UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 161

September Term, 2016

IN RE: ADOPTION/
GUARDIANSHIP OF J.B.

Eyler, Deborah S.,
Reed,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: September 14, 2017

This case involves an order of the Circuit Court for Baltimore County (the "juvenile court") terminating the parental rights of Mr. B. (the "father") and Ms. B. (the "mother") to their youngest daughter, J.B. Both parents appealed. Together, they present five partially-overlapping questions for our review,[1] which all boil down to:

> I. Whether the juvenile court erred where it terminated the appellants' parental rights based on parental unfitness and the existence of exceptional circumstances.

For the following reasons, we answer the above question in the negative and, therefore, shall affirm the judgment of the juvenile court.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. B. and Ms. B. (the "appellants") live together but are not married. They have three children: M.B., a boy, born in October 2010; Y.B., a girl, born in September 2011;

[1] The father presents us with the following questions:

> Did the juvenile court err in terminating the father's parental rights?
>
> Did the juvenile court err in finding that there was clear and convincing evidence to support its findings that the father was unfit and that exceptional circumstances existed to terminate his parental rights?

The mother, on the other hand, asks:

> I. Did the court err by shifting the burden of proof to the mother to show parental rights should not be terminated?
>
> II. Did the court err by terminating parental rights based on the finding of "exceptional circumstances?"
>
> III. Did the court err by terminating parental rights where it relied on clearly erroneous findings of fact?

and J.B., a girl, born in September 2013. They first became involved with the Baltimore County Department of Social Services (the "Department") when their oldest child, M.B., tested positive for marijuana at birth. At that time, Ms. B. admitted to smoking marijuana regularly while she was pregnant and Mr. B. tested positive for the use of benzodiazepines without a prescription. M.B. was found to be a child in need of assistance ("CINA") in November 2010. His case was closed in January 2012, with the result being reunification with his mother based on his mother's repeated assurances that she was no longer in a relationship with Mr. B. In fact, however, it appears that Mr. B. and Ms. B.'s relationship never did end, as Ms. B. later testified that she only said what she thought she needed to in order to get M.B. back from the Department.

In October 2013, M.B. and his younger sister, Y.B., were placed in shelter care with their maternal grandparents due to medical neglect and drug abuse on the part of Mr. B. and Ms. B. Both children were adjudicated CINA in November 2013, then placed in their maternal grandparents' custody under an order of protective supervision by the Department. Following a permanency plan hearing in November 2014, custody and guardianship of M.B. and Y.B. were granted to the maternal grandparents, and Mr. B. and Ms. B. were awarded supervised visitation.

When J.B. was born in September 2013, both she and her mother tested positive for opiates. During the time in which J.B. was in the hospital after being born, hospital staff observed her parents holding her in unsafe positions while they slept. J.B. was discharged from the hospital on September 25, 2013, and immediately placed in shelter care with her

maternal grandparents. A safety plan signed by the maternal grandmother required that all contact between J.B. and her parents be supervised. When two Department personnel arrived at the maternal grandparents' home for an unannounced visit on October 3, 2013, they found J.B. alone in the house with Mr. B. and Ms. B. in violation of the safety plan. The Department then removed J.B. and placed her in foster care. The juvenile court approved the foster care placement on October 4, 2013.

On November 25, 2013, following a three-day hearing and a report that Mr. B. and Ms. B. were beating Y.B., the juvenile court found all three children to be CINA. The court based this finding on the parents' lack of care, untreated substance-abuse issues, and refusal to participate in drug testing or treatment. The court ordered the parents to cooperate with the Department, allow home visits regardless of whether or not they were scheduled, undergo substance abuse evaluations and comply with the treatment recommendations resulting therefrom, submit to random drug testing, and maintain stable housing and employment.

J.B. remained in foster care following the November 25, 2013, CINA finding. However, the Department's ultimate goal remained the reunification of J.B. with her parents. Mr. B and Ms. B. were initially afforded the opportunity to visit with J.B. on a twice weekly basis, but, due to their inconsistent attendance, the visitation schedule was quickly reduced to once per week. Visitation remained sporadic at once per week, with the mother often coming late and the father frequently not attending at all.

Although reunification remained the ultimate goal, Mr. B. and Ms. B. proved unwilling to cooperate with the Department or participate in recommended services. Beyond that, there was a period of 18 months from February 2014 to September 2015 in which Mr. B. and Ms. B. did not attend a single visit with their daughter. The parents did, however, attend five supervised visits between September 2015 and January 2016.

Regarding the substance abuse evaluations that the court ordered Mr. B. and Ms. B. to undergo in November 2013, it took several months for Mr. B. and Ms. B. to get them completed. When Mr. B. and Ms. B. did undergo the evaluations, they were both recommended to participate in substance abuse treatment and submit to urine testing. Mr. B. plainly stated that he would not participate in any form of substance abuse treatment. Neither he nor Ms. B., who tested positive for opiates during her evaluation, made any effort to complete the court ordered substance abuse treatment during J.B.'s case, which spanned from October 2013 to February 2016. This was despite the Department's offer to pay for treatment for both parents at the program of their choice.

Like its efforts to convince the parents to participate in substance abuse treatment, the Department's repeated attempts to engage the parents in a service agreement also failed. Mr. B. and Ms. B. rarely responded to the Department's letters, e-mails, phone calls, or home visits. Because J.B.'s first foster parents were not an adoptive resource, the Department contacted J.B.'s maternal grandparents, who had custody of M.B. and Y.B., to ask whether they would be able to serve as a permanent placement for J.B. as well. Although they indicated that they were unable to provide permanent care for J.B., they

identified a family from their church as a possible resource. According to the maternal grandparents, placement with the family from their church would allow J.B. to maintain both her culture and her relationship with her older siblings. After thorough vetting by the Department, that family would become J.B.'s new foster placement.

On May 28, 2015, the Department filed a petition to terminate the parental rights of Mr. B. and Ms. B. The court held a four-day trial from February 16–19, 2016. J.B.'s adoption social care worker, Ms. Gina Ibello, LCSW-C, testified that J.B. is doing well with her new foster parents, that she calls them "mommy" and "daddy," and that she looks to them for comfort and approval. Ms. Ibello testified that while J.B. also calls her birth parents "mommy" and "daddy," she does not have a relationship with them. At the conclusion of the trial, the court found that Mr. B. and Ms. B. were unfit to be parents and that exceptional circumstances existed such that the continuation of their parental rights would be contrary to the best interests of J.B. Based on these findings, the court granted the Department's petition to terminate Mr. B. and Ms. B.'s parental rights to their youngest daughter.

STANDARD OF REVIEW

"In child custody disputes, Maryland courts apply three different but interrelated standards of review." *In re Adoption of Cadence B.*, 417 Md. 146, 155 (2010).

First, "[w]hen the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies." *Id.* (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). "A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record

to support the court's conclusion." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996). "[U]nder the clearly erroneous standard, this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case." *Liberty Mut. Ins. Co. v. Maryland Auto. Ins. Fund*, 154 Md. App. 604, 609 (2004) (quoting *Lemley*, 109 Md. App. at 628). Instead, we "view all the evidence 'in a light most favorable to the prevailing party,'" *Id.* (quoting *GMC v. Schmitz*, 362 Md. 229, 234 (2001)), to decide the limited question of "whether the circuit court's factual findings were supported by 'substantial evidence' in the record." *Id.* (citations omitted). "Substantial evidence has been defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Becker v. Anne Arundel Cty.*, 174 Md. App. 114, 138 (2007) (quoting *Snowden v. City of Baltimore*, 224 Md. 443, 448 (1961)).

Second, "if it appears that the [juvenile court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless." *Cadence B.*, 417 Md. at 155 (quoting *Yve S.*, 373 Md. at 586) (alteration in original). In the criminal context, where the harmless error doctrine is most commonly invoked, an error is considered to be harmless if "'a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *In re Lavar D.*, 189 Md. App. 526, 580 (2009) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

Third, and 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." *Cadence B.*, 417 Md. at 155 (quoting *Yve S.*, 373 Md. at 586) (alterations in original). A juvenile court is said to have abused its discretion if its decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* at 155–56 (quoting *Yve S.*, 373 Md. at 583–84).

DISCUSSION

I. Termination of Parental Rights

A. Parties' Contentions

The appellants argue that the juvenile court erred in both its finding of unfitness and its finding of exceptional circumstances. They assert that the court ignored evidence that the Department failed to sufficiently tailor reunification services to the parents' needs. This evidence includes: admissions by multiple Department workers that they could not recall whether the parents were notified of three hearings that were held between October 2013 and June 2014; the admission by the Department's clinical psychology expert that the results of his evaluations in termination of parental rights ("TPR") cases have always been consistent with the position of the Department; the Department's failure to accommodate Mr. B.'s request to have supervised visits scheduled after 5:00 p.m.; and the failure of the Department to facilitate communication between the parents and J.B.'s pre-adoptive family.

The appellants contend that the court also failed to consider a number of other important pieces of evidence. First, they argue that the court should not have discounted the three visits in which Mr. B. participated during October and November of 2013, nor the visits he participated in from September 2015 forward. The appellants assert that their hiatus from visitation was caused, in part, by the fact that they were visiting Mr. B.'s dying mother in the hospital. The appellants also point to the fact that Ms. B. had a warrant out for her as being another reason why they stopped participating in supervised visitation. Other evidence that the juvenile court overlooked, according to the appellants, includes: (1) the fact that Mr. B. would have been willing to participate in a drug treatment program if it was independent of the Department; and (2) the testimony of others besides Ms. Ibello that Mr. B. and Ms. B. always acted appropriately during their visits with J.B.

In addition, the appellants argue that lack of visitation for 18 straight months cannot, as a matter of law, be the sole basis for the termination of an individual's parental rights.

The child and the Department (the "appellees") respond that there was, in fact, sufficient evidence to support the juvenile court's findings. Regarding exceptional circumstances, the appellees acknowledge that the length of time in foster care alone is insufficient to support such a finding. However, they assert that when the length of time renders the continuation of the parental relationship contrary to the child's best interests, exceptional circumstances do exist. Applying that test to the present case, they contend that the length of time J.B. spent in foster care, J.B.'s young age, the 18-month gap in visitation, J.B.'s attachment to her foster parents, and the birth parent's failure to ameliorate the

circumstances that led to J.B.'s placement in foster care, when viewed together, constitute sufficient evidence to support an exceptional circumstances finding.

Likewise, the appellees argue that the court's finding with respect to unfitness is supported by the evidence. According to them, Mr. B and Ms. B. were correctly found to be unfit due to: (1) the fact that M.B. and J.B. were both born drug-exposed; (2) the fact that Ms. B. tested positive for opiates during her court-ordered evaluation; (3) the fact that neither Mr. B. nor Ms. B. ever completed substance abuse treatment; (4) Mr. B. and Ms. B.'s refusal to cooperate with the Department; (5) Mr. B. and Ms. B.'s failure to provide proof of where they lived or worked; (6) Mr. B. and Ms. B.'s failure to visit J.B. at all during an 18-month period; and (7) Mr. B. and Ms. B.'s failure to make any financial contribution towards their daughter's care.

Finally, the appellants assert that the lower court's judgment should be vacated because it was based, in part, upon the clearly erroneous finding that the parents had involuntarily lost their parental rights to J.B.'s two siblings. The appellees respond that this finding by the court amounts to harmless error.

B. Analysis

Section 5-323 of the Family Law Article ("FL") of the Maryland Code, which governs contested termination of parental rights cases, provides that

> [i]f, after consideration of factors as required in this section, a juvenile court finds by clear and convincing evidence that a parent is **unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child** such that

> terminating the rights of the parent is in a child's best interests, the juvenile court may grant guardianship of the child without consent otherwise required under this subtitle and over the child's objection.

FL § 5-323(b). In this case, after considering the factors outlined in FL § 5-323(d), the juvenile court found that termination of Mr. B. and Ms. B.'s parental rights was in J.B.'s best interests due to both parental unfitness and the existence of exceptional circumstances. We shall now address each of these findings in turn.

1. Parental Unfitness

i. In General

The Court of Appeals has explained that,

> [t]he court's role in TPR cases is to give the most careful consideration to the relevant statutory factors, to make specific findings based on the evidence with respect to each of them, and, mindful of the presumption favoring a continuation of the parental relationship, determine expressly whether those findings suffice either to show an unfitness on the part of the parent to remain in a parental relationship with the child or to constitute an exceptional circumstance that would make a continuation of the parental relationship detrimental to the best interest of the child, and, if so, how. If the court does that—*articulates its conclusion as to the best interest of the child in that manner*—the parental rights we have recognized and the statutory basis for terminating those rights are in proper and harmonious balance.

In re Adoption/Guardianship of Rashawn H., 402 Md. 477, 501 (2007) (emphasis in original).

The higher Court has also explained that, in addition to the factors outlined in FL § 5-323(d), "courts may consider 'such parental characteristics as age, stability, and the

capacity and interest of a parent to provide for the emotional, social, moral, material, and educational needs of the child.'" *In re Adoption of Ta'Niya C.*, 417 Md. 90, 104 n.11 (2010) (quoting *Pastore v. Sharp*, 81 Md. App. 314, 320 (1989), *cert. denied*, 319 Md. 304 (1990)). Although "the kind of unfitness or exceptional circumstances necessary to rebut the substantive presumption [in favor of continuation of parental rights] must be established by clear and convincing evidence," *Rashawn H.*, 402 Md. at 499, "primary consideration must be given to the safety and health of the child." *Id.* at 500 (internal quotation omitted). Moreover, "the focus must be on the continued parental relationship, not custody. The facts must demonstrate an unfitness to have a continued parental relationship with the child, or exceptional circumstances that would make a continued parental relationship detrimental to the best interest of the child." *Id.* at 499.

ii. Bases for the Lower Court's Decision

In the case at bar, after making specific factual findings with respect to each of the 5-323(d) findings, the juvenile court found that, "by clear and convincing evidence[,] . . . the presumption in favor of continuation of parental rights ha[s] been rebutted, and that the facts demonstrate that Ms. B. and Mr. B. are unfit to parent." *In the Matter of a Petition for Guardianship of J.B.*, Case No. 03-Z-15-30, slip. op. at 21–22 (Cir. Ct. Baltimore Cnty., Apr. 21, 2016). The court pointed to the fact that J.B. was born with exposure to opiates and, as a result, had to remain in the hospital for over two weeks of treatment. *Id.* at 22. The court also pointed to how the parents "violated a safety plan . . . in the very first visit by a D[epartment] worker," "did not remain in contact with [the Department]," "did not

participate in social service agreements prepared by [the Department]," failed to visit J.B. for a period of over 18 months, "have not provided confirmation of attending or completing drug treatment or drug testing, despite repeated efforts by [the Department] to arrange treatment paid for by [the Department] and with transportation to the treatment provided by [the Department]," "did not provide any documentation to support their assertions [that they were working and have a stable and safe living arrangement]," and "have not made any financial contribution to J.B.'s care despite their testimony that they have been employed for most or all of the period since J.B.'s birth." *Id.* at 22–23. The court specifically stated that the 18-month visitation hiatus "indicates a deeply troubling lack of parental care or concern for J.B." *Id.* at 22. We hold that substantial evidence supports each of and every one of these findings.

iii. Burden of Proof

The appellants argue that the juvenile court, in making its finding with respect to parental employment and housing, impermissibly shifted the burden of proof to the parents. We disagree. This issue was taken up by the Court of Appeals in *Adoption/Guardianship of Amber R.*, 417 Md. 701 (2011). The Court explained that, "[w]ith respect to [the mother's] sobriety—the key issue—Ms. F. was uniquely situated to produce the evidence." *Id.* at 722. Therefore, for the juvenile court to expect the mother to provide some evidence with respect to her sobriety was determined not to be unreasonable. The Court made clear that "the Department could not prove the negative fact that she had not abstained from

substance abuse, or had not been through the necessary rehabilitation to conquer the addiction." *Id.* Therefore, the Court of Appeals held:

> Although the burden of *production* may have shifted to Ms. F., the burden of *persuasion* remained with the Department. That is, Ms. F. would not have been required to generate enough evidence demonstrating her sobriety, employment, or home ownership to meet the clear and convincing standard, or indeed any standard of persuasion at all.

Id. (emphasis in original).

In the present case, Mr. B. and Ms. B. were likewise uniquely positioned to provide proof of their housing and employment. Moreover, Ms. B. had already lied once to the Department regarding her living situation, as she said she was no longer living with Mr. B. at the conclusion of M.B.'s CINA case in January 2012. This history of misleading statements provided even more reason for Mr. B. and Ms. B. to provide proof that they had obtained a stable living situation. For these reasons, we hold that the juvenile court did not impermissibly shift the burden of proof where it found that the parents "did not provide any documentation to support their [housing and employment] assertions."

iv. FL § 5-323(d)(3)(v) Finding

FL § 5-323(d)(3)(v) requires the court to consider whether "the parent has involuntarily lost parental rights to a sibling of the child" when making a determination as to whether the termination of parental rights is in the child's best interests. In the case at bar, the court stated in its written Order that "the parents have involuntarily lost parental rights to J.B.'s two older siblings, M.B. and Y.B., who have been placed in the custody of their maternal grandparents." While it is true that M.B. and Y.B. were placed in the care

and custody of their maternal grandparents, the appellants did not lose their parental rights to those two children. Therefore, the court's statement was erroneous. However, for the reasons that follow, we are persuaded by the appellees' argument that the error is harmless.

When the court wrote that "the parents have involuntarily lost parental rights to J.B.'s two older siblings, M.B. and Y.B.," it is clear that it mistakenly left out the word "not," such that it meant to write, "the parents have *not* involuntarily lost parental rights to J.B.'s two older siblings, M.B. and Y.B." We know this for two reasons. First, the remainder of the sentence we just quoted reads, "the parents have involuntarily lost parental rights to J.B.'s two older siblings, M.B. and Y.B., *who have been placed in the custody of their maternal grandparents*." If the court believed that parental rights had been terminated, then, instead of stating that J.B.'s older siblings had been placed in the custody of their maternal grandparents, the court would have stated that the siblings either had been or were in the process of being adopted. This is further evidenced by the fact that, elsewhere in its written Order, the court wrote that "custody and guardianship of M.B. and Y.B. was granted to the maternal grandparents on November 20, 2014, with supervised visitation for Mr. B. and Ms. B."

The second reason why we know the omission of the word "not" was a clerical error is because, in its oral ruling, the court acknowledged that the parents had <u>not</u> involuntarily lost their parental rights to J.B.'s siblings: "And obviously this court, beyond the drug exposure, does not find specific abuse, neglect or prior involuntary TPR [(termination of parental rights)]. *That is not at issue in this case*." *See* ERROR, Black's Law Dictionary

(10th ed. 2014) (defining "clerical error" as "[a]n error resulting from a minor mistake or inadvertence and not from judicial reasoning or determination; esp., a drafter's or typist's technical error that can be rectified without serious doubt about the correct reading," and noting that "[a]mong the numberless possible examples of clerical errors . . . [is] omitting an obviously needed word."). Clearly, based on its oral ruling, the court was aware of the fact that the appellants had not involuntarily lost their parental rights to J.B.'s siblings. Therefore, because the court's decision was based entirely on other findings, the inadvertent omission of the word "not" did not prejudice the appellants in such a way that requires reversal.

v. Ultimate Fitness Determination

We hold that the juvenile court committed no error in finding that Mr. B. and Ms. B were unfit to remain in a parental relationship with J.B. The evidence established, by clear and convincing evidence, that the parents had a history of drug abuse, refused to cooperate with the Department, failed to participate in recommended treatment programs, did not contribute financially to J.B.'s well-being, and had gone over a year and a half without visiting with J.B. "[A] parent's *actions and failures to act* both can bear on . . . the question of whether continuing the parent-child relationship serves the child's best interests." *In re Adoption/Guardianship of K'Amora K.*, 218 Md. App. 287, 307 (2014) (emphasis in original). Mr. B and Ms. B.'s actions and inactions with respect to their very young daughter sufficiently establish that continuation of the parental relationship would be contrary to J.B.'s best interests.

2. Exceptional Circumstances

In *Adoption/Guardianship of Alonza D., Jr.*, 412 Md. 442 (2010), the Court of Appeals held that "[p]assage of time, without explicit findings that the continued relationship with [the parents] would prove detrimental to the best interests of the children, is not sufficient to constitute exceptional circumstances." *Id.* at 463. Moreover, "the exceptional circumstances analysis . . . [must] take into account circumstances particular to an individual child." *Ta'Niya C.*, 417 Md. at 116.

In the case at bar, the juvenile court found the existence of exceptional circumstances from the following:

> (1) the extraordinary length of time with no contact between the parents and J.B. and no efforts by the parents to remain in regular contact with [the Department] and work towards reunification for an eighteen (18) month period up until the filing of this petition; (2) the lack of development of any parental bond between J.B. and her parents because the parents did not come forward and seek to remain in contact; (3) J.B.'s age and the length of time that she has remained in foster care exceeding the statutorily suggested time limit of 15 out of 22 months; and, (4) the prior contact between the parents and DSS for their eldest child, M.B., who was born drug exposed, was placed in foster care but was ultimately reunited with the parents and the CINA case closed (although it was later re-opened), which made the parents well aware of the importance of remaining in contact with [the Department] and how to follow its procedures to enable reunification.

Slip. op. at 23–24.

The appellants rely on the case of *Alonza D., Jr.* In that case, the Court of Appeals held that the juvenile court improperly based its finding of exceptional circumstances on the amount of time the children had spent in foster care. However, the parent in that case

readily participated in visitation, was employed, did not abuse drugs, and kept a close relationship with his child. 412 Md. at 447–49. Therefore, the case at bar is easily distinguished.

"The Court of Appeals has . . . directed trial courts to consider a parent's behavior or character in the exceptional circumstances analysis." *K'Amora K.*, 218 Md. App. at 306 (citing *In re Adoption/Guardianship No. A91-71A*, 334 Md. 538, 563 (1994)) (internal quotations omitted). "Moreover, a parent's *actions* and *failures to act* both can bear on the presence of exceptional circumstances[.]" *Id.* at 307 (emphasis in original). Here, the length of time J.B. spent in foster care was only one of the four reasons underlying the juvenile court's finding of exceptional circumstances. In a case like this, where parents with a history of substance abuse failed to visit their child for 18 months, did not keep a close relationship with their daughter, and evaded contact with the Department for extended periods of time in order to stunt cooperation, we agree that exceptional circumstances indeed exist.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.