting this contention consists of a single page plus several lines. In the course of that very cursory Argument, the Mother fails to point out or to mention a single required factor that the trial court failed to consider. The Mother simply throws out a generic challenge and then fails to follow up with any

particularization. We would remind this appellant that in the appellate process generally, the burden is allocated to the appellant to persuade the reviewing court that reversible error occurred. It will not do simply to proclaim a general challenge in the hope that that will shift to the appellee a burden to prove that no reversible error occurred. It is not enough to tell us that the trial judge failed to follow the rule. The Mother must tell us in precisely what respect the trial judge failed to follow the rule.

Above and beyond this totally insubstantial challenge with respect to the judge's consideration of all required factors, the Mother also alleges that Judge Ballou-Watts failed to utilize the proper standard of persuasion:

> "The trial court in this case, aside from not examining the statutory factors, also failed to make the requisite 'clear and convincing evidence' finding required by Md. Family Law Art. Sec. 5-323(b)[.]"

(Emphasis supplied).

That, however, absolutely is not the case. We repeat Judge Ballou-Watts' closing paragraph as she expressly stated that she was satisfied by the "clear and convincing" burden of persuasion:

> "I think that I have address all of the factors. I do find the Department has met its burden by clear and convincing evidence, and I specifically find that there are exceptional circumstances in this case that make it in the children's best interests that this petition be granted."

(Emphasis supplied).

Such a flatly incorrect assertion does strain our reliance of the Mother's contentions generally.

The TPR Decision Itself

The Mother's third and final contention is:

> "The trial court erred in granting the department's petition to terminate appellant's parental rights the trial court was clearly erroneous in finding it to be in the best interest of the children to terminate mother's parental rights."

(Emphasis supplied).

The challenge is to the court's ultimate decision to terminate the Mother's parental rights. That decision will be reviewed by the abuse of discretion standard. To be sure, the conclusion that TPR is in the best interests of the children is in a sense a finding of fact. It is, however, a finding of an ultimate fact, a conclusory fact, a mixed question of law and fact. The appellate inquiry, in such a case, is whether such a finding (and consequent ruling) is or is not an abuse of discretion. In re Yve S., 373 Md. 551, 586, 819 A.2d 1030 (2003). That ultimate finding of fact, of course, may frequently be the product of a series of first-level findings of fact that contribute to the ultimate or conclusory finding. It is these findings of first-level facts that are reviewed by the clearly erroneous standard.

In a sense, our legal vocabulary may be suggesting a distinction without a difference. When the law recognizes the prerogative of a trial judge to make first-level findings of fact that are not clearly erroneous and to make an ultimate or conclusory finding of fact (and ruling) that is not an abuse of discretion, it affords the judge in either event a wide range of

permissible fact-finding. It is, moreover, extremely deferential regardless of whether the judge's modality is that of finding first-level facts or that of finding (and ruling) on the case's ultimate fact.

On this contention, the Mother is of necessity challenging the ultimate fact of a need for TPR. Her supporting argument in her brief, however, consists of challenging a whole range of Judge Ballou-Watts's statements in her final opinion as clearly erroneous. That opinion came at the conclusion of the testimony and after hearing argument by counsel. The Mother's current argument in her appellate brief, therefore, would have been a very appropriate nisi prius argument before Judge Ballou-Watts as she considered her ultimate decision. As of the present, however, we are at a different level of review. The thrust of the Mother's argument comes too late. If even two or three of perhaps a dozen or two of constituent findings of first-level facts were, arguendo, clearly erroneous, that would by no means compel a holding that the ultimate finding (and ruling) on the conclusory fact was an abuse of discretion. Our concern on this appeal is whether the TPR order itself was an abuse of discretion.

The Department's case in support of its petition for TPR consisted of the testimony of five expert witnesses: case worker Shanee Hamlett; adoption worker Joanne Linzay; Dr. Lawrence Heller; Dr. Robert Kraft; and social worker Sharon Bloom, along with supporting documents and court orders. The competency of the witnesses to testify as experts was never challenged. Their testimony was admitted without objection. There was never a motion by

the Mother to strike any of their testimony from the record. The testimony of the Mother and her current husband did not effectively controvert in any way this body of evidence presented by the Department.

This then was the body of evidence that was in the case. We need not repeat it here. It is in the record. It was indisputably the prerogative of the factfinding trial judge to credit the witnesses and to give their testimony such weight as she might choose to give it.

It is also clear that that body of evidence, fully credited and given maximum weight, is legally sufficient to support a TPR decision. We are at a loss, therefore, to understand how Judge Ballou-Watts's decision to terminate the Mother's parental rights, a decision fully supported by legally sufficient evidence, could be deemed an abuse of discretion. We hold that there was no abuse of discretion.

The mother embellishes her argument by cherry-picking isolated sentences from the excellent opinion of Judge Wilner for the Court of Appeals in In re Rashawn H., 402 Md. 477, 937 A.2d 177 (2007). We fully agree that a TPR decision is far more dire than a custody decision and is, therefore, surrounded by procedural protections. Judge Wilner does then go on, however, to leaven the rhetoric:

> "Even in those cases, however, we have not discarded the best interests of the child standard, but rather have harmonized it with that fundamental right.
>
> "We have created that harmony by recognizing a substantive presumption – a presumption of law and fact – that it is in the best interest of the children to remain in the care and custody of their parents. The parental

> right is not absolute, however. The presumption that protects it may be rebutted upon a showing either that the parent is 'unfit' or that 'exceptional circumstances' exist which would make continued custody with the parent detrimental to the best interest of the child."

402 Md. at 495. (Emphasis supplied).

Fully cognizant of the procedural constraints, Judge Ballou-Watts's opinion concluded:

> "I do find the Department has met its burden by clear and convincing evidence, and I specifically find that there are exceptional circumstances in this case that make it in the children's best interests that this petition be granted."

(Emphasis supplied).

The absolute inability of the Mother in this case to provide a home or a proper parental environment for her children had dragged on for three and one-half years. The Mother relies on the fact that her visits with the children are pleasant to justify prolonging their indeterminate status indefinitely. In recognizing that the children were entitled to get on with their lives, Judge Ballou-Watts put their relationship with their Mother in realistic perspective:

> "I believe that K.D. and A.B. have some feelings towards their mother. They obviously enjoy some of the visits that they have had with her over time but I don't, I don't find that the relationship is one of a true parent/child in a sense. It is more of someone that they visit with and have fond relationship with but that is the extent.
>
> "With respect to their relationship to [the foster mother] it is clear that they love and have bonded with her. They call her mother. They don't call her mother. They call her mama, and they also bonded with her extended family.

> They go on trips together. They are included in the extended family's activities and they love her.
>
> "These kids have a well-rounded life. They have a life of structure, stability, love and safety. And so I find that this placement is ideal for them and has been. They have been there I believe since 2013 with [the foster mother]. So this is not someone that they just were placed with.
>
> "The expert testimony in this case, I've made reference to what Doctor's Kraft and Heller have testified to. Ms. Sharon Bloom also testified that permanency is needed because the children need to know that they have a place they can call home.
>
> "The potential for disruption in their lives if this petition is not granted could lead to significant regression. They are doing well now and it would be highly detrimental for them if the court did something other than grant the Department's petition."

(Emphasis supplied).

The Court of Appeals in the Rashawn case, 402 Md. at 501, spoke with the same voice in recognizing that a child's childhood is finite and that time is of the essence.

> "The State is not required to allow children to live permanently on the streets or in temporary shelters, to fend for themselves, to go regularly without proper nourishment, or to grow up in permanent chaos and instability, bouncing from one foster home to another until they reach eighteen and are pushed onto the streets as adults, because their parents, even with reasonable assistance from DSS, continue to exhibit an inability or unwillingness to provide minimally acceptable shelter, sustenance, and support for them. Based upon evidence of the effect that such circumstances have on the child, a court could reasonably find that the child's safety and health of the child is jeopardized. Recognizing that children have a right to reasonable stability in their lives and that permanent foster care is generally not a preferred option, the law requires, with exceptions not applicable here, that DSS file a TPR

> petition if "the child has been in amount-of-home placement for 15 of the most recent 22 months."

(Emphasis supplied).

Instead of Rashawn's "15 out of the most recent 22 months," the out-of-home placement in this case has been for 42 out of the last 42 months.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANT.