UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2063

September Term, 2014

IN RE: ADOPTION/GUARDIANSHIP
OF NICOLE S.

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Kehoe, J.

Filed: June 12, 2015

This appeal arises out of a decision by the Circuit Court for Baltimore City, sitting as a juvenile court, to grant the petition of the Baltimore City Department of Social Services (the "Department") to terminate the parental rights of Shawn S., appellant, and Mindy M., to their daughter, Nicole S.

A hearing on the petition was held on October 20 and November 7, 2014. Mr. S., who was incarcerated, participated by telephone. Mindy M. was not present and did not participate in the hearing. At the conclusion of the hearing, the juvenile court found Mindy M. to be an unfit parent. The court determined that exceptional circumstances existed that made the continuation of Shawn S.'s parental relationship detrimental to Nicole's best interests. The court terminated the parental rights of both parents. (Tr. 11/7/14 at 135-36) Mr. S. appealed the court's judgment; Mindy M. did not.

The sole issue presented for our consideration is whether the juvenile court erred in terminating Mr. S.'s parental rights to Nicole. For the reasons set forth below, we shall affirm.

BACKGROUND

At the time of the TPR hearing, Mr. S. was incarcerated with an anticipated release date in early 2016. To this Court, Mr. S. does not assert that he was able to care for his daughter at the time of the hearing. Instead, he contends that the juvenile court should have placed Nicole with his mother, Jada M., until he is released from prison and becomes able to provide a stable home for his daughter. (No one contends that Mindy M., Nicole's mother, was able to care for her daughter.)

We will summarize the relevant evidence pertaining to Mr. S.'s appellate contentions. We begin with Nicole because "the best interest of the child remains the ultimate governing standard." *In re Adoption of Jayden G.*, 433 Md. 50, 67-68 (2013) (citation and quotation marks omitted).

— Nicole —

Nicole was born on December 20, 2011. Both Nicole and her mother tested positive for cocaine and opiates. Nicole was placed in a neo-natal intensive care unit due to withdrawal symptoms and exposure to an unrelated health condition during birth. On January 4, 2012, Nicole was adjudicated a child in need of assistance ("CINA"). About three weeks later, the Department placed Nicole with foster parents, Mr. and Ms. McM. The McM.s had previously cared for, and then adopted, Nicole's older sister, Madison, who is about two years older than Nicole.

Alex Taylor, a clinical coordinator for Mentor Services, who monitored Nicole's progress in her foster placement testified that he had visited Nicole in her foster home on a weekly basis since October 2013. According to Taylor, Nicole was initially placed in a "medically complex" program because of her drug exposure, but, at the time of the hearing, she was healthy and showing no symptoms of drug exposure. Taylor described Nicole as happy and "very bonded" with her sister and foster family. Taylor testified that Nicole was dressed and cared for appropriately and that he observed her at a church event and interacting with her foster parents' granddaughter.

Roger Ellis, the Department case worker responsible for Nicole, testified that he visits Nicole in her foster home monthly. Like Taylor, he observed that Nicole is "very connected" to her sister and foster parents. He testified that the foster parents have a good relationship with Nicole, that they are adoptive resources for her, and that Nicole loves them. Ellis recommended adoption for Nicole. In making that recommendation, Ellis expressed a concern that Mr. S. will not be released until December 2016 and that he has not bonded with Nicole.

Nicole's foster parents also testified. Mr. McM. told the court that Nicole shares a bedroom with her sister, attends church on Sundays, and plays with his granddaughter. He and his wife provide for all of Nicole's daily needs including meals, bathing, and clothing. He stated that neither of Nicole's biological parents have provided any gifts. Ms. McM. testified that Nicole is learning her ABCs, plays and fights with her sister, and sees a doctor and dentist on a regular basis.

— Mr. S. —

Mr. S. has four children, the youngest of whom is Nicole. At the time of the hearing on the Department's petition for guardianship, Mr. S.'s other children were 12, 10, and 9 years old. None of the children has ever resided in his care.

Ellis, the Department's caseworker assigned to Nicole, testified as to Mr. S.'s contacts with the Department regarding Nicole. Ellis gave Mr. S. his contact information, but did not

have any contact with him between January and mid-March 2012. Ellis stated that Mr. S had a history of drug abuse, drug-related criminal activity, and domestic violence.

Ellis testified that Mr. S. entered into a service agreement with the Department that required him, among other things, to participate in a drug treatment program, to participate in mental health treatment, to attend an aftercare program relating to drug treatment, to participate in domestic violence counseling, and to provide the Department with a release of information pertaining to his drug treatment. Apparently, Mr. S. did not comply with the terms of the agreement in any substantial manner. On May 31, 2012, Mr. S. signed a second service agreement in which he agreed that he would perform substantially the same requirements as those set forth in the prior agreement by July 4, 2012.

To that end, Mr. S. met with the Department's drug specialist who recommended that he attend the Family Recovery Program. Mr. S. completed the intake and initial assessment for the Family Recovery Program. According to the assessment notes, Mr. S. has a history of heroin and opiate dependency and, despite one previous treatment episode, has had "no significant clean time." A few days after starting the Family Recovery Program, Mr. S.'s urinalysis was positive for opiates. He did not show up for an intensive outpatient treatment program on June 12, 2012, nor did he continue to participate in the Family Recovery Program because he was incarcerated on drug-related charges in the federal court system after pleading guilty to conspiracy to sell drugs. Mr. S. was sent to several out-of-state correctional institutions in Pennsylvania, Florida, West Virginia, and Kentucky, and

remained incarcerated at the time of the hearing on the Department's petition for guardianship. Mr. S.'s expected release date is in December 2016.

Letters sent by Ellis to Mr. S. in 2013 were returned. Mr. S. did not have any contact with Nicole in 2013 or 2014. He did not provide financial assistance for Nicole or send her any cards or letters.

Mr. S. was present at Nicole's birth, but could not recall her birth date. He never questioned his paternity, although it was undisputed that his name does not appear on Nicole's birth certificate. He visited her once in March and once in May of 2012.

Mr. S.'s version of events conflicted with Ellis's testimony. Mr. S. testified that he felt that Ellis had not given him a fair chance to clean up and fight for Nicole, although he acknowledged that, prior to his incarceration, he was still "doing drugs." Mr. S. testified that Ellis kept "putting stuff in my head like that's not your daughter," and asked him to take a blood test. Mr. S. claimed that he did the "couple of programs" Ellis asked him to do and that, before he was incarcerated, he visited Nicole every two weeks. Mr. S. acknowledged that he had been incarcerated in a federal prison for almost three years as a result of his guilty plea to charges "related to conspiracy to sell drugs," and he expected to be released in 2015 or 2016. At the time of the hearing, he had not seen Nicole in two years.

Mr. S. testified that he received a disability check once a month because he is "slightly slow." He acknowledged that he used cocaine and heroin and stated:

> I used enough that I wouldn't even go home and look at my mother. And sometimes I wouldn't even go home and look at my kids. And my mother

> would call my phone and tell me your kids – I've got your kids up there. And I used enough of it, though, that I didn't even want to look at them because it made me feel bad.

In 2010, that is, before Nicole's birth, Mr. S. enrolled in a drug treatment program through the Family Recovery Program, but did not complete it. In 2011, he participated in a 28 or 29 day treatment program known as Gaudenzia. He was released from that program before completing the outpatient portion because he required treatment for sleep apnea. He testified that, in June 2012, he returned to the Family Recovery Program drug treatment program and participated until he was arrested.

— Jada M. —

Ellis testified that Nicole's paternal grandmother, Jada M., visited Nicole in the hospital soon after she was born and expressed a desire to obtain custody of the child. In March 2012, the Department facilitated a visit between Nicole and Jada M. Ellis conducted a Child Protective Services ("CPS") clearance check and a criminal background check on Jada M. He discovered that she had a history of indicated abuse and neglect of her own children in 2000 and 1987, which arose from her leaving her young children at home alone. On May 23, 2012, Ellis visited Jada M.'s home and conducted a home health and safety assessment. The home did not pass because there were bags of clothes and wood piled up that constituted a fire hazard, peeling and flaking paint and plaster, mold, holes in the floor, and a hole the size of a baseball in the front door. Ellis and his supervisor returned to the home 30 days later, but the problems had not been corrected.

Ellis testified that Jada M.'s conduct "was very inappropriate," using obscenities, calling him names, and leaving "nasty messages" on his answering machine. Ellis acknowledged that he did not believe that Mr. S. was Nicole's father. Jada M. responded to Ellis's opinion about Mr. S.'s paternity by leaving a message on his answering machine asking if he had stuck his "dick in mom," referring to Mindy M.

Jada M. acknowledged that she had a Child Protective Services history from "the 1990s" when she left Mr. S. and his brother at home alone. She stated that she "was dumb" and "didn't know no better." After that incident, she attended counseling. Jada M., who has bipolar disorder, lives with her adult son, Tyrell, who has schizophrenia and requires her care. Both require medication for their medical conditions. Jada M. participates in medication management every two months, attends counseling every two weeks, and sees a psychiatrist monthly. Jada M. receives Supplemental Security Income ("SSI") and disability benefits. She does not work, but cares for Tyrell and some of her grandchildren, including one of Nicole's half-sisters. According to Jada M., Tyrell sometimes "might not want to be in a vicinity around certain people" and has "had little outbursts at times where you have to calm him down[.]" She explained that if he goes outside and someone in the neighborhood says "bad things to him[,]" he might "get upset like he want to fight the person[,]" although he has never attacked a child.

At the conclusion of the TPR proceeding, the court issued findings of fact from the bench. Insofar as they relate to Mr. S.'s appellate contentions, the court stated:

Are there exceptional circumstances which relate to father? And I believe that there are. Those exceptional circumstances include the fact that this is a child whose never been in the home of the biological parents, but has always been in a hospital or in the care of the long term foster parents who are the prospective adoptive parents, and who are the parents of her sibling. Or her half sibling. The fact that she was 21 [days old] when she was care -- in the care. I think that if I were to try to return this child to either mom or dad, or to place the child with the paternal grandmother, that the possible emotional effects on this child would be negative.

I know that paternal grandmother, Ms. M., loves Nicole, wants to have Nicole, and wants what's best for Nicole. However, she does have her own child protective services history, which is rather significant. She is caring for an adult child who requires 24 hour supervision.

The child has strong ties with the current caregiver. Has no ties with either mother, father, or with the paternal grandmother. When I think about the intensity and genuineness of dad's desire to have the child, I hear him. And perhaps as he's unable to demonstrate it, the only track record I have is the track record with respect to the other three children that he has. And that track record does not convince me that if I were to wait additional time, dad would be available and appropriate for the child. And that the child would be in a stable and certain placement if I were to place the child either with dad or with the paternal grandmother. And certainly I believe that the child's stability and certainty are enhanced by leaving her with the current caregiver.

I do believe that the continuation of parental relationship with mother and father would be detrimental to Nicole. So when I summarize it, Nicole doesn't come to the court in a vacuum. She comes to the court as dad's fourth child, and as mom's third child. She comes to the court as a child of parents who have each long substance abuse histories. She comes to the court as a child of a father who has significant distribution charges, significant drug history, and who's future in the next 18 months is uncertain at best. Considering all those factors, I do make a finding by clear and convincing evidence that it is in the best interest of Nicole S. for me to grant the Department's petition for guardianship with the right to consent to adoption or long term care short of adoption. Thereby terminating the natural parent rights of Mindy M. and Shawn S.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

A. Standard of Review

In *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90 (2010), the Court of Appeals discussed the three different but interrelated standards that are used in reviewing a decision of a juvenile court to terminate parental rights:

> [First,] 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.

417 Md. at 100 (internal quotation marks, citations, and alterations omitted).

B. The Termination of Parental Rights

Maryland courts and the Supreme Court of the United States have long recognized the fundamental right of a parent to raise his or her child. *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). Because this right "is so fundamental . . . it may not be taken away unless clearly justified." *In re Adoption/Guardianship No. 95195062/CAD*, 116 Md. App. 443, 454 (1997) (internal quotation marks omitted). As a result, in termination of parental rights (TPR) cases, the party seeking termination, typically the Department, must overcome the parental presumption. *In re Adoption/Guardianship of Jayden G.*, 433 Md. 50, 95 (2013). The

presumption "may be rebutted only by a showing that the parent is either unfit or that exceptional circumstances exist that would make the continued relationship detrimental to the child's best interest." *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 498 (2007). "A finding of parental unfitness [or, for that matter, exceptional circumstances] overcomes the parental presumption, but it does not establish that termination of parental rights is in the child's best interest. To decide whether it is, the court must still consider the statutory factors under FL § 5-323(d)." *Jayden G.*, 433 Md. at 94.[1]

[1] FL § 5-323(d) sets forth factors to be considered in determining whether a termination of parental rights is justified. Subsection (d) reads in pertinent part:

> (d) [I]n ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:
>
> (1)(i) all services offered to the parent before the child's placement, whether offered by a local department, another agency, or a professional;
> (ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and
> (iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any;
>
> (2) the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including:
> (i) the extent to which the parent has maintained regular contact with:
> 1. the child;
> 2. the local department to which the child is committed; and
> 3. if feasible, the child's caregiver;
> (ii) the parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so;

(continued...)

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(iii) the existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time; and

(iv) whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interests to extend the time for a specified period.

(3) whether:

(i) the parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect;

(ii) 1.A. on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidence by a positive toxicology test; or

B. upon the birth of the child, the child tested positive for a drug as evidenced by a positive toxicology test;

* * *

(iii) the parent subjected the child to:

1. chronic abuse;
2. chronic and life-threatening neglect;
3. sexual abuse; or
4. torture;

* * *

(v) the parent has involuntarily lost parental rights to a sibling of the child; and

(4)(i) the child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly;

(ii) the child's adjustment to:

1. community;
2. home;

(continued...)

As the Court concluded in *Rashawn*:

> 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.

402 Md. at 502. "This harmonizing synthesis of the law should be the touchstone for courts in TPR cases." *In re Ta'Niya C.*, 417 Md. 90, 111 (2010).

With these standards in mind, we turn our attention to the issue at hand.

C. The Juvenile Court's Decision

Mr. S. acknowledges that the juvenile court made specific findings of fact as to each consideration set forth in FL § 5-323(d), but challenges the juvenile court's determination that exceptional circumstances existed that made the continuation of the parent-child relationship detrimental to Nicole's best interests. Specifically, he contends that his incarceration should not serve to diminish his right to ensure that Nicole's permanent home is with her biological family. He asserts that his release date was between one and two years

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[1](...continued)

3. placement; and
4. school;

(iii) the child's feelings about severance of the parent-child relationship; and
(iv) the likely impact of terminating parental rights on the child's well-being.

from the date of the TPR hearing and that "he was not asking that Nicole languish in foster care, but rather that she be placed with his mother, who sought access to her since the inception of the case."

In addition, Mr. S. contends that the juvenile court erred in finding that exceptional circumstances existed because "its findings as to certain factors pertaining to Nicole's relationship with her foster care providers, went beyond what was required in the statute." According to Mr. S., the court failed to consider the harm that Nicole would suffer by intentionally being denied access to her paternal relatives and, instead, improperly compared "how Nicole would fare in the custody of her foster home over what could be provided by her biological family." Mr. S. further argues that the Department failed to offer him services of any kind, that he and Jada M. were denied access to Nicole due to questions of paternity, and that the Department's reasons for denying Jada M.'s request for custody were "clearly insufficient and aimed to hinder reunification . . . in favor of the placement with the foster parents." He points to the fact that Jada M.'s Child Protective Services history was over twenty years old, that it involved an isolated incident, and that it did not result in any harm to the children. He also maintains that the other concerns about Jada M., including the clothing packed in bags, the pile of wood, and the hole in the door, were "insignificant and correctable." According to Mr. S., the Department demonstrated an improper preference for the foster family by failing to put any effort into reunifying Nicole with her paternal relatives, failing to make efforts to allow Nicole to visit with any of her half-sisters other

than the one in her foster home, and failing to offer services tailored to allow Nicole to reunify with her father and develop a relationship with her biological family. Mr. S. asserts that being placed with a relative would have been in Nicole's best interest.

Our review of the record reveals that there was clear and convincing evidence to support the juvenile court's determination that, due to exceptional circumstances, a continuation of the legal relationship between Mr. S. and Nicole would be detrimental to Nicole's best interest. The court found that the presumption favoring continuation of the parental relationship was rebutted by evidence of the lack of relationship between Mr. S. and Nicole, Mr. S.'s long standing, untreated substance abuse problem, Mr. S.'s inability to provide a safe home for Nicole in the foreseeable future, and Nicole's positive adjustment to and bond with her foster family.

It is undisputed that Mr. S. has been incarcerated in out-of-state federal correctional institutions for over two-thirds of Nicole's life and is not scheduled to be released until about 2016, when Nicole will be almost five years old. In considering the totality of the circumstances, this was a significant factor in assessing Nicole's best interest. It was not, however, the only factor. In finding exceptional circumstances, the court also considered Mr. S.'s long history of substance abuse. It considered his testimony that he used enough heroin and cocaine per day that he "didn't even want to look at [his children] because it made [him] feel bad." The court recognized that Mr. S.'s substance abuse existed for over half his life with "no significant clean time," that he did not follow through with previous referrals from

the Department, and that even when the Department was working with him on reunification with Nicole, he was failing to meet the requirements he had agreed to in his service agreements.

The record does not support Mr. S.'s contention that the Department failed to offer him services of any kind. The Department made numerous efforts to assist Mr. S. in reunifying with Nicole, including referring him to a drug addiction specialist who facilitated his enrollment in the Family Recovery Program, entering into two service agreements with him, facilitating two visits with Nicole, and sending letters in an attempt to locate him when he was not in contact with the Department. That the Department had limited opportunity to work with Mr. S. was largely the result of his incarceration from the time Nicole was only six months old.

Mr. S.'s contention that the negative effects of his incarceration could have been ameliorated by placing Nicole in the care of Jada M. is unpersuasive. The focus of the TPR hearing was not on the potential suitability of Jada M. as a placement. First, "the appropriate focus of the TPR hearing [is] not the potential suitability of the paternal grandmother as a placement for [the child] . . . but rather, the fitness of [Ms. M.] and [Mr. S.] as parents." *In Re Cross H.*, 200 Md. App. 142, 152 (2011), *cert. dismissed*, 431 Md. 371 (2013). Second, the evidence indicated that Jada M. was not an appropriate placement resource. The evidence indicated uncorrected deficiencies in her own housing; her 24-hour supervision of

her disabled adult son living in her home; and her own disability. These factors combine to indicate that placement of Nicole in her care would have been inappropriate.

Neither was there any error in the court's determination that "the parent/child relationship is with the caregivers as opposed to with the biological parents," nor that "the possible emotional effects" on Nicole of placement with Mr. S. "would be negative." Mr. S. had visited with Nicole only twice prior to his incarceration. He had no relationship with her and she had resided with her foster family since she was 21 days old. Contrary to Mr. S.'s contention, the juvenile court was not required to disregard Nicole's attachment and emotional ties to her foster family. *Jayden G.*, 433 Md. at 102.

Finally, we are not persuaded by Mr. S.'s argument that the juvenile court should have extended Nicole's placement in foster care to allow him to participate in her life and allow her to have contact with his family. Mr. S.'s contention is contrary to the goal and requirements of the TPR statute and Nicole's best interest, and would improperly elevate his needs over Nicole's needs, particularly her need for permanency. Mr. S. will not be released from prison until 2016 and, even after his release, he will have to address all of the issues that brought Nicole into care, including his long history of cocaine, heroin and prescription drug abuse, and his past history of criminal activity and domestic violence. The juvenile court acted properly in refusing to place Nicole in "suspended animation" until Mr. S. is released from prison, addresses all of his own issues, and becomes available to parent Nicole.

Considering the totality of the circumstances, including Mr. S.'s incarceration, his lack of relationship with Nicole, the fact that he will not be available to parent Nicole in the near future, and his substance abuse issues and history of criminal activity and domestic violence, we conclude that the juvenile court's decision to terminate Mr. S.'s parental rights to Nicole was supported by clear and convincing evidence, was reasonable and legally correct, and constituted a sound exercise of discretion.

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