Circuit Court for Baltimore City
Case Nos. T16075001, T16075002, T16075003 & T16075004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2297

September Term, 2016

IN RE: ADOPTION/GUARDIANSHIP OF
D.H., D.H., J.H. and J.H.

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: August 1, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from orders by the Circuit Court for Baltimore City, sitting as a juvenile court, which terminated the parental rights of appellant D. H. ("Father") and C. Hu. ("Mother") and granted the Baltimore City Department of Social Services ("DSS") guardianship with the right to consent to adoption, or long term care short of adoption, relating to De. H. (DOB: 11/29/09), Da. H. (DOB: 11/10/11), Je. H. (DOB: 4/10/13), and Ja. H. (DOB: 4/8/14). All four children were adjudicated children in need of assistance ("CINA") in 2013 or 2014.[1]

Mother conditionally consented to the petitions for guardianship and is not a party to this appeal. Father objected to the orders and noted a timely appeal, asking this Court to consider whether the juvenile court erred in terminating his parental rights, "where it was possible for his children to have permanency without being adopted."

Finding no error or abuse of discretion, we shall affirm the juvenile court's orders.

FACTS AND LEGAL PROCEEDINGS

According to the stipulations of fact presented at the October 5, 2016 termination of parental rights ("TPR") hearing, Mother came to the attention of DSS in March 2010, after DSS received a report of mistreatment of Ca. Hu., Mother's child and half-brother of De. H. Mother was arrested on charges of abuse, and, following a shelter care hearing, De. H. was placed with Father under an Order Controlling Conduct ("OCC"). On

[1] Pursuant to Section § 3-801(f) of the Courts & Judicial Proceedings Article ("CP"), a "child in need of assistance" means "a child who requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." CP § 3-801(f).

October 5, 2010, Father agreed that De. H. was a CINA and returned the child to the care of Mother, under an Order of Protective Supervision to DSS.

At an April 4, 2011 CINA review hearing, the juvenile court rescinded the Order of Protective Supervision and terminated the court's jurisdiction with regard to De. H. In August 2011, De. H. was placed in foster care, after DSS received a report of neglect relating to Ca. Hu. In August 2012, the juvenile court found that De. H. was not a CINA and returned the child to Mother's custody.

In December 2011, DSS received a report of mistreatment of Da. H., who was just one-month old at the time.[2] Da. H. was placed in foster care but was returned to Mother under an OCC eleven days later, when DSS withdrew its request for shelter care. In January 2013, the juvenile court found that Da. H. was not a CINA; Mother retained physical custody.

In June 2013, Da. H. presented to a hospital emergency room, suffering from seizures and severe constipation. X-rays revealed three healing broken ribs, but neither Mother nor Father provided an explanation as to how the child was injured. Da. H., De. H., and Je. H. were placed in foster care the next day.

At a disposition hearing on December 20, 2013, Father agreed that De. H., Da. H. and Je. H. were CINA; the children were placed with him under an Order of Protective Supervision. Following a March 4, 2014 CINA review hearing, the juvenile court rescinded the Order of Protective Supervision and permitted the three children to

[2] Da. H. was born a "medically fragile child" who required several surgeries.

remain in Father's care and custody. DSS offered him services, including service agreements, safety plans, and housing, furniture, and clothing assistance.

On April 9, 2014, one day after her birth, DSS received a report of mistreatment regarding Ja. H. She was placed in foster care, where she has remained; Ja. H. has never lived with Mother or Father.

On April 23, 2014, Je. H. was seen in an emergency room and found to have a fracture to his right femur, allegedly caused by improper supervision while he was on a bed. DSS had provided a portable crib for Je. H. to sleep in, but Father used it for storage instead.

On April 28, 2014, DSS received a report of improper supervision pertaining to De. H., Da. H., and Je. H. The children were committed to the care and custody of DSS and placed in foster care, where they have remained ever since. At a June 19, 2014 disposition hearing, Father agreed that Ja. H. was a CINA.

On May 14, 2014, Father was detained at the Baltimore City Detention Center, pending criminal charges. He has remained incarcerated in state or federal prisons since that time.

DSS filed petitions for guardianship with the right to consent to adoption, or long term care short of adoption, relating to all four children on March 24, 2016. On October 5, 2016 and December 14, 2016, the juvenile court heard argument on DSS's petitions.

Mother consented to the guardianship petitions, with the condition that each child be adopted by the foster parents with whom they had been living. The children's attorney also conditionally consented to the petitions on their behalf. Father opposed the termination

of his parental rights, instead seeking reunification with the children upon his release from prison.

Tierra Sheppard, the children's family services caseworker, testified that she had been involved with this family since 2011; initially, she said, Mother and Father's involvement with DSS was "very steady" but had "trickled off" since 2012 or 2013. It was her opinion that Father cares for his children, and, during visits she supervised, he interacted appropriately with them.

After the May 2014 visit, Father was incarcerated in Baltimore City. Ms. Sheppard did not hear from him again until April 2015, when he told her he had been moved to the Chesapeake Detention Center, a federal prison.[3] In April 2015, he advised Ms. Sheppard that he had been granted permission to have three visits with the children and asked for her help in arranging those visits.

During the June 8, 2015, August 3, 2015, and September 14, 2015 prison visits, Ja. H., who was one year old, did not respond to Father and showed no attachment to him. Je. H., age two, went to Father when called but did not remain engaged with him for long. The older two children were more engaged with Father, with De. H. sitting on his lap and hugging him, but they did not have trouble separating from him at the end of the visits.

[3] At the time of the October 5, 2016 hearing, Father was incarcerated at FCC Petersburg, a medium security federal prison in Virginia, with an expected release date of March 14, 2022. He stated that with good behavior he would be released at the end of 2021, but he provided no supporting documentation for that claim.

According to Ms. Sheppard, Father had not interacted with the children since the September 2015 visit, nor provided updated contact information to DSS. And, as DSS was unable to provide services to someone in an out-of-state prison, none was offered to Father.

In their placements, all of which were adoptive resources, the children were doing well, and their caregivers were committed to creating opportunities for them to spend time with each other.[4] DSS requested the termination of Father's parental rights so it could provide these children with a "safe and stable living arrangement," with the permanency plan of adoption.

Father testified at the TPR hearing, via telephone, that upon his release from prison, he would likely live with his aunt in Baltimore. He agreed that he would need to get himself together before considering regaining custody of the children. He acknowledged that he had not seen his children since the three 2015 prison visits, nor spoken by phone with any of his children, except Je. H., since his incarceration, and that was on only one or two occasions many months prior to the hearing. He said he did not ask about his children too often because he knew they were with "good people." Father nonetheless disagreed that the court should terminate his parental rights because he deserved another chance to regain custody of the children.

In closing arguments at the TPR hearing, DSS's attorney argued that, despite all the services DSS had provided to Father, the children had been in and out of the system since 2011. And, given Father's incarceration out-of-state for the foreseeable future, DSS was

[4] Two of the children live in Delaware, and two live in Maryland.

unable to offer services that would facilitate reunification with the children. DSS argued that to make the children wait for a permanent home until Father was released from prison would do them a great disservice.

In addition, counsel continued, Father had ceased making efforts to contact Ms. Sheppard, the children's caseworker, to determine how they were doing or to facilitate their placement with family members. He had also failed to inquire about the children's well-being during phone conversations with their caregivers—some of whom were his relatives—since being in prison. In DSS's view, Father was unfit to parent, and exceptional circumstances existed that made it in the best interest of the children to terminate Father's parental rights.

Father's attorney argued that Father was not unfit, rather that he was currently unavailable. Father realized that he had to get his life together upon his release from prison before he could consider reunification with the children, but he had a sincere desire to parent them and sought another chance to do so.

After summarizing in detail the testimony presented at the hearing, the court ruled:

> I went through all of that because these cases, and this one in particular, is particularly about the health and safety of all of these four Respondents. All of the four Respondents are being cared for by their [caregivers] in a more than satisfactory manner and the Court is satisfied that the children's health and safety being a primary consideration is being met by all the [caregivers] in this case.
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> [As far as t]he efforts to reunify these children through the Department, there really was no case plan. Ms. Sheppard indicated that since [Father] was incarcerated that no services were offered to him while he was incarcerated because they don't have the authority to go into the facility and do same,

> although Father has given testimony that while he has been incarcerated, he is on certain waiting lists for GED and hopefully the parenting class also. So with regard to a case plan compliance, there is no case plan compliance because there is no case plan.
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> With regard to—in this case the Father's adjustment of his circumstances, adjustment of his conduct or adjustment of his conditions to make reunification in the best—in the children's best interests, the Department has introduced the Father's record with regard to the reason that he's incarcerated … . They're all convictions indicating that the Father has had convictions for either possession of a controlled dangerous substance, possession with intent to distribute a controlled dangerous substance[,] and most recently[,] felon in possession of a handgun.
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> Father has given quite frank testimony that at the earliest his mandatory release date is some time in 2021, at the latest it could be around 2022. Today is December the 14th of 2016 and the case starts to take on a geological form because now we're dealing with pressure on the Father to try to get himself together and time, which waits for no one, particularly little kids and ranging in these young ages who will be maybe … 9 to … 13, some five years from now.
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> * * *
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> The Court is satisfied with the testimony that the children have had attachments and bonds with their [caregivers]; that these [caregivers] are trying in some respects to act as a family unit to try to keep these children not only familiar with each other, [but] to know each other. That the siblings know who the siblings are. And they're doing the best that they can residing in the State of Delaware, which isn't too far from here, but residing in the State of Delaware and luckily one of the children actually lives with a H. The other one lives with a H. but she's a C. and the other two children are well taken care of and the Court is satisfied with their adjustment to home. With regard to the children in Leaf Walk Elementary, they've made adjustment to school.

> So the Court is satisfied that the Department has proven with regard to the [Family Law Article] Section 5-323[(d)] factors, that the children are healthy and safe, that there have been services before placement that did not—that the Father was not amenable to such that we wouldn't be in this situation with regard to the children, that there has been no case plan compliance, that the Father has not made any progress with regard to adjusting his circumstances, his conduct or his conditions with regard to a reunification effort in the case. Father was, again, candid. What little money he gets while he is incarcerated he has to basically use for his own cosmetic purposes and therefore nothing—there is no evidence that he has paid any reasonable support with regard to the children's support. He has candidly indicated that he believes that the—all the children are in safe, caring environments.
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> And would services—would more services likely result in a reunification 18 months after placement? We're well beyond 18 months after placement. The Court finds no services would work that would lead to a reunification in this case.
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> * * *
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> There are no aggravated circumstances in this case with regard to a parent having—there is an aggravated circumstance with regard to a finding of neglect. There is no criminal court finding of abuse or neglect on the behalf of the Father. He hasn't been convicted in Maryland or any other state of a crime of violence against a child or another parent or another child or of another parent or in aiding and abetting such abuse. And I have no evidence that he has involuntarily lost his … parental rights to other children.
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> In this case the Court finds, and frankly in all cases, kids are not placed on … this earth to be here for their parents. Parents are placed on this earth to be here for their children. Now, although it is not singularly factored that Father won't be available for five to six years, but that does play into the Court's consideration with regard to all four petitions in this case. That is a long period of time for children to be out of the care of their biological parent, particularly the children of this young age. If we were talking about children who were, like, 13 years old and they were out of the care of that parent for a

couple of years, oh, maybe we can work back to it. But pursuant to the evidence in this case, these are young children who are attaching to others and who are bonding to others. So in addition to this Court's consideration of the statutory factors in this case, the Court finds that the Department has overcome the substantive presumption that the children should remain parentally connected to their Father because it would be in the best interests of these children to sever that relationship as the Court finds little to no prospect that the Father would ever be available for these children in 2017, 2018, 2019, 2020 and well into 2021.

So the Court in this case, parental unfitness, I'm going to give him the benefit of the doubt that with regard to parenting when he did he did the best that he could. But these are clearly exceptional circumstances that this Court finds in this case, that this Father … continuing a parental relationship with either of these [children] … would be detrimental to the interests of the children because at that time five years from now these children will not have had any permanency. And children need permanency. It reminds me—they need not only permanency, they need that support. They need that resource. They need that service that all parents are supposed to give.

So I've considered all the factors in the case. I've considered the testimony in the case. I read the exhibits … to familiarize myself with all that I was dealing with in this case and trying to give a parent the benefit of the doubt, there is no further doubt in this Court's mind that this Department has proven by clear and convincing evidence that it is certain to the Court that the parental relationship between Biological Father and [De., Da, Je., and Ja.], all of whom have been committed to the Department for at least the last … two and a half years … that that parental relationship, if continued, would be detrimental to the best interests of these children; that these children, even the oldest child, would have little [or] no emotional ties with their father. Frankly, it's probably—it's rather non-existent; that they have really no feelings with regard to the severance of the relationship between parent and child; that the impact of the termination of parental rights would only be beneficial to these children because at that time they would have permanent or what I believe one of the Counsel has described as a, quote, forever home, end quote; and that they all receive permanency

> at this time; and that this tortuous existence that they've had for the period of their lives stop and cease today.
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> Therefore, the Court grants the Department's petitions as to [Da. H., De. H., Ja. H., and Je. H.]. And that's the order of the Court.

The court filed written orders memorializing its ruling the same day.

STANDARD OF REVIEW

As we recently explained:

> We review orders terminating parental rights using three interrelated standards. The Court of Appeals recently set forth the standard of review as follows:
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> [W]hen the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] [i]f 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.

In re Adoption/Guardianship of L.B., 229 Md. App. 566, 586-87, *cert. denied*, 450 Md. 432 (2016) (citations omitted). In undertaking appellate review of a TPR matter, we must remain mindful that questions within the discretion of the juvenile court are "much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred." *In re: Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (citation omitted).

DISCUSSION

As reported above, the juvenile court found that there "are clearly exceptional circumstances … that this Father … continuing a parental relationship with … these [children] … would be detrimental to [their best] interests." Father attributes this finding solely to his incarceration and argues that incarceration alone should not be the basis for a finding of exceptional circumstances. He misunderstands the juvenile court's decision-making process.

The statutory scheme permits nonconsensual termination of parental rights in two circumstances: (1) parental unfitness; and (2) exceptional circumstances. Md. Code Ann., Fam. Law ("FL") § 5-323(b). The 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). In determining whether to terminate parental rights, "it is unassailable that the paramount consideration is the best interest of the child." *In re Adoption/Guardianship No. T00032005*, 141 Md. App. 570, 581 (2001).

First, we disagree with Father's contention that the sole basis for the finding of exceptional circumstances was his incarceration. The juvenile court stated:

> Now, although *it is not singularly factored that Father won't be available for five to six years*, but that does play into the Court's consideration with regard to all four petitions in this case. That is a long period of time for children to be out of the care of their biological parent, particularly the children of this young age. If we were talking about children who were, like, 13 years old and they were out of the care of that parent for a couple of years, oh, maybe we can work back to it. (Emphasis added).

We understand the juvenile court, by saying that it was "not singularly factored," meant that Father's incarceration was not the singular or only factor in its consideration, but that it was an important factor. That finding comports precisely with our case law. We have held that although a parent's incarceration does not *per se* create a disability to parent, "[g]iven the appropriate set of factual circumstances … incarceration may indeed, under the facts of a particular case, be a critical factor in permitting the termination of parental rights, because the incarcerated parent cannot provide for the long-term care of the child. Under such circumstances, the best interests of the child may warrant the termination of parental rights." *In re Adoption/Guardianship No. J970013*, 128 Md. App. 242, 252 (1999).

Father doesn't appear to contest the juvenile court's findings with regards to the statutory factors listed in FL § 5-323(d),[5] nor could he. The juvenile court made clear, well-

[5] Section 5-323(d) of the Family Law Article sets out the statutory factors that the circuit court must consider before it can terminate parental rights because either: (1) the parent is unfit to remain in a parental relationship with the child; or (2) exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child. FL § 5-323(b), (d).

supported findings, organized to follow the statute, and those findings were not an abuse of discretion. *See supra* at *6-10. Father argues, however, that the juvenile court failed to consider three additional non-statutory factors weighing against termination: (1) that Father was a good parent when he was with the children; (2) that the children's "foster parents, three of whom were family members, did not testify that they would be unwilling to remain [as] permanent placement[s] for the children"; and (3) that Father provided a "link uniting [the] children, none of whom were placed together."

There is no doubt that the juvenile court may take into consideration any factor, statutory or non-statutory, that will help it "determine whether terminating a parent's rights is in [a] child's best interests." FL § 5-323(d). Thus, in addition to the factors outlined in Section 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) (citation omitted). Both "a parent's *actions and failures to act* … can bear on the presence of exceptional circumstances and 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).

Here, however, we do not think that these considerations change the analysis. The juvenile court did consider Father's relationship with the children but found that the children "have little [or] no emotional ties with their father." *See supra* at *9. Likewise, the court considered the possibility of maintaining the status quo with their foster parents, but decided that the children's best interests would be served by "receiv[ing] permanency at

this time; and that this tortuous existence that they've had for [this] period of their lives stop and cease today." *See supra* at *9-10. Finally, the juvenile court did consider the children's interest in maintaining "links" amongst each other, but noted that their respective caregivers "are trying in some respects to act as a family unit to try to keep these children not only familiar with each other, [but] to know each other." *See supra* *7. Thus, we find that the juvenile court correctly considered both statutory and relevant non-statutory considerations.

We are not persuaded that the juvenile court's factual findings were clearly erroneous or that it abused its discretion in finding exceptional circumstances to warrant terminating Father's parental rights and granting DSS's petition for guardianship. Therefore, we affirm the juvenile court.

ORDER OF THE CIRCUIT COURT FOR BALTIMORE CITY, SITTING AS A JUVENILE COURT, AFFIRMED. COSTS TO BE PAID BY APPELLANT.