Circuit Court for Harford County
Case No. 12-Z-15-0073

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2011

September Term, 2016

IN RE: A.B.

Graeff,
Berger,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: April 25, 2017

Appellant, Byron L.-R. ("Father"), challenges a judgment of the Circuit Court for Harford County, sitting as a juvenile court, terminating his parental rights with respect to his son, A.B., and granting guardianship to the Harford County Department of Social Services ("the Department"). A.B.'s mother consented to the termination of her parental rights to A.B.

Father presents three issues[1] for our review, which we have consolidated and rephrased as a single issue as follows:

> Whether the juvenile court erred by terminating Father's parental rights based upon a finding of exceptional circumstances.

[1] The issues, as presented by Father, are:

I. Did the trial court fail to address the factors enumerated in Md. Code Family Law Art. Sec. 5-323 and to make the specific consideration and findings as to the specific statutory factors?

II. Did the trial court err by applying exceptional circumstances to father in the absence of any evidence that he was in any way unfit, contrary to a long line of caselaw in Maryland?

III. Did the trial court's finding that terminating appellant's paternal relationship with AB was in the child's best interest because [sic] was clearly erroneous because:

   a. it erroneously found that the department had made reasonable efforts to reunite the child with his biological father, and

   b. it erroneously considered evidence not in the record in the present case?

For the foregoing reasons, we shall affirm the judgment of the Circuit Court for Harford County.

FACTS AND PROCEEDINGS

On March 3, 2012, A.B. was born to Brittany B. ("Mother"). A.B. was born prematurely at 28 weeks gestation, and he weighed two pounds seven ounces. He remained hospitalized in the neonatal intensive care unit for two months, where he required a feeding tube and oxygen for a period of time. At the time of A.B.'s birth, Mother did not list Father's name on A.B.'s birth certificate.

Mother and Father had met in 2011 in New Jersey, where Mother's mother worked with Father at a horse racing facility. In the fall of 2011, Mother told Father that she was pregnant, and Father attended one prenatal ultrasound appointment with Mother. Mother and Father ended their relationship in late November 2011, and Mother moved to Maryland. Father moved to Florida shortly thereafter. Mother and Father continued to communicate via Facebook and text messages. Father was a native Spanish speaker who spoke minimal English, and Mother did not speak Spanish. Generally, Mother and Father would each write in their respective native languages and have someone translate the messages for them.

After A.B.'s birth, Mother sent Father photographs of A.B. Father posted three photographs of A.B. on Facebook and identified the baby as his own.[2] The photographs

[2] Father wrote, "Es el mio" as a comment on one of the photographs.

showed A.B. with oxygen tubes. Father explained in a comment on one of the photos that A.B. needed oxygen because he was born at six months of gestation.[3] Father did not ask Mother for additional information about A.B.'s medical condition, nor did Father offer to contribute financially to A.B. Father did not visit A.B. at the hospital or at any time thereafter until May 2016. Mother testified that Father never responded to her text message announcing A.B.'s birth. Father testified that he did respond by asking for a paternity test. Mother and Father stopped communicating several months later.[4]

A.B. lived with Mother from the time of his birth until the fall of 2014. He had no contact with Father during this time period. In 2014, when A.B. was two and one-half years old, the Department received reports that Mother was leaving A.B. unattended in his crib and car seat for hours at a time. A representative of the Department visited Mother's home on October 15, 2014. The home was cluttered and dirty. Mother advised the Department's representative that A.B. was sleeping in his crib. The Department's representative found A.B. awake in his crib wearing only a diaper. Mother could not remember when she last checked on him. A.B.'s hair was matted and he exuded a foul body odor. A.B. was able to walk but with an unbalanced gait, and he did not speak. Mother told the Department's representative that A.B. had an eye condition and

[3] In response to a question, Father wrote, "Por que nacio 6 meses."

[4] Mother and Father characterized the reason they stopped communicating differently, but they both agreed that they stopped communicating when A.B. was a few months old.

underdeveloped lungs, but the Department's subsequent research showed that A.B. had not been seen by a physician in over a year. Mother behaved erratically during the visit, alternating between engaging in cheerful conversation and locking herself in the bedroom with A.B. and yelling. A.B. was removed from Mother and placed in shelter care.[5] The juvenile court found A.B. to be a Child in Need of Assistance ("CINA") on November 12, 2014.[6] The juvenile court committed A.B. to the custody of the Department. The Department continued to attempt to locate A.B.'s father, but at that point, Mother had only identified one potential biological father to the Department -- Mr. Carlos A.-M.

A.B. was initially placed with Ms. Y., a licensed foster parent who has had twenty-nine children placed in her care. A.B. resided with Ms. Y. from October 2014 until February 2015. When A.B. arrived, he was not potty trained, did not interact with other children, and was non-verbal. Ms. Y. realized that A.B. would be "too much for [her] to handle" and that A.B. needed to be placed "with someone who had more to invest in him." Ms. Y. asked that A.B. be placed with a different foster parent. Ms. Y. explained that she had never before asked the Department to find a different care provider for a child in her care.

[5] "Shelter care" is the "temporary placement of a child outside of the home at any time before disposition." Md. Code (1964, 2013 Repl. Vol.) § 3-801(y) of the Courts and Judicial Proceedings Article ("CJP").

[6] A CINA is a child who requires court intervention because the child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and 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. CJP § 3-801(f).

On February 13, 2015, A.B. was placed with Ms. T., with whom he has since remained.[7] At the time of placement with Ms. T., A.B. remained essentially non-verbal and was able to produce very few sounds. A.B. would attempt to communicate by engaging in disruptive behavior. He became frustrated easily and had frequent temper tantrums. A.B. would pull other children's hair, as well as push, shove, and bite. These behaviors occurred with Ms. T.'s other children as well as at A.B.'s childcare facility.

Ms. T. believed that A.B.'s behavioral problems were likely related to his inability to communicate, so she sought out resources to address A.B.'s needs. Ms. T. obtained an assessment of A.B. and arranged for occupational and speech therapy services at the Kennedy Krieger Institute ("KKI"). Ms. T. has been very involved in A.B.'s therapeutic services. She attends A.B.'s sessions and works with A.B. at home to reinforce skills between therapy sessions. Through therapy, A.B. has been able to make significant improvements with speech and motor skills.

After being placed with Ms. T., A.B. began attending a childcare facility. He initially struggled with behavior, but in time, made significant progress. He began attending a half-day pre-kindergarten program in the fall of 2016, in addition to attending the childcare facility for the remainder of the day. A.B. receives special education services in the pre-kindergarten class and has an Individualized Education Plan ("IEP"), which

[7] It is Ms. T.'s intention to adopt A.B. if his biological parents' rights are terminated.

specifies services A.B. must receive.[8] A.B. has done well in the pre-kindergarten class, although he is sensitive to and aware of the fact that he is not doing as well as his peers in several areas, and he continues to experience difficulty with expressing his frustration appropriately.

A.B. has developed a close relationship with Ms. T. since being placed with her in February 2015. A.B. has also developed close relationships with Ms. T.'s other children. Ms. T. has two other children in her home, a five-year-old adopted daughter, D., and a sixteen-year-old biological daughter. A.B. and D. are very close and are often mistaken for biological siblings. A.B. has also developed relationships with members of Ms. T.'s extended family, including Ms. T.'s fiancé, adult daughter, and parents. The family has traveled together to Disney World and England. A.B. has also maintained a good relationship with Mother, with whom he visits regularly. A.B.'s maternal grandfather frequently attends visits as well. Ms. T. is committed to maintaining A.B.'s relationship with his biological family.

Throughout the time A.B. has been in the custody of the Department, the Department has made efforts to locate A.B.'s father. Initially, Mother identified only one potential biological father to the Department, Mr. Carlos A.-M. On December 12, 2014, results of a paternity test excluded Mr. A.-M. as the biological father of A.B.

[8] As of the TPR trial, A.B. was receiving speech therapy services through his IEP. Ms. T. had requested that occupational therapy be added as well, and an IEP meeting was scheduled for late October 2016 to address A.B.'s need for occupational therapy.

In February 2015, Mother first identified a second potential biological father as an individual by the name of "Byron [L.]," later identified to be Father. Mother provided a surname, but the surname was common. Mother did not provide the other half of Father's hyphenated surname, nor did Mother provide his date of birth, address, telephone number, or any other contact information. In June 2015, Mother provided the Department with Father's full name and disclosed that she knew Father had moved to Florida at some point. Mother further disclosed to the Department that Father worked with horses. Nola Gidden, a caseworker for the Department, attempted to locate Father based upon the information it had available.

Ms. Gidden located two horse stables in Florida where she believed Father might be employed. She telephoned the stables and left messages in attempt to contact Father. She also located a possible home address on Accusearch and mailed a certified letter to Father at that address, in which she explained that there was a possibility that he was the parent of a child in the custody of the Department. The letter was mailed on October 23, 2015 and a person by the name of Alvarez signed for the letter on October 27, 2015. Ms. Gidden received no responses to the phone messages or the letter. Ms. Giddens engaged in various other efforts to locate Father, including performing a criminal background check and searching various websites, including the Maryland Judiciary Case Search website, Vinelink, Accusearch, and Facebook.

On December 8, 2015, over one year after A.B. came into the custody of the Department, the Department filed a petition for guardianship with the right to consent to adoption for A.B. The Department assigned a new caseworker, Noel Francis, to A.B.'s

case. Ms. Francis hired a private process server who attempted to serve Father at the address that Ms. Gidden had found on Accusearch. The process server attempted to serve Father on February 12, 2016, but a woman at the address told the server that she did not know anyone by Father's name.

Ms. Francis explained that by that point in time, the Department was considering serving an unknown father via publication, but Ms. Francis "was very adamant that [she] wanted to continue the search." Ms. Francis sent a private process server to the two stables that had been identified as possible places of employment for Father, and service ultimately was effectuated at Father's place of employment on March 3, 2016. On March 11, 2016, Father telephoned the court clerk's office and indicated that he wanted to object to the petition.

Ms. Francis telephoned Father on March 17, 2016. She spoke with Father's wife, Ms. S., because Father does not speak English. Ms. Francis told Ms. S. about A.B.'s special needs, including his behavioral problems and need for structure in his environment, as well as the services A.B. was receiving.

After Ms. Francis's initial conversation with Father, she arranged for a paternity test, which confirmed that Father is A.B.'s biological father. Thereafter, Ms. Francis entered into a service agreement with Father and Ms. S. The service agreement required Father and Ms. S. to engage in various tasks, including completing a home study, verifying

employment, participating in a psychological evaluation, and completing a parenting course. Father and Ms. S. were fully compliant with the service agreement.[9]

Ms. Francis arranged for Father to meet A.B. and participate in both in-person and Skype visits. In May 2016, the Department arranged for Father and Ms. S. to travel to Maryland with their two children.[10] When Father and A.B. met, A.B. was initially very shy and nervous. He wanted to sit on Ms. T.'s lap, but Ms. T. encouraged A.B. to interact with the other children. A.B. warmed up to the children and began to interact with Father and Ms. S. Ms. Francis described Father and Ms. S. as "very appropriate in not being too aggressive in their initial interaction" and observed that they "let him take time to warm up to them." Father and A.B. were unable to communicate directly due to A.B.'s limited speech proficiency and Father's limited English ability, but Ms. S. assisted with translating for Father. A.B. and Father visited on four separate days during Father's May 2016 trip to Maryland.

Father returned to Maryland in August 2016, when he had three more in-person visits with A.B. Over the course of the visits, A.B. became more accustomed to Father and began referring to him as "daddy" after Ms. T. instructed A.B. to refer to Father as "daddy" instead of by his first name. Father also visited with A.B. in person in October 2016, when

[9] Father and Ms. S. did not complete a parenting class because of logistical issues with the Department and the parenting class provider. The Department emphasized that the lack of participation in a parenting class was not due to any fault on the part of Father and/or Ms. S.

[10] Father and Ms. S. have two children, a three-year-old son and a one-year-old daughter.

Father returned to Maryland for the termination of parental rights hearing. A.B. greeted Father, called him "daddy," hugged him, and played video games with him.

In addition to in-person visits, the Department arranged for weekly Skype visits. The Skype visits generally lasted approximately twenty to thirty minutes, but technological issues sometimes led to dropped calls or poor video transmission. During the Skype visits, Ms. S. would translate Father's statements to English, and Ms. T. would translate A.B.'s sounds and hand gestures into standard English. The Skype visits usually occur during the day while Father is at work at the stables, and sometimes Father would show A.B. the horses and around the stables rather than engaging in spoken conversation. Sometimes A.B. would not participate in Skype visits for more than a couple of minutes before saying, "bye" and ending the conversation. After Skype visits, A.B. frequently engaged in disruptive and regressive behavior, including "biting and hitting and shoving" at daycare.

Ms. Francis discussed with Father the possibility of him moving to Maryland or a different nearby state in order to allow for more frequent visitation. She explained to Father that, in order to work toward reunification, they would need to move towards more frequent visits and transition from supervised to unsupervised and from short visits to longer and overnight visits. Ms. Francis mentioned that jobs in the horse industry might be available in Maryland, New Jersey, or Delaware, and that if Father lived closer to A.B., he could work toward increasing contact and visitation. Father responded that he planned to remain in Florida.

The contested termination of parental rights hearing was held on October 17, 18, and 19, 2016. The Department presented evidence relating to the facts discussed above.

Three expert witnesses testified on behalf of the Department: A.B.'s speech pathologist Sheryl Caughlin, as an expert in speech pathology, A.B.'s occupational therapist Joanne Powell, as an expert in occupational therapy, and Ms. Francis, as an expert in social work.

Ms. Caughlin, a speech pathologist with over thirty years of experience, testified about the extent of A.B.'s speech delay. Ms. Caughlin began working with A.B. in November of 2015, when he was approximately three and one-half years old. At that point, A.B. was "basically non-verbal," which Ms. Caughlin explained was not normal for a child his age. A.B. "primarily used behaviors as his primary means of communication." Ms. Caughlin described A.B.'s disorder as a "motor coordination disorder," which means that A.B. "cannot make his mouth move in the manner that it needs to move to put the sounds together to make the words clearly." Ms. Caughlin's initial goal for A.B. was for him to develop "functional communication" skills.

When A.B. began speech therapy, he "was easily frustrated," "had a hard time focusing" on tasks, and had "a lot of temper tantrums." Through weekly sessions and assignments that Ms. T. would complete with A.B. at home, A.B. made "tremendous progress." At the time of the termination hearing, A.B., then age four and one-half, spoke at the level of a typical two-year-old child. A typical four-year-old child is "one hundred percent intelligible with their speech," but A.B. was "about twenty-five percent intelligible."

Ms. Caughlin explained that, even though she had been working with A.B. for over one year, it is still difficult to understand him. She recounted that during the previous week's session, there were three times in one hour that neither Ms. Caughlin nor Ms. T.

could determine what A.B. was talking about "even using communication repair strategies" and there were five other times that it took at least fifteen to twenty seconds for one of the two adults to understand the topic A.B. was talking about. Ms. Caughlin explained that A.B. gets frustrated and his "whole body language kind of sags" when he cannot make himself understood.

Ms. Caughlin testified that her goal for A.B.'s therapy was for him to obtain "perfectly clear speech." She estimated that A.B. would require at least two more years of speech therapy. Ms. Caughlin expressed concerns about how A.B. would fare if he were placed in a home where the primary spoken language was Spanish. Ms. Caughlin testified that it "would be very difficult for A.B." because even "people that speak English don't understand him." Because A.B. "is frustrated on a certain level at this point with people who speak English," Ms. Caughlin believed this frustration would be exacerbated with people who are not fluent English speakers. She explained: "If you are dealing with someone that doesn't necessarily know English words, they don't have the same repertoire to run through their brain to try to figure out what [A.B.] is talking about."

Ms. Powell, an occupational therapist with twenty years of experience, described the occupational therapy services A.B. has received due to his low muscle tone and sensory issues. Ms. Powell and Ms. T. worked with A.B. with accepting objects with varying textures. Other tasks were designed to improve A.B.'s muscular strength, balance, and coordination. Ms. Powell testified that A.B. had improved significantly, particularly with respect to regulation and sensory activities. She explained, however, that A.B. was still delayed in fine motor skills. Ms. Powell arranged for A.B. to attend a one-on-one

gymnastics class for children with special needs as a supplement to occupational therapy sessions, which has proved beneficial for A.B.

Ms. Powell expressed concerns about the effect on A.B. if occupational therapy services were to be terminated. She explained that A.B. would not be able to regulate himself in a classroom environment, which would lead to "spiraling with his behavior and frustration." Ms. Powell testified that "there is potential as [A.B.] gets older and his nervous system and the needs with his sensory things kind of evolve on, if that isn't addressed, he could become disregulated." Ms. Powell testified that A.B. would have difficulty adjusting to a new occupational therapist and that A.B. is a child who "likes to have everything in place the way it is every single time he comes in." She explained that A.B. thrives on routine and "because of his difficulty with some of the sensory things and being [poorly] regulated, it helps him to have everything the same." Ms. Powell anticipated that A.B. would continue receiving occupational therapy services with her until he began kindergarten, when he would be reassessed.

Ms. Francis, a licensed clinical social worker with over twenty-seven years of experience, testified as an expert in social work. She testified that, based upon her observations, she had concluded that A.B. was "very bonded" and "very attached" to Ms. T., and that Ms. T. is similarly bonded to A.B. Ms. Francis described A.B. as "very affectionate" toward Ms. T. and explained that A.B. is a child who "craves" Ms. T.'s physical attention and likes "to be held, to be picked up, [and] to be hugged." Ms. Francis testified that A.B. had "become a part of [Ms. T.'s] family." According to Ms. Francis, A.B. requires a "very patient" caretaker who can handle his behavioral outbursts. Various

witnesses testified that A.B. turns to Ms. T. for support when he is upset or frustrated. Ms. Francis found Ms. T. to be a suitable placement option for A.B. because A.B. is "very bonded to Ms. T."

Based upon her observations of A.B.'s visits with Father, Ms. Francis concluded that A.B. did not have "any emotional ties" to Father. Ms. Francis observed that A.B. knew that Father was his biological father and that A.B. and Father play together, but concluded that A.B. had not formed a bond to Father because "there has not been enough contact." Ms. Francis testified that, in her opinion, moving to Florida would be "tremendously detrimental" to A.B. because A.B.'s entire support structure is in Maryland, including Ms. T. and her extended family, Mother and her family, and the various therapists and teachers who have been supportive members of A.B.'s community.

Ms. S. and Father each testified at the termination of parental rights hearing. Ms. S. testified that she and Father did not know anything about A.B.'s case until March 2016. Ms. S. emphasized that she and Father had been fully compliant with everything the Department had requested. Ms. S. testified that she would locate resources for A.B. in Florida if he were reunited with Father, and she offered equine therapy as one example of a potential therapy resource.

Father testified through an interpreter and expressed that he wants A.B. in his life and would do whatever the Department wanted him to do in order to have A.B. placed in his care. Father testified that he had no way to locate Mother after A.B. was born. Father explained that he never knew where A.B. was born or where he was hospitalized when in the neonatal intensive care unit.

At the conclusion of the third day of the termination of parental rights hearing, the juvenile court issued its ruling from the bench. The court did not find that Father was an unfit parent, but the court found, by clear and convincing evidence, that exceptional circumstances existed that made the continuation of the parental relationship detrimental to the best interests of A.B. This appeal followed. Additional facts shall be discussed as necessitated by our discussion of the issues.

STANDARD OF REVIEW

In child custody and TPR cases, this court utilizes three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). The Court of Appeals described the three interrelated standards as follows:

> We point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131 (c)] applies. [Second,] if it appears that the [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. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. at 586. In our review, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id.* at 584. We recognize that "it is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the [trial court] because only [the trial judge] sees the witnesses and the parties, hears the testimony, and has the

opportunity to speak with the child; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Id.* at 585-86.

DISCUSSION

Father contends that the juvenile court erred by terminating his parental rights. The Court of Appeals has explained the process juvenile courts must undertake when determining whether to grant a petition for TPR as follows:

> First, the court must focus on the continued parental relationship and require that facts 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. Second, the State must show parental unfitness or exceptional circumstances by clear and convincing evidence. Third, the trial court must consider the statutory factors listed in [Md. Code (1984, 2012 Repl. Vol.), § 5-323(d) of the Family Law Article ("FL")] to determine whether exceptional circumstances warranting termination of parental rights exist.

In Re Adoption/Guardianship of Ta'Niya C., 417 Md. 90, 103-04 (2010) (internal quotations, citations, and footnotes omitted).

The juvenile court outlined the factual circumstances that gave rise to the filing of the TPR petition by the Department. The court recounted that A.B. was found to be a CINA on November 15, 2012 and that a petition for guardianship was filed on December 8, 2015. The court found that an appropriate service of show cause was accomplished on the parties, and that Mother freely and voluntarily consented to the termination of her parental rights. The court found that Father noted a timely objection to the petition for guardianship. The juvenile court commented that, due to Father's objection, the court was

required to address the factors mandated by Md. Code (1984, 2012 Repl. Vol.), § 5-323(d) of the Family Law Article ("FL").

The record reflects that, in this case, the juvenile court made explicit findings on each of the relevant factors set forth in FL § 5-323(d). With respect to the services offered to Father by the Department, the court found that the Department made "extraordinary efforts to identify [and] locate [Father] and get him served." The court further found that the Department entered into a service agreement with Father, arranged for and paid for Father's transportation to Maryland on multiple occasions, provided for an interpreter, arranged for psychological evaluations, initiated a request for an interstate compact, and provided in-person and Skype visits.

The next factor the court considered were "the results of the [Father's] effort to adjust [his] circumstances, condition, or conduct to make it in [A.B.'s] best interests . . . to be returned to the [Father's] home." The court emphasized that A.B. had never lived with Father and had resided with the same foster parent, Ms. T., for the previous eighteen months. The court found that Father had maintained contact with A.B. and Ms. T. since May 2016, when he was established as the biological father. The court found that there was no showing that Father contributed to A.B.'s care and maintenance, but that there was no showing that Father was asked to do so. The juvenile court further found that Father did not have any disability that would render him unable to care for A.B.'s needs.

The factor set forth in FL § 5-323(d)(2)(iv), which focuses on services that would likely result in reunification within eighteen months of placement absent a specific finding that it is in a child's best interests to extend the time for a specified period, was not directly

applicable to this case because A.B.'s case was beyond eighteen months of placement. The court explained, however, that leaving A.B. "waiting . . . in limbo" for another eighteen months would be detrimental to A.B. The court emphasized that "in the life of a child who is four and a half, eighteen months is [a] huge" period of time.[11] The court noted that the considerations set forth in FL § 5-323(d)(3), which relate to aggravating circumstances such as past abuse of the child, were not relevant in A.B.'s case.

The juvenile court then turned its attention to consideration of the factors set forth in FL § 5-323(d)(4), which involve the child's emotional ties to his biological family; adjustment to community, home, placement, and school; the child's feelings about severance of the parent-child relationship; and the likely impact of terminating parental rights on the child's well-being. The court found that A.B.'s "real emotional ties" were with Ms. T. as well as with members of Ms. T.'s family. The court noted that "[t]he uncontroverted testimony is that [A.B.] is closely attached to [Ms. T.], that he calls her mommy, that he turns to her when upset." The court emphasized that it was "noteworthy . . . that A.B. has special needs" and that "he gets overtly upset when he is out of the presence of his foster mother." The court further emphasized that A.B. "gets upset when he is not understood."

[11] The court later explained that it had very significant concerns about the potential harm to A.B. if the petition were denied and the case sent back to CINA court, which we discuss *infra*.

The court considered A.B.'s attachment with Father, observing that A.B. "knows [Father] as daddy or dad and he is cordial to him," but observed that the "language difficulty" had affected their relationship. The court explained:

> One of the issues that arises, however, is the language difficulty. [Father] does not speak English and [A.B.] does not speak Spanish. Not only that, [A.B.] is four and a half years old. Because of his speech needs, speech and language deficits, the uncontroverted testimony is that only twenty-five percent of what he says is intelligible. So that relates to [Father's] ability to communicate with [A.B.].

The juvenile court found that Ms. S. "relates to [A.B.] in a positive way" and that A.B. had only recently "just got[ten] to know [his siblings] in May." The court also considered A.B.'s attachment to Mother and his biological maternal relatives, finding that A.B. has "some strong emotional ties" to Mother and that they have had visitation.

With respect to A.B.'s adjustment to the community and school, the juvenile court found that A.B. had made "huge progress" in school. The court explained that when A.B. began school he was "biting and fighting and disruptive and isolated," but now, although "he does have some socialization issues which are being addressed, . . . by all indications he has made tremendous progress in school." The court found that A.B. had also made "tremendous progress in terms of his developmental growth" but "does have a continuing need for occupational therapy and speech therapy." The court found that A.B. had no feelings about the severance of the parent-child relationship. The juvenile court emphasized that A.B. had never lived with Father and Father had never had responsibility for addressing A.B.'s needs.

After considering the requisite factors, the juvenile court found that there was clear and convincing evidence that there were exceptional circumstances that made continuation of the parental relationship detrimental to A.B.'s best interests. The court explained its reasoning as follows:

> [A.B.] is a special needs child who has come a long way, but the woods for him have not all disappeared and he will continue to need ongoing therapeutic and speech and language therapy. Ms. [S.] is to be commended because she has made contact at the University of Florida and at least ascertained the availability of these services. However, the uncontradicted testimony evidence before the [c]ourt, and this came from both [Ms.] Caughlin and [Ms.] Powell who are his therapists at Kennedy Krieger, that it would be harmful at this time for A.B. to change therapists. He does not do well with change.
>
> Also, I am satisfied that it is -- I want to say this because I'm not a xenophobe and I just believe that the United States of America is loving enough and big enough for everyone. So, I don't denigrate people because of their home country or the fact that they are not from the United States of America. That would be inappropriate.
>
> I do, however, have grave concerns because the parent in this case, [Father], does not speak English. Would English classes help? I don't know. But I am convinced that the gains that [A.B.] has made might be jeopardized if that were so because we would be hoping and anticipating that the parent, I'm not addressing the step-parent, although Ms. [S.] is clearly a support or would be a support for [A.B.] but my job is to look at the parents globally. The testimony of Ms. Caughlin is it would be harmful for [A.B.] to be exposed to a second language if the person only spoke that second language because he struggles with speech in English and now his parent, his father, does not speak English.
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> ***
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> Also, Ms. Caughlin said that it would be very difficult for [A.B.] to be understood with his limited speech capabilities now by a person who only speaks the second language.

Also, Ms. Powell testified, without being contradicted, that one of the most important needs [A.B.] has at this time is the need for consistency. He is routine oriented. He does not deal with change. I understand that if I denied the guardianship petition he would stay where he is, but that's not the paramount go[al of] these proceedings. The paramount interest is permanence and consistency.

Ten years ago I went to a child welfare conference. I have been a member of the Foster Care Court Improvement Project for twenty years. I chaired a committee that this week will put on a two-day conference for judges and masters. I went to a conference ten years ago because I had a tendency to think globally. There was a speaker at the conference who opened my eyes to the fact that while adults we can think spatially in terms of longitude, but if you say to a child not today, that's denial. If you say to a child I'll buy you this when I get paid, that's denial. If you say to a child not now but later, that's denial. He said, but in the context of these cases when a child needs permanency, if you say we're going to work so that this happens, this may happen is the same as a denial because children can only think in terms of the amount of time that they have been on the planet. So, [A.B.] has been on the planet, if you will, for four and a half years and he has, for two-thirds of that, been in a neverland. For the past eighteen months, the last eighteen months only he has had what I believe is a nurturing, stable, supportive environment which was conducive to development.

I only go into that because I don't want anybody to think I don't care, but in the life of a child who is four and a half, eighteen months is huge. For me to send this back to CINA court, if I denied the guardianship petition, means that theoretically for up to another eighteen months [A.B.] would no doubt remain in his current placement prayerfully, I [do not] have any control over that, but for another eighteen months as he grows this child would be waiting, he would be in limbo. I have to consider that.

[A.B.] is at the Kennedy Krieger Institute and he would probably be there unless the CINA court changed custody. But I have a lot of reservations about what the impact of that change

would be on him. He has continued to experience significant developmental delays and deficits.

I do want to point out that [Father] and [Ms. S.] have complied in all respects, with the exception of the parenting class, with the Service Agreement. There is no doubt in my mind that [Father] is concerned. There is no doubt in my mind that he loves [A.B.]

I'm almost done.

One of the things in terms of exceptional circumstances, because it is not defined in the statute, and I need to say the passage of time alone without explicit findings does not constitute exceptional circumstances, the parent's behavior and character must be considered. I don't have any concerns about [Father's] behavior or his character.

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My emphasis is on the importance of permanence and stability. Because of his special needs, his needs for permanence and stability even now and in the immediate future are of paramount consideration to this [c]ourt.

***

This is an unusual fact pattern . . . because there is no allegation of abuse or neglect by dad. Although it was he said-she said about when he became aware of [A.B.] but once he was served he did come forward.

Family pathologies, if any, existed in [Mother's] life. There [are] no real pathologies that I know of in [Father's] life. I am very concerned about the impact on [A.B.'s] psychological, emotional, social and even physical well-being if I denied the petition and sent it back. I believe that the [c]ourt would risk uprooting [A.B.] from the only safe and stable family environment he has known. He is bonded with Ms. [T.], he is bonded with her children, her son-in-law . . . .

[A.B.'s] transcende[nt] best interests in my opinion are not served by continuing to deny the Department's petition for guardianship. He displays significant detachment behaviors when separated from his foster care mother. I heard that now

> it is getting better, but there was also a considerable amount of testimony from Ms. Caughlin and Ms. Powell along with his [case]worker that he displays regressive behavior when he visits his father.
>
> Anyway, therefore, the [c]ourt having considered the factors alluded to as required by the statute, it is hereby ordered that the Department of Social Service[s'] petition for guardianship with the right to consent to adoption of [A.B.] is granted. The Department is granted guardianship with the right to consent to adoption of [A.B.]

On appeal, Father asserts that the juvenile court's termination of his parental rights was improper for four reasons: (1) because the juvenile court failed to properly consider the statutory factors; (2) because exceptional circumstances with no finding of parental unfitness cannot support a termination of parental rights; (3) because the juvenile court incorrectly found that the Department made reasonable efforts toward reunification; and (4) because the juvenile court improperly considered information outside the record when making its determination. As we shall explain, none of Father's arguments is availing.

FL § 5-323(d) Factors

First, we expressly reject Father's contention that the juvenile court failed to consider the requisite factors pursuant to FL § 5-323(d). As discussed *supra*, the juvenile court carefully considered each factor and fully articulated its reasoning when applying each factor the circumstances of this case. We perceive no error on the part of the juvenile court with respect to this issue.

Exceptional Circumstances

Second, Father asserts that the juvenile court's termination of his parental rights on the basis of exceptional circumstances, absent any finding of parental unfitness, is improper

under Maryland law. Father maintains that some level of underlying parental unfitness is necessary to support a court's finding of exceptional circumstances. We disagree with Father's characterization of the law.

Section 5-323(b) of the Family Law Article sets forth the standard for termination of a parent's rights as follows:

> If, 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.

(Emphasis added). Because the statute uses the disjunctive "or," either exceptional circumstances or parental unfitness may support the termination of a parent's rights if the termination is in the child's best interests. Father's assertion is inconsistent with the clear and unambiguous language of the statute and with Maryland caselaw. *See In re Adoption of K'Amora K.*, 218 Md. App. 287, 310 (2014) ("The exceptional circumstances alternative is meant to cover situations . . . in which a child's transcendent best interests are not served by continuing a relationship with a parent who might not be clearly and convincingly unfit.").

Furthermore, we note that the Court of Appeals has commented that "parental unfitness, exceptional circumstances, and the child's best interests considerations are not 'different and separate analyses.'" *In re Adoption of Jayden G.*, 433 Md. 50, 96 n.32 (2013) (quoting *Ta'Niya C.*, *supra*, 417 Md. at 105-06). Rather, "[t]he three concepts are fused

together, culminating in the ultimate conclusion of whether terminating parental rights is in a given child's best interests." *Id.* In this case, the juvenile court repeatedly emphasized the need for permanency and stability in A.B.'s life. This was an appropriate consideration for the juvenile court. Indeed, the Court of Appeals has emphasized that "the desire for permanency in [a] child's life" is "a critical factor in determining what is in the best interest of a child." *Id.* at 82. As the Court recognized, numerous studies have demonstrated that "[l]ong periods of foster care are harmful to the children and prevent them from reaching their full potential." *Id.* at 83 (internal quotation omitted). Having considered the requisite statutory factors, the court reasonably concluded that termination of Father's parental rights served A.B.'s best interests because A.B. was a special needs child who needed consistency, dealt poorly with change, and required permanency. The juvenile court's conclusion was supported by the evidence, grounded in well-established Maryland law, and not "well removed from any center mark imagined by the reviewing court and beyond the fringe of what [we] deem[] minimally acceptable." *In re Adoption/Guardianship of Joshua M.*, 166 Md. App. 341, 351 (2005) (defining what constitutes an abuse of discretion) (internal quotation omitted). Accordingly, we reject Father's assertion that the juvenile court's termination of parental rights based upon exceptional circumstances was inappropriate absent a finding of some level of parental unfitness.

Reasonable Efforts

Father's next allegation of error is that the circuit court erroneously found that the Department had made reasonable efforts towards reunification. We are unpersuaded.

Pursuant to FL § 5-323(d)(1), the juvenile court was required to consider "all services offered to the parent before the child's placement," "the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent," and "the extent to which a local department and parent have fulfilled their obligations under a social services agreement." In this case, as discussed *supra*, the juvenile court specifically considered the efforts made by the Department. The court found that the Department made "extraordinary efforts to identify [and] locate [Father] and get him served." The court further emphasized that the Department entered in a service agreement with Father, arranged for and paid for transportation expenses, provided for an interpreter, provide for psychological evaluations, initiated an interstate compact, and provided visitation.

Father asserts that the majority of the efforts put forth by the Department were aimed at reunifying A.B. with Mother rather than with Father. Indeed, given that the Department was unable to identify Father until May of 2016, this is not an inaccurate assessment. The Department worked towards reunification with Mother from the time of A.B.'s removal in October 2014. The juvenile court found that Department engaged with Mother by holding family involvement meetings, providing visitation, entering into service agreements, supervising visits, and referring Mother for mental health treatment, parenting classes, and G.E.D. classes. That the Department exhausted more efforts towards reunification with Mother was logical given that Father's identity was unknown until the filing of guardianship petition. The Department expended significant efforts in its attempts to

identify and locate Father, and the Department was unable to provide any other services to Father until Father was identified.

In this appeal, Father asserts that the Department failed to provide "what [Father] needed most: more time to have [A.B.] become more familiar with him and his family." Critically, it is the child's needs -- and not the needs of the parent -- that are the focus of termination of parental rights proceedings. *In re Ta'Niya*, *supra*, 417 Md. at 114 (explaining that it is improper for a court to focus on a parent's circumstances instead of on a child's best interest). Indeed, "the ultimate focus of the juvenile court's inquiry must be on the child's best interest." Furthermore, as discussed *supra*, the juvenile court clearly articulated why it believed that it would be detrimental to A.B. to allow the case to continue to languish into the future, explaining that A.B. needed permanency and stability. In our view, the juvenile court properly considered the efforts made by the Department in the context of its determination of whether exceptional circumstances existed that would made the termination of Father's parental rights serve A.B.'s best interests. Accordingly, we reject Father's reasonable efforts argument.

Extrinsic Evidence

Father's final argument is that the juvenile court improperly referenced extrinsic evidence when considering the statutory factors. Father points to two examples of allegedly improper conduct by the juvenile court. First, Father asserts that the juvenile court improperly considered information he learned at a judicial conference about the way children perceive time. This reference was made in the context of a discussion of A.B.'s immediate need for permanence. Second, Father asserts that the juvenile court improperly

referenced expert testimony he heard in a different proceeding when assessing the significance of the fact that A.B. used the term "daddy" to refer to Father. The juvenile court made this reference when explaining how the use of parenting labels such as "mommy" or "daddy" are characterizations from which conclusions about bonding cannot necessarily be drawn. As we shall explain, neither of Father's arguments are grounds for reversal.

First, we emphasize that the only authority cited to by Father with respect to this issue readily distinguishable. In support of his assertion that the juvenile court inappropriately considered evidence from outside the record, Father cites the fifty-year-old federal habeas case of *Dove v. Peyton*, 343 F.2d 210 (4th Cir. 1965). In *Dove*, the appellant argued "that during a respite of his trial, the judge who was hearing his case without a jury, tried other indictments against other defendants arising out of the same event upon which Dove was indicted, and thus the [c]ourt heard evidence in respect to Dove's offense in his absence." *Id.* at 212. The appellate court rejected Dove's argument, explaining that "[a] judge is presumed not to confuse the evidence in one case with that in another." *Id.* at 214. In *Dove*, the issue related to whether a court considered specific evidence relating to a defendant's offense. In the instant case, there is no allegation that the juvenile court considered any outside evidence relating to any specific facts in dispute. Rather, in this case, the court referenced guiding principles and background information that informed the way in which the court applied the statutory factors to the circumstances of this case. In our view, this is critically different than a court's consideration of outside evidence which would tend to prove or disprove specific disputed facts.

Judicial discretion is defined as the "power of decision exercised to the necessary end of awarding justice and based upon reason and law, but for which decision there is no special governing statute or rule." *In Re Yve S., supra*, 373 Md. at 583. In guardianship cases, § 5-323 of the Family Law Article is the governing statute that sets forth the factors a court must consider when determining whether termination of a parent's rights serves a child's best interests. The statute does not, however, explain precisely how a juvenile court should determine a child's immediate need for permanence or the extent of a child's bond to a biological parent. Indeed, the Court of Appeals has referenced scholarly literature as guidance in determining the importance of permanence in a child's life. *See In re Adoption of Jayden G., supra*, 433 Md. at 83-84. A trial judge is not a blank slate, and when making such a determination, a juvenile court exercises discretion. Accordingly, we reject Father's contention that the juvenile court improperly referenced extrinsic evidence.[12]

As the juvenile court recognized, this case presents somewhat unusual circumstances in that "contrary to other respondents in [guardianship] cases," A.B. is loved by his biological family members, including Father. Indeed, the court specifically found that A.B. "is loved by his father deeply" and recognized that A.B. "is very fortunate in that regard." This case presents fraught circumstances in that no party has suggested that Father is in any way an unfit parent, and the juvenile court was not blind to the fact that its ruling

[12] Assuming arguendo that the court's references were improper, Father has further failed to establish prejudice. Ms. Francis separately testified that A.B.'s use of the term "daddy" for Father did not, by itself, establish that A.B. and Father had established a substantial bond. Ms. Francis further emphasized A.B.'s "crucial" need for "permanency now."

gravely affects Father. The governing statute, however, provides for exceptional circumstances as a separate basis for a termination of parental rights ruling, and the critical inquiry is, and always must be, on the child's best interests. The juvenile court, based upon the evidence presented, found that exceptional circumstances existed such that A.B.'s transcendent best interests were not served by a continuation of the parental relationship with Father. This is the proper inquiry under the law. Perceiving no error, we affirm.

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