J. S15017-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: C.M.T.-M., MINOR	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
	:	
APPEAL OF: B.A.T., FATHER	:	
	:	No. 1781 MDA 2012

Appeal from the Decree entered September 12, 2012,
in the Court of Common Pleas of Dauphin County,
Orphans' Court, at No.: CP-22-DP-0000068-2010

BEFORE: DONOHUE, ALLEN, and OTT, JJ.

MEMORANDUM BY ALLEN, J.: Filed: April 29, 2013

B.A.T. ("Father") appeals from the decree terminating his parental rights to his daughter, C.M.T.-M., ("Child"), pursuant to 23 Pa.C.S.A. § 2511.[1] We affirm and grant counsel's petition to withdraw.

We incorporate herein the facts and procedural history set forth in our memorandum in ***In the Interest of A.L.M. and C.M.T.-M.***, 1779 and 1780 MDA 2012 (Pa. Super. 2013) (unpublished memorandum). We set forth additional facts relevant to this appeal as follows.

On June 14, 2007, Father was incarcerated for attempted robbery with a deadly weapon. N.T., 9/11/12, at 13. Child was born in June of 2006, and Father had no contact with Child before his incarceration. ***Id.*** at 41.

[1] On September 14, 2012, the trial court entered decrees for the involuntary termination of the parental rights of M.M., the mother of C.M.T.-M. and A.L.M. M.M. appealed the trial court's decrees, but is not a party to this appeal. ***See In the Interest of A.L.M. and C.M.T.-M.***, 1779 and 1780 MDA 2012 (Pa. Super. 2013) (unpublished memorandum). On September 11, 2012, W.F.M., the father of A.L.M., voluntarily relinquished his parental rights. W.F.M. did not appeal.

The parties first became known to CYS in February of 2010, due to allegations that there was inappropriate discipline in the home, concerns regarding the condition of the home, and concerns regarding Child's development. ***Id.*** at 168-69.

The trial court adjudicated Child dependent on June 30, 2010, and placed her with her mother under court-ordered supervision. Father participated in the June 30, 2010 hearing via telephone. ***Id.*** at 31-32. On June 30, 2010, the trial court ordered Father to complete the following Family Service Plan objectives: (1) cooperate and comply with the Agency, (2) present himself to CYS upon release from a Florida state prison so that CYS could assess him before any contact with Child, (3) sign all release of information forms requested by CYS to ensure compliance in meeting the objectives, and (4) notify CYS within twenty-four hours of a new residence with new contact information. ***Id.*** at 32-33.

Father had no contact with CYS after his release from prison on July 13, 2011. ***Id.*** at 33-34. On May 14, 2012, Child was placed in foster care with her half-sister, A.L.M. ***Id.*** at 37-38, 150.

On June 29, 2012, CYS filed a petition for the involuntary termination of Father's parental rights pursuant to 23 Pa.C.S.A. § 2511(a)(1), (2), (4), and (b). On July 18, 2012, the trial court found that aggravated circumstances existed as to Father. ***Id.*** at 35. On September 11, 2012, a termination hearing was held. Father's counsel, Attorney Robert Hawn, Jr., was present, but Father was not present at the hearing. N.T., 9/11/12, at

10-11. The trial court proceeded in Father's absence, ultimately excusing Attorney Hawn from being present.

During the hearing, Courtney Gordner, Child's CYS caseworker, testified that Father failed to complete his court-ordered services. ***Id.*** at 33. With regard to cooperating and complying with CYS, she testified that Father did not satisfy this service objective because CYS was unable to contact him. ***Id.*** at 33. She also testified that Father did not complete his objective that required him to contact CYS upon release from a Florida state prison. ***Id.*** Ms. Gordner testified that Father did not complete his objective to sign all release of information forms that CYS requested. ***Id.*** Additionally, with regard to notifying CYS within twenty-four hours of a new residence or new contact information, Ms. Gordner testified that Father did not comply. ***Id***. at 34.

On September 12, 2012, the trial court entered its decree terminating Father's parental rights to Child, and changing Child's goal to adoption. Father timely filed his notice of appeal and concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).

As a preliminary matter, Father's counsel seeks to withdraw representation pursuant to ***Anders v. California***, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). ***Anders*** principles apply to appeals involving termination of parental rights. ***See In re S.M.B.***, 856 A.2d 1235 (Pa. Super. 2004). ***Anders*** and ***Santiago*** require counsel to: 1) petition the Court for leave to withdraw, certifying that after a thorough review of the record, counsel has

concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support the appeal; and 3) furnish a copy of the brief to the appellant and advise him or her of the right to obtain new counsel or file a *pro se* brief to raise any additional points the appellant deems worthy of review. ***Santiago***, 978 A.2d at 358-61; ***In re Adoption of V.G.***, 751 A.2d 1174, 1176 (Pa. Super. 2000). Substantial compliance with these requirements is sufficient. ***Commonwealth v. Wrecks***, 934 A.2d 1287, 1290 (Pa. Super. 2007). "After establishing that the antecedent requirements have been met, this Court must then make an independent evaluation of the record to determine whether the appeal is, in fact, wholly frivolous." ***Commonwealth v. Palm***, 903 A.2d 1244, 1246 (Pa. Super. 2006) (*quoting* ***Commonwealth v. Townsend***, 693 A.2d 980, 982 (Pa. Super. 1997)).

In ***Santiago***, our Supreme Court addressed the briefing requirements where court-appointed counsel seeks to withdraw representation on appeal:

> Neither ***Anders*** nor [***Commonwealth v.***] ***McClendon***[, 495 Pa. 457, 434 A.2d 1185 (1981)] requires that counsel's brief provide an argument of any sort, let alone the type of argument that counsel develops in a merits brief. To repeat, what the brief must provide under ***Anders*** are references to anything in the record that might arguably support the appeal.
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> Under ***Anders***, the right to counsel is vindicated by counsel's examination and assessment of the record and counsel's references to anything in the record that arguably supports the appeal.

Santiago, 978 A.2d at 359-360. Thus, the Court held:

> [I]n the ***Anders*** brief that accompanies court-appointed counsel's petition to withdraw, counsel must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Id. at 361.

Instantly, counsel filed a motion for leave to withdraw representation. The motion states that counsel conscientiously and thoroughly reviewed the record of the proceedings, and concluded that the appeal is frivolous. Application for Leave to Withdraw Appearance, 1/2/13, at 3-7. The motion also states that counsel informed Father, by United States Mail, of his appellate rights. ***Id.*** at 7. The letter itself, attached to the motion, advises Father of his right to raise questions about the jurisdiction of the court and to question the legality of the trial court's decision, and of his right to retain new counsel, proceed *pro se*, or to raise any additional points that he may deem worthy of consideration.

In his ***Anders*** brief, counsel provides reasons for his conclusion that the appeal is wholly frivolous. Father's Brief at 11-15. Counsel also refers to items in the record that arguably support the appeal. Father's Brief at 9-10. Additionally, counsel provides a well-written and detailed summary of the facts and procedural history of the case, with citation to the record and relevant law. Father's Brief at 5-15. Thus, counsel has substantially complied with the requirements of ***Anders*** and ***Santiago***.

As Father has filed neither a *pro se* brief nor a counseled brief with new privately retained counsel, we review this appeal based on the issue raised in the ***Anders*** brief:

> A. Whether the lower court deprived [Father] of his right of due process by terminating his parental rights to [Child] under section 2511 of the Adoption Act, 23 Pa.C.S. §2511, after convening an evidentiary hearing under 2512 of the act, 23 Pa.C.S. § 2512, for which [Father] never received timely notice pursuant to section 2513(b), 23 Pa.C.S. § 2513(b), although the mother of [Child] knew where [Father] could be found and how to contact him [?]

Father's Brief at 4.

Our Supreme Court has emphasized that an appellate court's standard of review of a trial court's order terminating parental rights is limited to an abuse of discretion:

> [A]ppellate courts must apply an abuse of discretion standard when considering a trial court's determination of a petition for termination of parental rights. As in dependency cases, our standard of review requires an appellate court to accept the findings of fact and credibility determinations of the trial court if they are supported by the record. If the factual findings are supported, appellate courts review to determine if the trial court made an error of law or abused its discretion. As has been often stated, an abuse of discretion does not result merely because the reviewing court might have reached a different conclusion. Instead, a decision may be reversed for an abuse of discretion only upon demonstration of manifest unreasonableness, partiality, prejudice, bias, or ill-will.
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> [T]here are clear reasons for applying an abuse of discretion standard of review in these cases. … [U]nlike trial courts, appellate courts are not equipped to make the fact-specific determinations on a cold record, where the trial judges are observing the parties during the relevant

> hearing and often presiding over numerous other hearings regarding the child and parents. Therefore, even where the facts could support an opposite result, as is often the case in dependency and termination cases, an appellate court must resist the urge to second guess the trial court and impose its own credibility determinations and judgment; instead we must defer to the trial judges so long as the factual findings are supported by the record and the court's legal conclusions are not the result of an error of law or an abuse of discretion.

In re Adoption of S.P., 47 A.3d 817, 826-27 (Pa. 2012) (citations omitted).

The burden is upon the petitioner to prove by clear and convincing evidence that the asserted grounds for seeking the termination of parental rights are valid. ***In re R.N.J.***, 985 A.2d 273, 276 (Pa. Super. 2009). 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 hesitance, of the truth of the precise facts in issue." ***Id.*** (*quoting* ***In re J.L.C.***, 837 A.2d 1247, 1251 (Pa. Super. 2003)). Section 2513 of the Adoption Act provides as follows.

> **§ 2513. Hearing**
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> **(a) Time.—**The court shall fix a time for hearing on a petition filed under section 2512 (relating to petition for involuntary termination) which shall be not less than ten days after filing of the petition.
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> **(b) Notice.—**At least ten days' notice shall be given to the parent or parents, putative father, or parent of a minor parent whose rights are to be terminated, by personal service or by registered mail to his or their last known address or by such other means as the court may require. A copy of the notice shall be given in the same manner to the other parent, putative father

> or parent or guardian of a minor parent whose rights are to be terminated. A putative father shall include one who has filed a claim of paternity as provided in section 5103 (relating to acknowledgment and claim of paternity) prior to the institution of proceedings. The notice shall state the following:
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> > "A petition has been filed asking the court to put an end to all rights you have to your child (insert name of child). The court has set a hearing to consider ending your rights to your child. That hearing will be held in (insert place, giving reference to exact room and building number or designation) on (insert date) at (insert time). You are warned that even if you fail to appear at the scheduled hearing, the hearing will go on without you and your rights to your child may be ended by the court without your being present. You have a right to be represented at the hearing by a lawyer. You should take this paper to your lawyer at once. If you do not have lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.
> >
> > (Name)
> > (Address)
> > (Telephone number)
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> * * *
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> **(d) Decree.—**After a hearing, which may be private, the court shall make a finding relative to the pertinent provisions of section 2511 (relating to grounds for involuntary termination) and upon such finding may enter a decree of termination of parental rights.

23 Pa.C.S.A. § 2513.

In ***In re G.P.-R.***, 851 A.2d 967 (Pa. Super. 2004), this Court stated that in termination of parental rights proceedings, the subject parent must be afforded the guarantees imposed by the Fourteenth Amendment of the United States Constitution regarding procedural due process of law. ***Id.*** at 975 (*citing* ***Santosky v. Kramer***, 455 U.S. 745 (1982), and ***In re***

Adoption of A.M.B., 812 A.2d 659, 670 (Pa. Super. 2002)). It is well-settled that "[p]rocedural due process requires, at its core, adequate notice, opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction over the case." ***Garr v. Peters***, 773 A.2d 183, 191 (Pa. Super. 2001) (internal quotation marks and citations omitted). "Due process is flexible and calls for such procedural protections as the situation demands." ***In re Adoption of Dale A., II***, 683 A.2d 297, 300 (Pa. Super. 1996) (citing ***Mathews v. Eldridge***, 424 U.S. 319, 334, (1976)). Further, this Court in ***In re G.P.-R.*** instructed that the law is clear that the mandates of procedural due process require that the petitioner must satisfy his burden with clear and convincing evidence. ***In re G.P.-R.***, 851 A.2d at 974.

CYS admitted into the record Exhibits 1-A through 5-A which document their attempt to serve Father with notice of the termination proceedings. On September 5, 2012, Jennifer Risser, paralegal for CYS, filed an Affidavit of Service, stating that service of the Petition for Involuntary Termination of Parental Rights was made, and notice was given, to Father pursuant to section 2513(b) at his last known address in Tampa, Florida, via First Class United States Mail and Certified Mail. In the Affidavit of Service, Ms. Risser stated that the Certified Mail was returned to CYS. On September 10, 2012, Ms. Risser filed an Affidavit of Service, stating that service of the Notice of Hearing was made to Father at his last known address in Tampa,

Florida via First Class United States Mail and Certified Mail. In the Affidavit of Service, Ms. Risser stated that the mail was not returned to CYS, but that it had the status of "Dead Mail." Further, at the hearing on September 11, 2012, Ms. Risser testified that she was notified that Father was released from prison in July of 2011, but he never contacted CYS with an updated address. Ms. Risser testified:

> I did notice of filing and notice of hearing to the parties. I did numerous search letters in an attempt to locate an accurate address for [Father].
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> * * *
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> We had done a search previously, the agency had, but most recently, I did one in the middle of July. I believe July 13th [2012] I sent out postal letters. I sent letters to his probation – his statewide probation officer's office and the county probation office.
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> I got no forwarding address from the post office. I had sent two letters to the post office. Because both of – the only previous addresses I had for him were prison addresses, so they were not able to give me any information. And then I did not see any return information from the probation offices.
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> * * *
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> We also did two Accurint searches for [Father] but the information was not good. He had, like, three or four addresses, but they were all such wide periods of time…
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> * * *
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> [Father] was incarcerated … from June 14th, 2007 until July 13th, 2011. Upon his release, I had signed up for a system called VINELink, so I received an email when he was released on July 13th. We were always able to serve him with mail when he was incarcerated, but he never contacted us with an address upon his release. And I was actually able to speak with his probation

> officer, Roger Dean. … I [spoke with his probation officer yesterday and] they have not known of his whereabouts since the middle of December 2011. On December 16th, Officer Dean was supposed to do a check in with him at his residence at the time, but he was late showing up. So when he called, that was the last time he ever heard from [Father]. At that time … his residence was not stable.

N.T., 9/11/12, at 11-13.

In view of the foregoing testimony, we find that there was evidence in the record to support the trial court's finding that Father had notice and an opportunity to be heard on the termination petition but chose not to appear. Thus, on the basis of the decision in ***In re G.P.-R.***, we reject Father's claim that the trial court deprived Father of his right of due process by terminating his parent rights to Child when he never received timely notice.

Moreover, Father has failed to include a specific challenge to the sufficiency of the evidence to support the trial court's determination under subsections 2511(a) or (b) in his Rule 1925(b) statement and statement of questions involved; thus, the issue is waived. ***See Krebs v. United Refining Co.***, 893 A.2d 776, 797 (Pa. Super. 2006), in which we stated, "[w]e will not ordinarily consider any issue if it has not been set forth in or suggested by an appellate brief's statement of questions involved, Pa.R.A.P. 2116(a), and any issue not raised in a statement of matters complained of on appeal is deemed waived." ***See also Dietrich v. Dietrich***, 923 A.2d 461, 463 (Pa. Super. 2007) (stating that issues not raised in Rule 1925(b) statement are waived on appeal).

Finally, despite our finding of waiver, we agree with counsel that a challenge to the sufficiency of the evidence would be frivolous. We would find that the trial court's decision to terminate Father's parental rights under section 2511(a)(1) and (b) is supported by competent evidence in the record. ***See*** Trial Court Opinion, 11/30/12, at 24-25.

Accordingly, for the reasons stated above, we affirm the trial court's decree terminating Father's parental rights to Child and changing the permanency goal to adoption.

Decree affirmed. Counsel's petition to withdraw granted.