NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

IN THE MATTER OF THE ADOPTION OF: S.M.J.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: F.S., NATURAL MOTHER	:	No. 15 WDA 2014

Appeal from the Decree entered November 21, 2013,
in the Court of Common Pleas of Erie County,
Orphans' Court, at No. 73 B in Adoption 2012

BEFORE: PANELLA, DONOHUE and ALLEN, JJ.

MEMORANDUM BY ALLEN, J.: **FILED JULY 2, 2014**

F.S. ("Mother") appeals from the decree terminating her parental rights to S.M.J. ("Child").[1] Mother's counsel ("Counsel") has filed a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009), along with a petition seeking to withdraw as counsel. We grant counsel's petition to withdraw and affirm the decree terminating Mother's parental rights.

Erie County Office of Children and Youth ("OCY") was involved with Mother regarding two of her other children when Child was born in early October 2012. Child was removed from Mother shortly after birth and on October 31, 2012, Child was adjudicated dependent. Permanency hearings were held on May 8, 2013 and July 24, 2013. On August 27, 2013, OCY filed a petition seeking to terminate Mother's parental rights to Child. A

[1] Child's father's parental rights were also terminated, but he is not a party to this appeal.

hearing was held on November 15, 2013, following which the trial court entered a decree terminating Mother's rights pursuant to 23 Pa.C.S.A. §§ 2511(a)(2),(5),(8) and (b). Trial Court Order, 11/18/13, at 1-2. This timely appeal followed.

As noted above, Counsel has filed an ***Anders*** brief and petition seeking permission to withdraw.[2] "When faced with a purported ***Anders*** brief, we may not review the merits of any possible underlying issues without first examining counsel's request to withdraw." ***Commonwealth v. Wimbush,*** 951 A.2d 379, 382 (Pa. Super. 2008) (citation omitted). In a proper ***Anders*** brief, 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.

Commonwealth v. Santiago, 978 A.2d at 361; ***see also In re J.T.,*** 983 A.2d 771, 774-75 (Pa. Super. 2009) (granting counsel's permission to withdraw in an appeal regarding the involuntary termination of parental rights pursuant to ***Anders*** and ***Santiago***). In addition to these

[2] This Court, in ***In re V.E.***, 611 A.2d 1267 (Pa. Super. 1992), authorized the filing of a petition to withdraw as counsel pursuant to ***Anders*** in the context of an appeal involving the involuntary termination of parental rights. ***Id.*** at 1275.

requirements, "counsel must also provide a copy of the ***Anders*** petition and brief to the appellant, advising the appellant of the right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention." ***Wimbush***, 951 A.2d at 382. "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)).

We conclude that Counsel has complied with the requirements as set forth above.[3] She has provided Mother with a copy of the ***Anders*** brief and indicated in her correspondence enclosing the brief that Mother may proceed *pro se* or with private counsel. In her brief, Counsel refers to facts of record that might arguably support Mother's appeal and sets forth her conclusion that the appeal is frivolous and the reasons for this conclusion. ***See Anders*** Brief at 5-13.[4] Accordingly, we undertake our independent evaluation of the record to determine whether Mother's appeal is wholly frivolous.

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[3] Counsel should have included citations when she discussed facts of record. ***See Santiago,*** 978 A.2d at 361. Counsel is advised to adhere more closely to the requirements as set forth in ***Santiago*** in the future.

[4] In the ***Anders*** Brief, Counsel states that there is a meritorious claim that termination was not appropriate under section (a)(8) because section (a)(8) requires that at least 12 months have passed since the child's removal from the parent, and 12 months had not yet elapsed at the time of the

Termination of parental rights, which is governed by 23 Pa.C.S.A. § 2511, involves a bifurcated inquiry by the trial court. ***In re C.L.G.***, 956 A.2d 999, 1004 (Pa. Super. 2008). The initial focus is on the conduct of the parent, and the burden of proof is on the petitioner to establish by clear and convincing evidence the existence of grounds for termination under § 2511(a). ***Id.*** If the trial court finds that termination is warranted under § 2511(a), it must then turn to § 2511(b), and determine if termination of the parent's rights is in the child's best interest. ***Id.***

In her ***Anders*** brief, Counsel posits that the trial court erred in concluding that OCY had established grounds for termination under § 2511(a)(2),(5),(8) and (b). ***Anders*** Brief at 4. We begin with § 2511(a)(2), which provides as follows:

> **§ 2511. Grounds for involuntary termination**
>
> **(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:
>
> * * *
>
> (2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused

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termination hearing. ***Anders*** Brief at 11. However, OCY did not petition to terminate Mother's parental rights under section (a)(8). ***See*** Petition for Involuntary Termination of Parental Rights, 8/27/13. As such, Mother's rights could not be terminated under this provision. Furthermore, the trial court did not discuss section (a)(8) in its discussion of reasons for terminating Mother's rights, ***see*** N.T., 11/15/13, at 157-59; Trial Court Opinion, 1/17/14. Plainly, there could be no merit to this challenge and so we will overlook Counsel's identification of this issue as potentially meritorious.

> the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

23 Pa.C.S.A. § 2511(a)(2). This Court has previously addressed termination under this provision, stating,

> Parental rights may be terminated under Section 2511(a)(2) if three conditions are met: (1) repeated and continued incapacity, abuse, neglect or refusal must be shown; (2) such incapacity, abuse, neglect or refusal must be shown to have caused the child to be without essential parental care, control or subsistence; and (3) it must be shown that the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied. ***In re Geiger***, 459 Pa. 636, 331 A.2d 172, 174 (1975).

In re E.A.P., 944 A.2d 79, 82 (Pa. Super. 2008).

In the present case, the trial court found that because of Mother's limited cognitive abilities, Mother was unable to provide proper parental care for Child and despite the services provided to assist Mother, Mother remains unable to provide proper parental care. Trial Court Memorandum, 1/17/14, at 1-2. Our review of the record reveals evidence that supports this determination. Psychiatrist Dr. Belinda Stillman testified that she evaluated Mother and concluded that Mother has "borderline intellectual functioning" and suffers from major depressive disorder. N.T., 11/15/13, at 54. With regard to her depressive disorder, Dr. Stillman testified that Mother needs permanent treatment in order to achieve and maintain mental health and

stability for her daily life. ***Id.*** at 55. Furthermore, psychologist Dr. Robert Iddings administered two tests to determine Mother's cognitive abilities. N.T., 7/10/13, at 7. He concluded that Mother is "considered in the mild range of mental retardation." ***Id.*** at 8. Multiple OCY caseworkers testified that Mother consistently demonstrated a lack of basic parenting skills, such as knowing how to determine whether Child is hungry, how to mix formula, how to properly hold Child, how to soothe Child when Child is crying or fussy, knowing what food is appropriate for an infant, and knowing how to appropriately address Child's daily needs, including diapering. ***Id.*** at 66-67, 72, 85. One caseworker, Pamela Palmer, testified that despite Mother's completion of some of the court-ordered goals, and despite constant help from caseworkers, Mother has failed to absorb basic parenting skills the caseworkers demonstrate for her and attempt to teach her, including the ability to properly feed Child. ***Id.*** at 120-23. Ms. Palmer testified that Mother participated in two parenting programs geared toward people with limited cognitive abilities, but that Mother did not make any significant progress because she would forget what she learned from one week to the next, particularly with regard to the feeding. ***Id.*** at 122-23. At one point, Mother's visitations with Child were extended, but Ms. Palmer, who supervised the visits, testified that "[t]he longer the visits were extended, the more [Mother] seemed to struggle, which I felt demonstrated that she

wasn't able to hold the information that was being taught to her. She wasn't able to comprehend it for longer periods of time." ***Id.*** at 120.

This evidence supports the trial court's conclusion that Mother is not capable of caring for Child and that Mother cannot remedy her incapacity to provide the proper care to Child. As the evidence of record supports the trial court's conclusion, we may not disturb it. ***In re R.L.T.M.***, 860 A.2d at 191. Thus, we agree with Counsel that there is no merit to a claim alleging that termination was not appropriate under § 2511(a)(2).

This Court need only agree with the trial court's decision as to any one subsection of § 2511(a) in order to affirm the termination of parental rights. ***In re B.L.W.***, 843 A.2d 380, 384 (Pa. Super. 2004) (*en banc*). Having determined that the requirements of § 2511(a)(2) were met, the question of whether the remaining subsection of § 2511(a) were established is moot. Accordingly, we proceed to consider Counsel's claim with regard to § 2511(b).

Section 2511(b) provides as follows:

> **(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.A. § 2511(b).

When considering the needs and welfare of a child pursuant to the § 2511(b) inquiry, the trial court must consider whether termination of parental rights would best serve the developmental, physical and emotional needs of the child. ***In re C.M.S.***, 884 A.2d 1284, 1286-87 (Pa. Super. 2005), *appeal denied*, 587 Pa. 705, 897 A.2d 1183 (2006).

To reiterate, Child was removed from Mother shortly after birth in early October of 2012, and on October 31, 2012, Child was adjudicated dependent. Mother has never cared for Child, who was one year old at the time of the termination hearing. Moreover, Child was "prospectively dependent", as her twin older siblings had been placed into emergency protective custody on December 22, 2011, when they were just one month old, after one twin had been admitted to the hospital for "non-organic failure to thrive." ***See*** Trial Court Opinion, 11/14/13, at 1, incorporated by Trial Court Memorandum, 1/17/14, at 1; ***see also In re A.S.***, 11 A.3d 473, 481 (Pa. Super. 2010) (termination of father's parental rights was proper where aggravated circumstances existed and father's inability to parent predated the children's birth; CYS's involvement with the family began in 2006 and children were born in 2008 and 2009).

Again, psychiatrist Dr. Belinda Stillman evaluated Mother, treated her "for two or three years", and diagnosed Mother with "major depressive disorder" and "borderline intellectual functioning." N.T., 11/15/13, at 54-56. Dr. Stillman opined that Mother's major depression "is something that would need permanent treatment." ***Id.*** at 55.

Ms. Kristen Costa, the program manager for the Erie Family Center, testified to being involved with Mother since 2011, and working with Child "prenatally." ***Id.*** at 63-64. Ms. Costa issued a report in February of 2013 in which she recommended against uniting Mother and Child based on "the day-to-day decisions [Mother] was making and continually making towards not keeping her children safe." ***Id.*** at 66, 72. Ms. Costa testified that Mother "never" demonstrated "an ability to safely parent Child on her own." ***Id.*** at 66-67. Ms. Costa explained that despite "repeated attempts to teach [Mother]", "after 14 months of working with her, we still couldn't get her to demonstrate [appropriate feeding, bathing and diapering skills]." ***Id.*** at 67.

Ms. Rachel Hillen, a family support worker from Healthy Families America, testified to becoming involved with Mother when Mother was pregnant with Child. ***Id.*** at 76. Ms. Hillen explained that Mother would need constant support in her life to safely parent Child. ***Id.*** at 78.

Ms. Sally Houston, a social service aid at OCY, testified to supervising thirteen (13) weekly visits between Mother and Child during 2012 - 2013. Ms. Houston expressed concerns about Mother's parenting ability, noting

that the concerns "were kind of ongoing from before this. Still unable to prepare the bottle by herself, having to be prompted to hold the baby correctly and carefully. You know, just having to be prompted throughout the visit." ***Id.*** at 85.

Ms. Houston offered an example:

> When [Child] woke up, she was crying, and she was hungry. [Mother] couldn't pick up on that, and she started putting juice from a Little Hug – which was absolutely not age appropriate [for an infant] or okay – into a bottle to try and feed her and I had to stop her. And I said, you know – I was trying to prompt her and, you know, when is the last time that you fed [Child]? And [Mother] said, well I just fed her this morning. Well, now it's 12:30. You know, we have been here for many hours. It's something you have to do [with an infant] every few hours of the day.
>
> And [Mother] just – even with prompting and kind of clues, she couldn't pick up, you know, oh, wait, she's been here three hours, and I need to feed her again.

Id. at 88. Ms. Houston testified that despite being "given a lot of opportunity", Mother never progressed in her ability to care for Child. ***Id.*** at 89, 94. Ms. Houston opined that more time would not have helped Mother. ***Id.*** at 95.

OCY caseworker Pamela Palmer testified to becoming involved with Mother and Child on October 31, 2012, shortly after Child's birth. Ms. Palmer reiterated that Mother "had cognitive limitations and had displayed that she was unable to meet … the needs of this new infant." ***Id.*** at 99. Ms. Palmer explained that although Mother had other issues, "the major concern" was Mother's cognitive limitations. ***Id.*** at 109. Child was placed in

a pre-adoptive foster home with her older twin siblings. ***Id.*** at 101, 111. Ms. Palmer stated that Child was "doing well" in her placement. ***Id.*** at 111. Ms. Palmer testified, "I do not believe that a substantial relationship was ever built [between Child] and either parent." ***Id.*** Ms. Palmer averred that termination was in Child's best interests. ***Id.*** at 112.

On cross-examination, Ms. Palmer confirmed that Mother evidenced no improvement with her parenting. ***Id.*** at 120. She testified:

> The longer the visits were extended, the more she seemed to struggle, which I felt demonstrated she wasn't able to hold the information that was being taught to her. She wasn't able to comprehend it for longer periods of time. Had I seen any improvement, we would have maybe pulled some of the supervision out a little ways to see if that would have worked, but I was never comfortable even discontinuing supervision for 15 minutes.

Id. Ms. Palmer testified that "I think we've employed everything in our resources." ***Id.*** at 123.

OCY caseworker Ms. Gaylene Abbott-Fay testified that Child and her twin siblings moved together from their foster home to an "adoptive resource" home on May 16, 2013. ***Id.*** at 131. Ms. Abbott-Fay explained that Child "looks at [her foster parents] as her parents. She is very attached to them … it's all positive interactions with the foster parents and her siblings there." ***Id.*** at 132-133. Ms. Abbott-Faye testified that it would be in the best interests for Child to be adopted by her foster parents. ***Id.*** at 134.

> Mother testified on her own behalf. The following exchange occurred:
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> COUNSEL: Now, you understand why we're here today? The agency is requesting that the judge order that your parental rights to [Child] be terminated?
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> MOTHER: But I don't understand how. That's why I don't understand everybody taking everybody's kids from people. But the people that need to get their kids taken, they don't, but the people that want to be in their kids' life, they still get adopted out.
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> THE COURT: So, as I understand it, [Mother], you do understand what the purpose of this hearing is for?
>
> MOTHER: Yeah, I know.

***Id*.** at 137. Mother testified that she wished to be with Child and that she "was not given a chance to prove" herself. ***Id*.** at 145.

Given the foregoing, we agree with Counsel that the hearing testimony supports the trial court's finding that termination serves Child's needs and welfare pursuant to 23 Pa.C.S.A. § 2511(b). While we would encourage the trial court in the future to expand upon the needs and welfare analysis, the cumulative and overwhelming evidence presented at the hearing in this case indicates that termination is in the best interests of Child, and it is apparent from the record that the trial court considered the Child's needs and welfare. ***See id*.** at 159. Child has been in placement since birth, is in a pre-adoptive home with her twin siblings, and is attached to her pre-adoptive parents. ***See Anders*** Brief at 12-13. Furthermore, the record provides uncontroverted evidence that because of Mother's severe cognitive

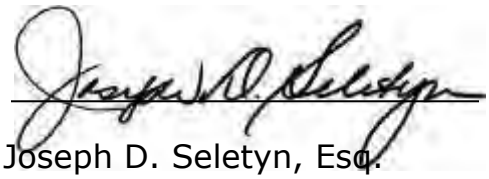
impairment, she is unlikely to ever be able to care for Child. Mother cannot competently feed, hold, bathe or diaper Child – skills which are necessary to meet the needs and welfare of Child, as well as facilitate a parental bond. In this case, the trial court could readily infer that there was no bond between Mother and Child. ***J.M.***, ***supra*** (in cases where there is no evidence of a bond between a parent and child, it is reasonable to infer that no bond exists; the extent of the bond-effect analysis necessarily depends on the circumstances of the particular case). The needs and welfare analysis is reviewed on a case-by-case basis and "with consideration of intangible factors … such as the love, comfort, security, and stability children enjoy with their respective foster parents and the importance of continuing those beneficial relationships upon their wellbeing." ***In re N.A.M.***, 33 A.3d 95, 104, (Pa. Super. 2011) (internal citation omitted). While the evidence unequivocally established that Mother was incapable of caring for Child, it also established Child's successful placement with her biological siblings in a pre-adoptive home.

Upon review, we find no abuse of discretion in the trial court's termination of Mother's parental rights. Our independent review of the record reveals no non-frivolous claims that Mother could have raised, and we agree with Counsel that this appeal is wholly frivolous. We therefore affirm the termination decree and grant Counsel's petition to withdraw.

Decree affirmed. Petition to withdraw granted.

Judge Donohue concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/2/2014