NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: L.N.B.-G., Appellee v. APPEAL OF: L.S.G., FATHER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1473 MDA 2015

Appeal from the Decree July 28, 2015
In the Court of Common Pleas of Lancaster County
Orphans' Court at No(s): 2115 of 2014

BEFORE: BOWES, OTT, AND FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.: **FILED FEBRUARY 16, 2016**

L.S.G. ("Father") appeals from the orphans' court order entered on July 28, 2015, which terminated his parental rights to his daughter, L.N.B.-G.[1] We affirm and grant counsel leave to withdraw from representation.

L.N.B.-G. was born during August 2009, while Father and S.N.B. ("Mother") resided as an intact family with L.N.B.-G.'s half-sister, who was approximately one year old. Lancaster County Children and Youth Services ("CYS") first contacted the family during April 2012 in response to concerns

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[1] On June 2, 2015, the orphans' court terminated the parental rights of L.N.B.-G.'s mother, S.N.B., in absentia. We do not address that order.

* Former Justice specially assigned to the Superior Court.

of domestic violence between Mother and Father. The incident led to Father's incarceration due to a violation of probation. Thereafter, during August 2012, CYS interceded again after Mother and the maternal grandmother engaged in additional instances of domestic violence while Father was incarcerated. The juvenile court granted CYS temporary custody of L.N.B.-G. and her half-sister on August 3, 2012, and it adjudicated both girls dependent on September 4, 2012. The children have remained in the same pre-adoptive foster home since their initial placement.

Since L.N.B.-G.'s birth, Father has been incarcerated intermittently for over thirty months. For example, Father was imprisoned for ten months during 2010 for a parole violation and seven months during 2012 following the above-referenced dispute with Mother. Father was released during November of 2012 but was imprisoned again on February 8, 2013 and May 23, 2013. He was most recently incarcerated during September 2013, and as of the date of the evidentiary hearing, he was still serving that sentence.

Father's incarceration at the time of L.N.B.-G.'s initial placement made it difficult for CYS to assess his parenting situation. However, during Father's sporadic discharge from prison, the agency was able to develop a permanency plan for his benefit. Father was required to: (1) improve his mental health; (2) remain crime free and avoid domestic violence; (3) abstain from drugs and alcohol abuse; (4) employ good parenting skills; (5)

achieve financial stability; (6) obtain appropriate housing; and (7) maintain an ongoing commitment to his daughter.

Father's adherence to the permanency plan was dismal. He overdosed on opiates during February 2013, and was incarcerated for at least one drug offense. Father attempted mental health and drug abuse treatment, but he was discharged without completing the program after he assaulted another patient. Absent compliance with the mental health and substance abuse components of the permanency plan, Father was not eligible to participate in parenting programs. Likewise, Father failed to confront his domestic violence issues, achieve financial stability, obtain suitable housing, or forsake his life of crime. Father violated parole episodically. Over the course of the dependency proceedings, Father visited with L.N.B.-G. on only four occasions. However, he did mail correspondence to her approximately twice per month and maintained contact with the agency when he was not in prison.

On October 14, 2014, CYS filed a petition to terminate Father's parental rights to L.N.B.-G. pursuant to § 2511(a)(1), (2), (5), (8) and (b). Father was represented by Jeremy S. Montgomery, Esquire, who was appointed on January 7, 2014, as part of the dependency proceedings. Father indicated his desire to consent to voluntary termination. However, after the orphans' court continued the portion of the hearing relating to Father so that CYS could provide him with the necessary documents, he

ultimately declined to relinquish his parental rights. During the rescheduled termination hearing, CYS presented testimony from the CYS caseworker assigned to the family, L.N.B.-G.'s outpatient therapist, and her court appointed special advocate ("CASA").

Father participated in the hearing by telephone from SCI-Coal Township and testified on his own behalf. The orphans' court discounted Father's testimony regarding the programs that he completed while incarcerated, noting that Father had snubbed CYS's request for him to document his accomplishments. Similarly, while Father presumed that his release from prison was imminent, he did not identify a specific date for that event. He indicated that he served his minimum term of imprisonment but still needed to complete a class and obtain the facility's approval before he could reappear before the parole board. The orphans' court did not share Father's optimism, however, and it concluded that, at best, Father's release date was uncertain.

Following the close of evidence, the orphans' court ruled from the bench that CYS established by clear and convincing evidence the statutory grounds to terminate Father's parental rights pursuant to § 2511(a)(1), (2), (8), and (b). On July 28, 2015, the court subsequently entered a written decree that omitted any reference to the grounds for termination under subsection (a)(8). This timely appeal followed. Father complied with Pa.R.A.P. 1925(a)(2)(i) by filing a concise statement of errors complained of

on appeal that challenged the orphans' court's determinations regarding § 2511(a)(1), (2), and (b).

On October 30, 2015, Attorney Montgomery filed an ***Anders*** brief and petition to withdraw from representation. ***See Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. McClendon,*** 434 A.2d 1185 (Pa. 1981). We may not address the merits of the appeal without first reviewing the request to withdraw. ***Commonwealth v. Rojas,*** 874 A.2d 638, 639 (Pa.Super. 2005). Accordingly, we review Attorney Montgomery's petition at the outset.

In ***In re V.E.***, 611 A.2d 1267 (Pa.Super. 1992), this Court extended the ***Anders*** principles to appeals involving the termination of parental rights. We stated that counsel appointed to represent an indigent parent on appeal from a decree involuntarily terminating parental rights may, after a conscientious and thorough review of the record, petition this Court for leave to withdraw from representation and submit an ***Anders*** brief. ***Id***. at 1275. In ***Commonwealth v. Santiago***, 978 A.2d 349, 361 (Pa. 2009), our Supreme Court altered our application of the ***Anders*** briefing requirements to permit counsel to fully articulate his or her conclusion that the appeal is frivolous.

The ***Santiago*** Court did not change the remaining procedural requirements that court-appointed counsel must satisfy in requesting to withdraw from representation, *i.e.*: (1) petition the court for leave to

withdraw stating that, after making a conscientious examination of the record, counsel has determined that the appeal would be frivolous; (2) furnish a copy of the brief to the defendant; and (3) advise the defendant of his or her right to retain new counsel or raise any additional points that he or she deems worthy of the court's attention.

Herein, Attorney Montgomery's petition to withdraw from representation stated that he had made a conscientious review of the record and had concluded that the appeal was wholly frivolous. In addition, Attorney Montgomery attested that he mailed to Father: a copy of the petition to withdraw; a copy of the ***Anders*** brief stating the reasons for his conclusion; and a letter advising Father of his rights to proceed *pro se* or to retain private counsel if the petition is granted and to raise any additional issues that he deemed worthy of consideration.[2] Significantly, with respect to the latter requirement, Attorney Montgomery attached to his petition a copy of the letter he mailed to Father advising him of his rights. ***See Commonwealth v. Millisock***, 873 A.2d 748, 752 (Pa. Super. 2005). Thus, counsel has satisfied the procedural requirements of ***Anders***.

Having found procedural compliance, we now must determine whether Attorney Montgomery's ***Anders*** brief complies with the substantive dictates outlined in ***Santiago***. We conclude that it does. Attorney Montgomery's

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[2] Father neglected to respond to counsel's letter or the petition to withdraw.

Anders brief 1) summarized the procedural history and pertinent facts with citation to the certified record; 2) identified the testimony adduced during the evidentiary hearing that arguably supports the appeal and outlines potential claims that the certified record does not sustain the statutory grounds for termination; and 3) referenced controlling case law in setting forth his conclusion that the appeal is frivolous because the competent evidence supports the orphans' court's determination that CYS satisfied its statutory burden and that terminating Father's parental rights is in his daughter's best interest. Accordingly, Attorney Montgomery satisfied the ***Santiago*** requirements.

Next, we turn to whether Father's appeal is, in fact, frivolous. Our standard of review is well settled.

> The standard of review in termination of parental rights cases requires appellate courts 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. A decision may be reversed for an abuse of discretion only upon demonstration of manifest unreasonableness, partiality, prejudice, bias, or ill-will. The trial court's decision, however, should not be reversed merely because the record would support a different result. We have previously emphasized our deference to trial courts that often have first-hand observations of the parties spanning multiple hearings.

In re T.S.M., 71 A.3d 251, 267 (Pa. 2013) (citations and quotation marks omitted).

Involuntary termination of parental rights is governed by § 2511 of the Adoption Act, 23 Pa.C.S. §§ 2101-2938. As the party petitioning for termination of parental rights, CYS "must prove the statutory criteria for that termination by at least clear and convincing evidence." ***In re T.R.,*** 465 A.2d 642, 644 (Pa. 1983). 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 hesitancy, of the truth of the precise facts in issue." ***Matter of Sylvester,*** 555 A.2d 1202, 1203–04 (Pa. 1989).

As noted, the orphans' court terminated Father's parental rights pursuant to § 2511(a)(1), (2) and (b), which provide 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:
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> (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.
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> (2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused 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.
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> . . . .
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> **(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(a)(1), (2) and (b).

With respect to § 2511(a)(1), this Court has explained,

> A court may terminate parental rights under Section 2511(a)(1) where the parent demonstrates a settled purpose to relinquish parental claim to a child or fails to perform parental duties for at least the six months prior to the filing of the termination petition. The court should consider the entire background of the case and not simply:
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> > . . . mechanically apply the six-month statutory provision. The court must examine the individual circumstances of each case and consider all explanations offered by the parent facing termination of his . . . parental rights, to determine if the evidence, in light of the totality of the circumstances, clearly warrants the involuntary termination.

In re A.S., 11 A.3d 473, 482 (Pa. Super. 2010) (citations omitted).

As it relates to the effect of Father's incarceration on the analysis under § 2511(a)(1), our Supreme Court reaffirmed in ***In re Adoption of S.P.***, 47 A.3d 817 (Pa. 2012), that 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 the child. ***Id***. at 828.

Next, we outline the legal principles pertinent to § 2511(a)(2). In ***In re Geiger***, 331 A.2d 172 (Pa. 1975), our Supreme Court first announced the fundamental test in terminating parental rights pursuant to § 2511(a)(2). According to ***In re Geiger***,

> three things must be shown before a natural parent's rights in a child will be terminated: (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.

Id. at 173-174; ***see also In Interest of Lilley***, 719 A.2d 327, 330 (Pa.Super. 1998).

In ***In re Adoption of S.P.***, ***supra***, our Supreme Court addressed the effects of incarceration upon a parent's ability to provide essential care and control pursuant to § 2511(a)(2). The High Court reasoned,

> [I]incarceration neither compels nor precludes termination. 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 (quotation marks and citations omitted).

After the orphans' court finds statutory grounds to terminate parental rights pursuant to § 2511(a), it must also determine whether the involuntary termination of parental rights would best serve the child's developmental,

physical, and emotional needs and welfare pursuant to § 2511(b). As it relates to whether the termination of parental rights would best serve L.N.B.-G.'s developmental, physical, and emotional needs and welfare pursuant to § 2511(b), we employ the following analysis.

> In ***In re C.M.S.***, 884 A.2d 1284, 1287 (Pa.Super. 2005), this Court stated, "Intangibles such as love, comfort, security, and stability are involved in the inquiry into the needs and welfare of the child." In addition, we instructed that the trial court must also discern the nature and status of the parent-child bond, with utmost attention to the effect on the child of permanently severing that bond. ***Id***. However, in cases where there is no evidence of a bond between a parent and child, it is reasonable to infer that no bond exists. ***In re K.Z.S.***, 946 A.2d 753, 762-63 (Pa.Super. 2008). Accordingly, the extent of the bond-effect analysis necessarily depends on the circumstances of the particular case. ***Id***. at 63.

In re Adoption of J.M., 991 A.2d 321, 324 (Pa.Super. 2010).

After a thorough review of the ***Anders*** brief, the advocate briefs filed by CYS and the guardian *ad litem*, and the pertinent law, and following our independent examination of the certified record, we conclude that the appeal is frivolous and unsupported in law or in fact. We affirm on the basis of the orphans' court's cogent and well-reasoned opinion entered on September 28, 2015.[3] Specifically, we agree with the orphans' court's analysis as to

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[3] We agree with the orphans' court's proposition that Father's repeated incarceration is a legitimate factor in conducting the incapacity analysis pursuant to § 2511(a)(2). Indeed, this principle is consistent with our Supreme Court's holding in ***In re Adoption of S.P.***, ***supra***. However, the orphans' court also cited an unpublished memorandum of this Court as
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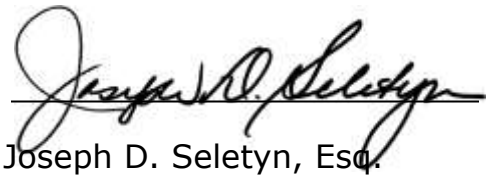
§ 2511(a)(2) and (b). ***See In re B.L.W.***, 843 A.2d 380, 384 (Pa.Super. 2004) (*en banc*) ("we need only agree with [the court's] decision as to any one subsection in order to affirm the termination of parental rights").

Decree affirmed. Petition of Jeremy S. Montgomery to withdraw from representation is granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/16/2016

(Footnote Continued) ———————————

additional support for the foregoing proposition. We observe that the reference to an unpublished memorandum is improper herein, and we emphasis that our reliance upon the orphans' court opinion should not be viewed as an *imprimatur*. ***See*** Superior Court I.O.P. 65.37 ("An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding, except that such a memorandum decision may be relied upon or cited (1) when it is relevant under the doctrine of law of the case, *res judicata*, or collateral estoppel[.]").