Circuit Court for Garrett County
Case No. 11-Z-15-004159

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 887

September Term, 2016

IN RE: ADOPTION/GUARDIANSHIP OF
T.M. & A.M.

Arthur,
Reed,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: January 20, 2017

On June 8, 2016, the Circuit Court for Garrett County, sitting as a juvenile court, issued an opinion and order terminating the parental rights of Mr. M., the appellant, to T.M. and A.M. (collectively, "the children").[1] The appellant noted this timely appeal, from which we discern two issues:[2]

1. Did the court err by terminating Mr. M.'s parental rights?
2. Did the court err by failing to consider the paternal grandparents as a resource for the children?

For the reasons stated below, we answer the first question in the affirmative and the second in the negative. We conclude that the court failed to determine expressly whether Mr. M. was unfit and/or that exceptional circumstances existed such that it was in the children's best interest to terminate his parental rights. Therefore, we vacate the judgment of the circuit court and remand for further proceedings.

[1] The order also terminated the parental rights of the children's mother, Ms. B., who did not file an objection to the termination and was deemed to have consented as a matter of law.

[2] The appellant's question presented in his brief reads:

> Did the TPR court err by terminating the father's parental rights without finding that he was unfit or that exceptional circumstances warranted terminating his rights; and by granting the petition without independently considering whether allowing the boys to be placed with their grandparents would prevent the need to terminate the father's rights and allow them to live with their biological family?

FACTUAL AND PROCEDURAL BACKGROUND

The Garrett County Department of Social Services (the "Department") became involved with T.M. (born July 2011) and A.M. (born July 2012) on January 11, 2014, after emergency room personnel were unable to contact a parent to provide consent for treatment of A.M. At that time, the children had been in the care of non-relatives for approximately six months. Both children had unmet medical needs. Indeed, then two-and-a-half-year-old T.M. had never received any vaccinations, and then one-and-a-half-year-old A.M. had received only his two-month immunizations. A shelter care hearing[3] was held on January 15, 2014, and the court ordered the children to remain in the custody of the Department.[4] Mr. M. did not attend the hearing because he was on parole in West Virginia.[5]

Mr. M. was first incarcerated in December 2011 for grand larceny and remained in prison until April 2013. He was again imprisoned from July to December 2013 for violating

[3] A shelter care hearing is "a hearing held before ["child in need of assistance"] disposition to determine whether the temporary placement of the child outside of the home is warranted." Md. Code Ann., Cts. & Jud. Proc. §3-801(z).

[4] At the time of removal, the Department entered into a service plan with Ms. B., due to concerns about her mental health and substance abuse. Ms. B. initially complied with the service plan and attended visits with the children, but the Department developed concerns as to her conduct. Furthermore, she did not consistently attend mental health treatment. Ms. B. last visited the children in December 2014, and her last communication with the Department was in September 2015.

[5] Mr. M. testified that he was wearing an ankle monitor and that there was not enough notice from Maryland to permit West Virginia to decide if he could attend the hearing.

his parole. At the time of the removal hearing, Mr. M. was unaware that non-relatives had been caring for the children.

In February 2014, the Department petitioned to have the children declared children in need of assistance ("CINA").[6] The Department agreed to investigate the paternal grandparents and the maternal aunt and uncle as potential placement resources for the children by conducting a "walk through" of both homes. Mr. M. attended the adjudication hearing on February 25, 2014 and advised the Department that he wanted the children placed with his parents so that the family could be reunified after his incarceration ended. The Department expressed concerns about Mr. M.'s parenting skills and level of involvement with the children prior to them entering the Department's care.

Following the disposition hearing on March 18, 2014, the court declared the children to be CINA. The court found the aunt and uncle to be an inappropriate placement resource, and the Department learned that the paternal grandparents' home did not have running water. Because the grandparents reside in West Virginia, the Department opened an Interstate Compact for the Placement of Children ("ICPC") investigation[7] so that a more thorough home assessment could be completed. After a full home study, West Virginia

[6] A CINA is a child "who requires court intervention because: (1) [t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) [t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." Maryland Code (1973, 2013 Repl. Vol., 2014 Suppl.), Courts & Judicial Proceedings Article ("CJP") § 3-801(f).

[7] The ICPC is a statutory agreement among all 50 states governing the safe placement of children from one state into another state. It requires the Department to work with the child welfare authorities of another state to determine the suitability of placing a child in a home in that state. Md. Code Ann., Fam. Law §§ 5-601 – 5-611.

denied the grandparents' ICPC request due to prior involvement with that state's child protective services agency.

Meanwhile, the Department attempted to enter into a service agreement with Mr. M., which required him to obtain or verify employment, complete a parenting course, submit to random drug screenings, attend all of the children's medical appointments, visit with the children, and obtain stable housing free of abusive persons and people with substance abuse issues. The agreement also required him to sign a release so that the Department could speak with his parole officer. Mr. M. initially refused to sign the release. The Department did not have contact with him again until June 10, 2014, at which time he signed the release. The following month, Mr. M. signed the service agreement and arranged for visitation with the children. At the same time, Mr. M. submitted to a random drug test. He tested positive for cocaine but not Suboxone, despite stating that he was participating in a Suboxone treatment program.[8]

Mr. M. visited the children twice after signing the service agreement. Other visits were cancelled because Mr. M. arrived late. The children were initially "apprehensive" around Mr. M., but they did "warm up" to him. Mr. M. last visited the children on August 6, 2014 but spoke to them by telephone through September 2014. On October 11, 2014, Mr. M. was arrested and imprisoned in West Virginia for first-degree robbery – a charge

[8] Suboxone is a combination of buprenorphine and naloxone and is meant to help opiate addicts overcome their addiction. *The Effects of Suboxone Use*, DRUGABUSE.COM, http://drugabuse.com/library/the-effects-of-suboxone-use/ (last visited Nov. 23, 2016).

Mr. M. later pled guilty to and received a prison sentence of twenty years.[9] Mr. M. made no attempt to contact the children or the Department after his incarceration.

In April 2015, the paternal grandparents appealed the denial of the ICPC in West Virginia. They notified the Department that the child protective services findings against them had been overturned and requested a new home study. Workers from the Department met with the grandparents at their home and conducted a drug screening. Both grandparents tested positive for buprenorphine, for which neither had a prescription.[10] Additionally, the paternal grandmother had an outstanding warrant for her arrest for theft in Garrett County. The Department also noted that the grandparents did not express an interest in visiting the children until the spring of 2015. In total, the grandparents visited the children five times before the Department stopped scheduling visits because of several missed visits. The ICPC request was rescinded, and Mr. M. did not file exceptions to this determination.

On August 20, 2015, the Department filed a petition to terminate the parental rights of Ms. B. and Mr. M. After receiving the termination request in September 2015, Ms. B. contacted the Department and consented to the termination. Mr. M. objected, and the court heard testimony on February 17 and April 18, 2016. Jessica Savage and Ashley Stuck,

[9] The State of West Virginia alleged that Mr. M. stole approximately $200 from a fast food worker at knifepoint. In response to a question from the West Virginia judge, Mr. M. stated that he stole the money "[t]o get dope." As part of the plea agreement, Mr. M. agreed to a twenty-year prison sentence, with parole eligibility after five years.

[10] Buprenorphine is prescribed to help opiate addicts overcome their addictions. *Buprenorphine*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, http://www.samhsa.gov/medication-assisted-treatment/treatment/buprenorphine (last visited Nov. 23, 2016).

foster care workers with the Department, both testified at the proceedings. Ms. Savage explained that she was the first foster care worker assigned to the case and described difficulties she had staying in contact with Mr. M. Ms. Stuck testified to the children's foster care placement. Specifically, she stated that the children began to transition to their current placement with K.D. and J.D. in January 2015 and were placed with them permanently on June 20, 2015. She further testified that the children have adjusted well to their foster family. They are current on their immunizations and receive regular medical care. T.M. has received counseling to address aggressive behaviors and is doing well in preschool, while A.M. is enrolled in Head Start. K.D. and J.D. are fully committed to adopting the children, who refer to them as "mom" and "dad."

Mr. M. testified via telephone on the second day of proceedings. He stated that he lived with T.M. for the first five months of T.M.'s life in 2011, lived with the children for three months in 2013, and spent about two weeks with them in December 2013. Mr. M. admitted that he had not complied with any of the requirements of the service agreement. He also explained that despite his incarceration, he would be able to take care of his children "when [he] make[s] parole" because he is "not the same person" he was before.

The court directed the parties to submit written memoranda in lieu of closing arguments, and on June 8, 2016, the court issued its written opinion and order, granting the Department's request. This appeal followed.

STANDARD OF REVIEW

In reviewing termination of parental rights ("TPR") cases, appellate courts utilize three related standards of review:

> [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, 587 (2016) (quoting *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010)).

In this case, Mr. M. contends that the court committed legal error in failing to expressly determine its findings as to parental unfitness and/or the presence of exceptional circumstances sufficient to terminate his parental rights. Mr. M. contends that the reasoning of the Court of Appeals in *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 504-05 (2007), is sufficient to vacate the determination of the juvenile court in this case. As such, our review of whether the juvenile court committed legal error is *de novo*. *See In re Adoption of Jayden G.*, 433 Md. 50, 96 (2013).

DISCUSSION

In considering whether to terminate a natural parent's parental rights, the court "must balance the presumption that 'a continuation of the parental relationship is in the child's best interests,' 'against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect.'" *In re Adoption of K'Amora K.*, 218 Md. App. 287, 301 (2014) (internal citations omitted). Accordingly, F.L. § 5-323(b) provides that if, after a court considers the factors listed in the statute, "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[,]" then the court may terminate the parental rights of the parent in the child.[11]

This Court has recognized that "[a] parent's right to raise her children 'is not absolute[.]'" *K'Amora K.*, 218 Md. App. at 302 (quoting *In re Adoption/Guardianship of Darjal C.*, 191 Md. App. 505, 530 (2010)). Indeed, the presumption that a child's best interests are best served by remaining with the natural parent "'may be rebutted upon a showing either that the parent is unfit or that exceptional circumstances exist which would make continued custody with the parent detrimental to the best interest of the child.'" *Ta'Niya C.*, 417 Md. at 103 (quoting *Rashawn H.*, 402 Md. at 495).

In this case, Mr. M. contends that the juvenile court erred by failing to determine expressly whether he was unfit and/or that exceptional circumstances existed such that termination of his parental rights was in the children's best interest. The Department maintains that the juvenile court's factual findings support a finding that Mr. M. is unfit and/or that exceptional circumstances exist, but asserts that the matter should be remanded to the lower court for an express determination. Counsel for the children, however, contends that the lack of "magic words" in the court's opinion should not serve to place form over substance in this case. Rather, the children's attorney argues that the court ably considered the appropriate statutory factors and concluded that Mr. M. "is unable, even if

[11] *See* F.L. § 5-323(d) for the list of factors.

released, to put his children in a healthy environment." Counsel for the children asserts that the juvenile court's findings are sufficient for this Court to infer that the juvenile court found parental unfitness and/or the existence of exceptional circumstances sufficient to terminate Mr. M.'s parental rights. We agree, however, with Mr. M. and the Department.

In *Rashawn H.*, the Court of Appeals reiterated the presumption that children's best interests are served by remaining with the natural parent(s). 402 Md. at 495. The Court remarked that "[t]o justify a TPR judgment . . . the focus must be on the continued parental relationship, not custody. The facts must demonstrate an unfitness to have a continued parental relationship with the child, or exceptional circumstances that would make a continued parental relationship detrimental to the best interest of the child." *Id.* at 499. To that end, the Court recognized that the legislature had "circumscribed the near-boundless discretion" that courts have in considering the best interests of children with F.L. § 5-323. *Rashawn H.*, 402 Md. at 499. The Court then discussed the role of the juvenile court in TPR cases as follows:

> 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.

Id. at 501 (emphasis added) (emphasis in original omitted).

In *Rashawn H.*, the Court vacated the termination of a mother's parental rights because the juvenile court in that case had not only relied upon findings that did not appear to be based on clear and convincing evidence, *see id.* at 503-04, but also because "[p]rincipally, the problem is that the court . . . did not relate the findings it made with respect to the statutory factors to the presumption favoring continuation of the parental relationship or to any exceptional circumstance that would suffice to rebut that presumption." *Id.* at 504-05. The Court directed the juvenile court to, upon remand, make factual findings with regards to the statutory factors and "to the extent that any amalgam of those findings leads to a conclusion that exceptional circumstances exist sufficient to rebut the presumption favoring the parental relationship, explain clearly how and why that is so." *Id.* at 505.

Children's counsel is correct that this Court has remarked that in making a TPR determination, a juvenile court "'is not required to recite the magic words of a legal test,' and that 'mere incantation of the magic words of a legal test, as an adherence to form over substance, may not cause the Genie to appear and is neither required nor desired if actual consideration of the necessary legal considerations are apparent in the record.'" *In re Adoption/Guardianship of Jasmine D.*, 217 Md. App. 718, 738 (2014) (quoting *Darjal C.*, 191 Md. App. at 532). Children's counsel is incorrect, however, in applying that statement and that case to this one in conjunction with *Rashawn H.*

In *Jasmine D.*, this Court upheld the termination of parental rights of a mother where the juvenile court had expressly found the mother to be unfit, but the court had not

explicitly found the termination to be in the child's best interests. 217 Md. App. at 738. We remarked that "the facts adduced in the juvenile court and language of the court's oral decision make clear that the court determined that Jasmine's best interests would be served by ending [the parent]'s parental rights." *Id.* The record made clear that the juvenile court had considered the appropriate statutory factors and expressly found the mother to be unfit. *Id.* at 738-39. The juvenile court had merely omitted explicitly finding that termination of parental rights was in the child's best interests. *See id.* at 728-33; *see also Darjal C.*, 191 Md. App. at 532 (remarking that this Court vacated and remanded the first appeal in the case because even though the juvenile court considered the statutory factors and the best interests of the child, this Court "commanded the trial court to go one step further and 'determine expressly whether those findings suffice either to show unfitness or exceptional circumstances and, if the findings show unfitness or exceptional circumstances, explain how.'" (quoting *In re Adoption/Guardianship of Darjal C.*, No. 1734, Sept. Term 2007 (Sept. 5, 2008), [hereinafter *Darjal I*] at slip op. 14)).

In this case, the juvenile court's opinion and order reads, in pertinent part, as follows:

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> After a review of the testimony and memoranda of counsel and considering the requirements of [F.L.] § 5-323, which will be discussed later in the opinion, the Court finds by clear and convincing evidence that the Petition in each case shall be granted.
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> [Mr. M.] was offered visitation, referred to substance abuse counseling and parenting class, none of which were successful. He did eventually sign a service plan in July, 2014.

All efforts of the Department to fulfill its obligations were frustrated. The Department even considered the parents of [Mr. M.] and began an investigation into the grandparents' home until issues of substance abuse and other issues curtailed that investigation. The Court finds that the Department's efforts were reasonable and frustrated by the two parents.

Despite the Department's efforts, neither the mother nor the father will adjust their circumstances, conduct, or conditions to make it to the best interest of the children to return home. The mother did not maintain regular contact with the children since December, 2014, and the father has been incarcerated in West Virginia serving a sentence of 20 years since July 22, 2015.[12] The mother contributed several hundred to the children's care. The father nothing.

Neither parent has a disability that would render them unable to care for their children. Additional services would not be likely to bring about a parental adjustment so that the children could be reunited. The mother decided to consent to the Termination of Parental Rights, and the father is serving a long sentence of incarceration. The children's emotional ties to the parents are slight. The mother hasn't visited since December, 2014. The father has had three total visits since the children were removed.

The children are together in the same foster home, refer to their foster parents as Mom and Dad, who are apparently willing to adopt. The children are current in their immunizations, regularly see their doctor, and have been given counseling.

The granting of this petition will have a positive impact on the children and is certainly in their best interest.

The mother consented to the petition, and the father is unable, even if released, to put his children in a healthy environment. In the best interest of the children, they need to move on if they are ever to have a chance at life.

[12] This is not wholly accurate. Mr. M. was given credit for time served. Accordingly, October 11, 2014, is the effective start date of Mr. M.'s sentence.

The juvenile court did make factual findings as to the statutory factors found in F.L. § 5-323(d), including: the services offered to Mr. M., the extent to which he maintained contact with the children and the Department, his lack of contribution to the children's care and support, the children's adjustment to their placement, and the likely impact of terminating Mr. M.'s parental rights. The juvenile court did not, however, expressly link those factual findings to a finding of parental unfitness and/or the existence of exceptional circumstances rendering it in the children's best interests to terminate Mr. M.'s parental rights. As the Court of Appeals did in *Rashawn H.*, and we did in *Darjal I*, we vacate the judgment of the juvenile court and remand so that "the trial court [may] go one step further and 'determine expressly whether those findings suffice either to show unfitness or exceptional circumstances and, if the findings show unfitness or exceptional circumstances, explain how.'" *Darjal C.*, 191 Md. App. at 532 (quoting *Darjal I* at slip op. 14). It would appear that the evidence here supports such a finding, but it is the trial judge's responsibility to make that finding.

Mr. M. also urges this Court to review the rejection of the paternal grandparents as a resource for the children. Mr. M. contends that had the juvenile court awarded custody to the paternal grandparents, his parental rights would not need to be terminated, and the family could remain together. The Department argues that the issue of placing the children with the grandparents is not properly before this Court, as Mr. M. failed to raise the issue in the children's CINA cases or after the court changed the children's permanency plan to

adoption by a non-relative in July 2015. Counsel for the children agrees with the Department.

We note that the juvenile court altered the children's permanency plan in July 2015 to adoption by a non-relative and explicitly stated, "the paternal grandparents are not a permanent option and therefore, the [ICPC] request is hereby rescinded." Notwithstanding the problem of Mr. M.'s standing to raise an appeal on behalf of his parents, Rule 8-202(a) requires that, with exceptions inapplicable to this case, a notice of appeal "shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." Mr. M.'s June 30, 2016 notice of appeal does not encompass the juvenile court's July 2015 determination as to the paternal grandparents. Therefore, this issue is not properly before this Court.

JUDGMENT OF THE CIRCUIT COURT FOR GARRETT COUNTY VACATED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID 1/2 BY APPELLANT AND 1/2 BY APPELLEES.