

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

IN THE INTEREST OF: D.C.D., MINOR,

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

APPEAL OF: CLINTON COUNTY  
CHILDREN AND YOUTH SERVICES,

Appellant

No. 1335 MDA 2012

Appeal from the Order Entered June 21, 2012  
In the Court of Common Pleas of Clinton County  
Orphans' Court at No(s): 12-2012

BEFORE: BOWES, OLSON, and WECHT, JJ.

MEMORANDUM BY BOWES, J.:

Filed: February 14, 2013

Clinton County Children and Youth Services ("CYS") appeals from the order denying its petition to terminate the paternal rights of C.D. ("Mother") and J.W. ("Father") to their then-fifteen-month-old daughter D.C.D. We affirm in part and reverse in part.

CYS became involved with the family the day after D.C.D.'s March 2011 birth. The agency intervened due to medical problems that D.C.D. suffered as a result of Mother's drug use and the unavailability of the then-unknown birth father. The juvenile court adjudicated D.C.D. dependent on April 14, 2011. A court-ordered test subsequently confirmed Father's paternity on May 6, 2011. CYS initially placed D.C.D. in kinship care with her maternal uncle and the uncle's paramour for approximately two months; however, when that relationship dissolved, the child resided with the uncle's

paramour for an additional month until the paramour relinquished D.C.D. to the agency during July 2011. D.C.D. has remained with her current foster parents since November 4, 2011.

During the course of the dependency matter, Mother failed to comply with the terms of the Family Service Plan ("FSP") that CYS created to assist her with reunification. Although Mother was provided three two-hour visitations with her daughter per week, she maintained contact with D.C.D. sporadically. N.T., 5/31/12, at 10, 24. At one point, Mother missed every visitation scheduled for a two-month period. *Id.* Moreover, when CYS informed Mother that it would reinstitute visitations if she desired, Mother failed to respond to the agency. *Id.* at 14. Indeed, except for a brief interaction following a January 12, 2012 permanency review hearing, Mother has not had any contact with her daughter since September 2011. *Id.* at 9-10. In addition, Mother failed to send D.C.D. any gifts or cards to commemorate her birthday. *Id.* at 33.

Mother's compliance with the substance abuse component of the FSP was also deficient. Mother left at least one inpatient substance abuse treatment facility against medical advice,<sup>1</sup> and even when she attended

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<sup>1</sup> CYS's petition to terminate Mother's and Father's parental rights asserted that Mother left an additional drug and alcohol rehabilitation facility against medical advice on May 12, 2011; however, since the agency did not proffer any evidence to support this assertion, we will not consider it.

visitations during summer 2011 she would periodically submit positive urine samples.<sup>2</sup> *Id.* at 15.

Father has been incarcerated throughout D.C.D.'s life. *Id.* at 8, 38-39. He apparently was jailed in Virginia when his daughter was born, and since March 6, 2012, he has been serving an aggregate term of eight to sixteen years imprisonment in SCI Graterford for drug and firearm convictions. *Id.* at 35-37, 39. Father served a portion of his Pennsylvania sentence prior to being transferred to Virginia, and thus asserts that he could be eligible for release as early as mid-2015 or 2016, assuming that he receives credit for good behavior and participates in an eighteen-month prerelease program. *Id.* at 39-40.<sup>3</sup> Nevertheless, it is clear that his aggregate maximum sentence will not expire until 2027. *Id.* at 39.

On November 29, 2011, Father requested virtual visitations with D.C.D. *via* live video from prison in Virginia. By order dated December 12,

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<sup>2</sup> The visitations had a drug-screening component. N.T., 5/31/12, at 24.

<sup>3</sup> Although Father vacillated about the date his Pennsylvania sentence commenced, it appears that his sentence started sometime in 2011. N.T., 5/31/12, at 35-36, 37, 39. While CYS did not challenge Father's characterization of his sentence, we observe that, in Pennsylvania, prisoners incarcerated in state facilities generally must serve the minimum term of imprisonment before they are eligible for parole. In this case, even with credit for time served, it appears unlikely that Father could complete his eight-year minimum term of imprisonment by 2016. However, absent any record evidence outlining the precise terms of Father's sentence or a challenge leveled by CYS that Father would not be eligible for release on the dates that he asserted, we will not disturb the orphans' court's reliance on the testimonial evidence.

2011, the juvenile court directed that virtual visitation occur monthly beginning January 2012. *Id.* at 17. That order was entered over Mother's and the guardian *ad litem*'s objections. *Id.* The first visitation occurred as scheduled on January 12, 2012. *Id.* at 8, 16. It lasted approximately fifteen to thirty minutes. *Id.* at 9, 40. However, due to Father's separation from the general prison population and placement in the prison's segregation unit, the Virginia prison authorities refused to permit additional virtual visitations to occur, notwithstanding the juvenile court's order. *Id.* at 18, 19. Father sought CYS's assistance in getting the virtual visitations reinstated, but those attempts were unsuccessful. *Id.* at 17-19. After he returned to SCI Graterford during March 2012, Father requested in-person visitation with D.C.D. because that facility was not equipped for virtual visitation. *Id.* at 35, 41, 44. However, CYS never responded to Father's request or sought to initiate visitations in accordance with the juvenile court's December 12, 2011 order. *Id.* at 20, 22, 44. Thus, despite his several requests for visitations with D.C.D., as of the date of the termination proceedings, Father's total contact with his daughter amounted to a single virtual visitation. *Id.* at 9, 38.

Throughout the course of his incarceration, Father corresponded with CYS monthly and provided D.C.D. birthday and Christmas cards and gifts. In addition, he designated his niece, S.R., as a possible kinship placement resource until he was released from prison. *Id.* at 8, 16, 42-43, 44. CYS communicated with Father regularly; however, it declined to offer S.R.

temporary kinship care of D.C.D. *Id.* at 57-58, 62. Instead, the agency informed S.R. that it intended to terminate Father's parental rights and that she would be considered only as a permanent placement option or adoptive resource for D.C.D. *Id.* at 57-58. CYS has not interacted with S.R. since April 16, 2012, when it instructed her to contact the agency to establish a time to meet D.C.D. and schedule a psychological evaluation if she desired to pursue a permanent placement such as adoption. *Id.* at 53, 57, 62-63, 64.

On May 8, 2012, CYS filed a petition to involuntarily terminate Mother's and Father's parental rights pursuant to 23 Pa.C.S. § 2511(a)(1), (5), (8), and (b). As Mother's whereabouts were unknown at the time, CYS served Mother notice of the termination proceedings by publication. Mother failed to appear for the evidentiary hearing; however, counsel represented her. Father participated in the hearing from prison *via* video conferencing. CYS presented the testimony of Danielle Sherman, the caseworker assigned to the family since April 2011, and called Father as if on cross-examination. Father was able to interject his evidence during CYS's case-in-chief. Thus, neither he nor Mother nor the guardian *ad litem* presented any additional witnesses. During summations, however, the guardian *ad litem* opined that CYS filed its petition prematurely as it relates to Father. *Id.* at 82-84. The guardian *ad litem* suggested that the orphans' court hold the petition in abeyance or dismiss it without prejudice so that CYS can pursue the concurrent goal of placing D.C.D. with a fit and willing relative. *Id.* at 84.

On June 21, 2012, the orphans' court entered the above referenced order wherein it denied CYS's petition to terminate Mother's and Father's parental rights.<sup>4</sup> The orphans' court's rationale is three-fold. It concluded that 1) Father's attempts to maintain contact with his daughter were sufficient to overcome the impediment of incarceration; 2) CYS failed to provide him adequate reunification services; and 3) CYS altered its intra-agency goal for D.C.D. to adoption prematurely without pursuing the concurrent goal of placement with a fit and willing relative. Trial Court Opinion, 6/20/12, at 10-11.

As it relates to Mother, the orphans' court conceded that CYS satisfied the statutory grounds to terminate her parental rights pursuant to § 2511 (a)(1), (5), and (8), but it reasoned that in light of its decision to preserve Father's parental rights, it would be inappropriate to terminate Mother's parental rights to D.C.D. *Id.* at 3-4, 8-9, 12. This timely appeal followed, wherein CYS challenges both aspects of the orphan's court determination.

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<sup>4</sup> On the same date, the trial court entered a separate order under the auspices of the Juvenile Act, wherein it, *inter alia*, denied CYS's request to change the goal of D.C.D.'s permanency plan to adoption and directed CYS to "immediately begin assisting Father in [his] attempt to establish a relationship with this child and to meet the established goals of return to parent or guardian or placement with a fit and willing relative." Juvenile Court Order, 6/21/12. While the trial court included the order in the certified record transmitted to this Court on appeal, the propriety of the juvenile court's order is not before us.

CYS presents the following questions for our review, which we reordered and reformatted for ease of disposition:

[1]) the Court committed an abuse of discretion and/or error of law in failing to terminate Mother's parental rights despite finding that sufficient evidence existed to do so[;]

[2]) the Court committed an error of law and/or an abuse of discretion when it found that the Father did not fail to perform parental duties during the six (6) months immediately prior to the filing of the termination of parental rights petition;

[3]) the Court committed and abuse of discretion and/or error of law in failing to find that the Father cannot remedy the conditions which led to the placement of the child within a reasonable period of time, the services or assistance reasonably available to the Father are not likely to remedy the conditions which led to the placement within a reasonable period of time, and that termination of the Father's parental rights would best serve the needs and welfare of the child;

[4]) the Court committed an abuse of discretion and/or error of law by evaluating the Father's willingness or ability to remedy the condition which led to the placement of the child, which is impermissible in a termination of parental rights' request under 23 Pa.C.S. 2511 (a)(8); [and]

[5]) the Court committed an abuse of discretion and/or error of law in failing to consider what effect Father's incarceration, until 2016, will have on the developmental, physical and emotional needs of the child[.]

CYS's Brief at 3.

None of the Appellees presented countervailing positions. Mother and the guardian *ad litem* both submitted superficial briefs that relied entirely upon the trial court's rationale, which they incorporated by reference as if it were set forth therein. **See** Mother's brief at 4; Guardian *ad litem*'s brief at

4. Likewise, Father submitted a letter indicating that he "subscribes to the rationale of the [trial] [c]ourt" and would not file a brief in the matter. **See** Father's Letter, 10/4/12.

The pertinent scope and standard of review of an order terminating parental rights is as follows:

When reviewing an appeal from a decree terminating parental rights, we are limited to determining whether the decision of the trial court is supported by competent evidence. Absent an abuse of discretion, an error of law, or insufficient evidentiary support for the trial court's decision, the decree must stand. Where a trial court has granted a petition to involuntarily terminate parental rights, this Court must accord the hearing judge's decision the same deference that we would give to a jury verdict. We must employ a broad, comprehensive review of the record in order to determine whether the trial court's decision is supported by competent evidence.

***In re S.H.***, 879 A.2d 802, 805 (Pa.Super. 2005). In termination cases, the burden is upon the petitioner to prove by clear and convincing evidence that its asserted grounds for seeking the termination of parental rights are valid. ***Id.*** at 806.

The standard of clear and convincing evidence is defined as testimony that is so "clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitation, of the truth of the precise facts in issue." ***In re J.L.C. & J.R.C.***, 837 A.2d 1247, 1251 (Pa.Super. 2003). The trial court is free to believe all, part, or none of the evidence presented and is likewise free to make all credibility determinations and resolve conflicts in the evidence. ***In re M.G.***, 855 A.2d 68, 73–74 (Pa.Super. 2004). If competent evidence supports the trial court's findings, we will affirm even if the record could also support the opposite result. ***In re Adoption of T.B.B.***, 835 A.2d 387, 394 (Pa.Super. 2003).

***In re Adoption of M.R.B.***, 25 A.3d 1247, 1251 (Pa.Super. 2011).

Grounds for termination of a biological parent's parental rights are governed by 23 Pa.C.S. § 2511, which provides in pertinent part as follows:

**(a) General rule.**--The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

(1) The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.

. . . .

(5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

. . . .

(8) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency, 12 months or more have elapsed from the date of removal or placement, the conditions which led to the removal or placement of the child continue to exist and termination of parental rights would best serve the needs and welfare of the child.

. . . .

**(b) Other considerations.**--The court in terminating the rights of a parent shall give primary consideration to the developmental, physical and emotional needs and welfare of the child. The rights of a parent shall not be terminated solely on

the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent. With respect to any petition filed pursuant to subsection (a)(1), (6) or (8), the court shall not consider any efforts by the parent to remedy the conditions described therein which are first initiated subsequent to the giving of notice of the filing of the petition.

23 Pa.C.S. § 2511.

The test for terminating parental rights consists of two parts. In *In re L.M.*, 923 A.2d 505, 511 (Pa.Super. 2007), we explained:

Initially, the focus is on the conduct of the parent. The party seeking termination must prove by clear and convincing evidence that the parent's conduct satisfies the statutory grounds for termination delineated in Section 2511(a). Only if the court determines that the parent's conduct warrants termination of his or her parental rights does the court engage in the second part of the analysis pursuant to Section 2511(b): determination of the needs and welfare of the child under the standard of best interests of the child. One major aspect of the needs and welfare analysis concerns the nature and status of the emotional bond between parent and child, with close attention paid to the effect on the child of permanently severing any such bond.

CYS's first claim is that the orphans' court erred in failing to terminate Mother's parental rights. Herein, the orphans' court concluded that CYS satisfied the statutory grounds to terminate Mother's parental rights, but found that it was inappropriate to terminate her parental rights because the agency failed to establish the grounds to terminate Father's parental rights. The orphans' court's perspective of the two rights as intertwined runs contrary to our established precedent.

Our Supreme Court addressed this precise issue in *In re Burns*, 379 A.2d 535 (Pa. 1977), and it rejected a mother's assertion that the termination of her parental rights was improper because the orphans' court did not also terminate the paternal rights of the child's father. Contrary to the mother's position in *Burns*, and the orphans' court's perspective in the case at bar, our Supreme Court reasoned that the parents' respective rights to their children are not inextricably interwoven and when a child service agency files a petition for the involuntary termination of parental rights, the parents' rights are decided separately. Specifically, the *Burns* Court explained:

We cannot agree with appellant's assertion that the decree terminating her parental rights must be set aside because the orphans' court did not also terminate the parental rights of [birth] father. Nothing in the Adoption Act requires that an agency, which has assumed custody of a child, must establish grounds for the involuntary termination of both parents, before it can obtain such a decree as to either. When an agency having custody of a child petitions for termination of parental rights, the rights of the respective natural parents must be determined independently.

*Id.* at 541.

Herein, the orphans' court found that CYS adduced clear and convincing evidence to satisfy its burden of proving the statutory grounds to involuntarily terminate Mother's parental rights. Moreover, since Mother has not had any contact with her daughter since January 2012, it is apparent that no parent-child relationship exists that would preclude terminating Mother's parental rights. Accordingly, consistent with our Supreme Court's

rationale in **Burns**, we find that the orphans' court erred in declining to terminate Mother's parental rights simply because it elected to preserve Father's. **See also In re C.W.U., Jr.**, 33 A.3d 1, 8-9 (Pa.Super. 2011) (trial court abused its discretion in discounting competent evidence that supported terminating father's parental rights and by concluding that terminating father's parental rights without terminating mother's was contrary to child's best interest). Thus, for the forgoing reasons, we reverse the portion of the orphans' court's order that denied CYS's petition to terminate Mother's parental rights to D.C.D.

Next, we address CYS's arguments that assail the orphans' court's determination that the agency failed to satisfy its statutory burden of proof as to Father. In denying the agency's petition, the orphans' court concluded that the evidence adduced at trial could not sustain the finding that Father either evidenced a settled purpose to relinquish a parental claim to D.C.D. or that he refused or failed to perform parental duties. Trial Court Opinion, 6/21/12, at 10-11. As it relates to the remaining grounds for terminating parental rights, the trial court concluded that CYS did not establish that Father cannot resolve within a reasonable time the conditions which led to D.C.D.'s removal from Mother immediately after her birth. **Id.** at 11.

Invoking our Supreme Court's analysis of **In Re Adoption of S.P.**, 47 A.3d 817 (Pa. 2012), CYS contends that Father's incarceration is "highly relevant" to whether he has refused or failed to perform his parental duties.

**See** CYS brief at 8-9. In *In re Adoption of S.P.*, our Supreme addressed the effects of a lengthy incarceration upon a parent's ability to provide essential care and control pursuant to § 2511(a)(2). After providing a scholarly review of the relevant case law, the High Court reasoned,

"incarceration neither compels nor precludes termination." *Z.P.*, 994 A.2d at 1120. Instead, we hold that incarceration is a factor, and indeed can be a determinative factor, in a court's conclusion that grounds for termination exist under § 2511(a)(2) where the repeated and continued incapacity of a parent due to incarceration has caused the child to be without essential parental care, control or subsistence and that the causes of the incapacity cannot or will not be remedied.

*Id.* at 828. The Court expounded,

In line with the expressed opinion of a majority of justices in [*In re R.I.S.*, 36 A.3d 567 (Pa. 2011)], our prior holdings regarding incapacity, and numerous Superior Court decisions, we now definitively hold that incarceration, while not a litmus test for termination, can be determinative of the question of whether a parent is incapable of providing "essential parental care, control or subsistence" and the length of the remaining confinement can be considered as highly relevant to whether "the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent," sufficient to provide grounds for termination pursuant to 23 Pa.C.S. § 2511(a)(2).

*Id.* at 830.

CYS acknowledges that in *In re Adoption of S.P.*, our Supreme Court addressed the grounds for termination set forth in § 2511(a)(2) rather than subsection (a)(1), which is at issue in the case at bar. Nevertheless, to sustain its premise that the length of Father's incarceration is highly relevant to his failure or refusal to perform parental duties under subsection (a)(1),

relating to abandonment, CYS attempts to equate that section with a parent's incapacity to perform parental duties due to a lengthy prison term under (a)(2). As the trial court accurately observes, however, the two subsections that address incapacity and abandonment, respectively, are distinct and require the petitioner to adduce different evidence to establish the grounds to terminate parental rights. Trial Court Opinion, 6/21/12, at 9-10. Thus, contrary to CYS's contention, our Supreme Court's analysis of § 2511(a)(2) in *In re Adoption of S.P.*, is inapplicable to § 2511(a)(1), and therefore, the length of Father's incarceration is not highly relevant to whether he failed or refused to perform his parental duties.

Indeed, in setting forth the effect of incarceration on the § 2511(a)(2) incapacity analysis in *In re Adoption of S.P.*, the Supreme Court reaffirmed the correct analysis as it relates to an incarcerated parent's refusal or failure to perform parental duties pursuant to section 2511(a)(1). The Court observed as follows:

Applying in [*In re McCray's Adoption*, 331 A.2d 652 (Pa. 1975)] the provision for termination of parental rights based upon abandonment, now codified as § 2511(a)(1), we noted that a parent "has an affirmative duty to love, protect and support his child and to make an effort to maintain communication and association with that child." *Id.* at 655. We observed that the father's incarceration made his performance of this duty "more difficult." *Id.*

. . . .

[The *McCray's* Court] stated:

[A] parent's absence and/or failure to support due to incarceration is not conclusive on the issue of abandonment. Nevertheless, we are not willing to completely toll a parent's responsibilities during his or her incarceration. Rather, we must inquire whether the parent has utilized those resources at his or her command while in prison in continuing a close relationship with the child. Where the parent does not exercise reasonable firmness in declining to yield to obstacles, his other rights may be forfeited.

*Id.* at 655 (footnotes and internal quotation marks omitted). Notably, we did not decree that incarceration could never be a factor in a court's determination that grounds for termination had been met in a particular case. Instead, **the emphasis of this passage was to impose on the incarcerated parent, pursuant to an abandonment analysis, a duty to utilize available resources to continue a relationship with his or her child.**

*Id.* at 828 (emphasis added). Thus, as established in *In re McCray's Adoption*, the primary focus of the § 2511(a)(1) analysis is whether an incarcerated parent exercised reasonable firmness in declining to yield to obstacles created by imprisonment and employed available resources to maintain a relationship with his or her child. *See In re Adoption of Dale A., II*, 683 A.2d 297, 302 (Pa.Super. 1996) ("a parent's responsibilities are not tolled during his incarceration. Instead, a reviewing court must analyze whether the parent utilized those resources available while in prison to maintain a relationship with his child.").

Instantly, the orphans' court found that Father exercised reasonable firmness in attempting to overcome the obstacles presented by incarceration and utilized available resources in attempting to establish a relationship with

D.C.D. In reaching its decision, the orphans' court specifically identified the following activities that Father performed in an attempt to cultivate the father-daughter relationship: Father corresponded with CYS on a monthly basis; he forwarded birthday and Christmas cards and gifts to D.C.D. through the agency; he requested virtual visitation while incarcerated in Virginia; he requested in-person visitation at SCI Graterford; and finally, he recommended his niece as a resource for kinship foster care. Trial Court Opinion, 6/21/12, at 4-5.

The orphans' court further observed that CYS disregarded the court-ordered goals of D.C.D.'s permanency plan that required the agency to work with Father toward reunification with his daughter or find a fit and willing relative to care for her. *Id.* at 10. In addition, the court noted that CYS failed to assist Father in his attempt to establish contact with D.C.D., and informally altered the focus of its services from reunification or kinship placement to adoption by D.C.D.'s foster family. *Id.* at 10-11. In light of Father's yet-unassisted attempts to fashion and maintain a relationship with his daughter, the orphans' court concluded that CYS's petition to terminate his parental rights was premature. *Id.* at 11-12. Accordingly, the court denied CYS's petition to terminate parental rights and admonished the agency for deserting Father's reunification efforts. In light of our admittedly circumscribed standard of review of the orphans' court's determination, we are constrained to agree. *See In re Adoption of S.P., supra* at 826-27

(where record supports trial court's factual findings and the court's legal conclusions are not the result of legal error, appellate court must resist urge to second guess and impose its own judgment—even where facts could support opposite result). As set forth *supra*, our review of the record sustains the orphans' court's determination that CYS provided Father effectively no assistance and that, notwithstanding the dearth of services he received from CYS, Father utilized the resources available to him in prison to attempt to fashion a relationship with his daughter.

Furthermore, as it relates to Father's proposal to have S.R. provide kinship placement resources until he is released from prison, the record confirms that CYS rejected the notion of temporary kinship placement from the outset. During the evidentiary hearing, Ms. Sherman testified that Father informed her during March 2012 that S.R. was interested in caring for D.C.D. while he was incarcerated. N.T., 5/31/12, at 51-52. However, a CYS supervisor directed Ms. Sherman to pursue a permanent placement for D.C.D. and to inform S.R. that temporary kinship placement pending Father's release was not an alternative the agency would pursue. *Id.* at 57-58, 62, 69. Ms. Sherman explained that CYS believed that, since D.C.D. had endured foster care for fourteen months by that juncture, achieving permanency was the next logical step. *Id.* at 67. Consequently, when the agency contacted S.R., it only presented her with the options of adopting D.C.D. or becoming a permanent placement resource. *Id.* at 69. Thus, the

record bears out that since the agency had already foreclosed reunification, at least internally, by the time that it first established contact with S.R. during March 2012, and was actively preparing to terminate Father's parental rights, it failed to consider Father's request for temporary placement pending his release. **See** CYS Exhibit 2, CYS Letter dated 3/30/12, ("I also want to inform you that this would be a permanent thing and that you would be responsible for [D.C.D.] until she is 18 . . . [.] The Agency is going for termination of parental rights and therefore [D.C.D.] would not be returning to her father upon his release.").

As the record substantiates the determination that Father both demonstrated a desire to maintain a parental relationship with D.C.D. and confirmed his interest and concern in his daughter's welfare during his incarceration, we affirm the orphans' court's findings that CYS did not satisfy the requirements to terminate his parental rights pursuant to § 2511(a)(1).

**See *In re M.T.T.'s Adoption***, 354 A.2d 564, 568-69 (Pa. 1976) (efforts sufficient to preclude finding of abandonment where father utilized resources at his command while imprisoned notwithstanding children's service agency's attempts to frustrate his endeavors).

Next, CYS complains that the orphans' court erred in finding that Father could remedy the conditions that led to the placement of the child within a reasonable period. Thereafter, the agency contends that the trial court should have considered the length of Father's incarceration as a factor

militating against its finding that Father can remedy the underlying conditions.

The allegations set forth in CYS's petition to terminate parental rights and the evidence presented at trial establish that Mother's substance abuse and the unavailability of the unknown father were the primary conditions that led to D.C.D.'s placement. Recalling aspects of its prior argument regarding the effects of incarceration, CYS complains that, although Father stepped forward as D.C.D.'s birth father following CYS's intervention, his incarceration will preclude him from remedying the underlying condition that led to placement, *i.e.*, his unavailability to care for D.C.D. The agency continues that, since Father's earliest possible release is during mid-2015 or 2016, Father cannot care for D.C.D. within a reasonable time.

In this respect, CYS invokes our holding in ***In re Adoption of K.J.***, 936 A.2d 1128, 1134 (Pa.Super. 2007), for support of its position that Father cannot remedy the conditions that necessitated placement. In ***In re Adoption of K.J.***, the child service agency intervened during October 2003 and placed a mother's two young children, ages one and three, in emergency care due to 1) the suspicious death of their three-year-old sibling; 2) deplorable living conditions; and 3) inadequate medical care. The mother was eventually convicted of, *inter alia*, third-degree murder in connection with her child's death and she was sentenced during 2006 to an aggregate term of eighteen to forty years imprisonment. A third child

relevant to the termination proceedings was born while mother was incarcerated pending the murder trial. The orphans' court terminated the mother's rights to the three children pursuant to § 2511(a)(2), (5), and (8). We affirmed the order on appeal.

In reviewing the trial court's decision to terminate the mother's parental rights pursuant to § 2511(a)(5) and (8) due to her failure to remedy the conditions that led to the children's placement we explained,

[T]he record supports termination under subsections (a)(5) and (a)(8). On the day of the termination hearing, the children had been in placement well over twelve months. Mother is incarcerated and cannot remedy the conditions that caused the placement. She will also not be able to remedy the conditions within a reasonable time because her release from prison will not occur for another eighteen years at the earliest, during which time she will be incapable of parenting the children. Mother's own actions caused her to be in prison, her release date is uncertain, and could be as late as 2046. Mother's future with respect to adequate housing and care for her children is indefinite. Additionally, while Mother contends she is appealing her conviction, the result of that appeal is speculative. Under subsections (a)(5) and (a)(8), termination of Mother's parental rights best serves the needs and welfare of the children.

*Id.* at 1134-35.

Again, in light of our standard of review, we find no basis to disturb the trial court's conclusion in the case at bar. First, we recall the edict our Supreme Court reiterated in *In re Adoption of S.P., supra* at 828,

"incarceration neither compels nor precludes termination[.]"<sup>5</sup> Next, mindful of that precept, we observe that, unlike the mother in *In re Adoption of K.J.*, who's eighteen-year sentence utterly precluded her from participating in any parental aspect of her children's lives at any point prior to their emancipation, Father is not facing a minimum of eighteen years imprisonment before he is eligible for release. Indeed, Father testified that he would be eligible for parole during 2016 and may be eligible for a prerelease program in as few as two to three years from the date of the hearing. Moreover, in contrast to the mother in *In re Adoption of K.J.*, who failed to cultivate any plans with regard to providing adequate housing and care for her children, Father attempted to address the underlying cause of CYS's involvement as it relates to him, *i.e.*, his unavailability as parent and proposed a kinship resource to provide for D.C.D. until he is released

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<sup>5</sup> We agree with CYS that the length of a parent's incarceration is particularly relevant to the § 2511(a)(5) determination of whether the parent can remedy the conditions which led to the removal or placement of the child within a reasonable period. While our Supreme Court did not confront this subsection in *In re Adoption of S.P.*, the High Court's rationale relating to the effect of a lengthy imprisonment on an incarcerated parent's ability to remedy the conditions and causes of parental incapacity under (a)(2), is equally applicable to the (a)(5) consideration of an incarcerated parent's ability to remedy the conditions that led to placement. Tellingly, this Court invoked this principle, at least implicitly, in *In re Adoption of K.J., supra* at 1134 ("She will also not be able to remedy the conditions within a reasonable time because her release from prison will not occur for another eighteen years at the earliest[.]"). However, for the reasons discussed in the body of this memorandum, most notably the disparity in the length of the prison terms, we do not find that our brief analysis in *In re Adoption of K.J.*, is dispositive of this case.

from prison, an option that CYS refused to pursue despite the existence of an alternative directive in the court-approved permanency plan to place the child with a willing and capable relative.

As the record supports the orphans' court's finding that Father has shown an enduring interest in D.C.D., continues to make genuine efforts to maintain contact with her, and nominated a temporary kinship placement resource to care for his then-fifteen-month-old daughter until he is released from prison, the predicate concerns underlying our rationale in *In re Adoption of K.J.*, are not implicated herein. We reach this decision particularly mindful of the orphans' courts' consideration of CYS's failure to provide Father reunification services and the agency's hasty decision to terminate Father's parental rights based upon his incarceration. While we cannot predict the result of Father's efforts to reunify with D.C.D., the evidence adduced during the hearing supports the orphans' court's viewpoint that CYS's petition to terminate Father's parental rights was premature. Accordingly, for all of the foregoing reasons, we find that the orphans' court did not err in declining to terminate Father's parental rights to D.C.D. pursuant to § 2511(a)(5) or (a)(8).

Finally, as it relates to CYS's assertion that the trial court erred in failing to consider the effect of Father's incarceration upon D.C.D.'s best interest pursuant to § 2511(b), we point out that since the orphans' court found that CYS failed to establish the statutory grounds for terminating

Father's parental rights pursuant to § 2511(a), the § 2511(b) needs-and-welfare analysis was never implicated in this case. *See In re L.M., supra* at 511. ("Only if the court determines that the parent's conduct warrants termination of his or her parental rights does the court engage in the second part of the analysis pursuant to Section 2511(b)[.]"). Thus, the orphans' court did not err in failing to perform that analysis in relation to Father.

We affirm the orphans' court order as it relates to Father, reverse the order in relation to Mother, and direct the orphans' court to enter an order terminating Mother's parental rights pursuant to § 2511(a) and (b).

Order affirmed in part, reversed in part, and remanded.  
Jurisdiction relinquished.