NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: K.C., A MINOR	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: D.O., FATHER	:	No. 2841 EDA 2012

Appeal from the Order entered on September 13, 2012,
in the Court of Common Pleas of Monroe County,
Orphans' Court Division, No. 42 O.C.A. 2012

IN THE INTEREST OF: E.O., A MINOR	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: D.O., FATHER	:	No. 2843 EDA 2012

Appeal from the Order entered on September 13, 2012,
in the Court of Common Pleas of Monroe County,
Orphans' Court Division, No. 41 O.C.A. 2012

BEFORE: STEVENS, P.J., WECHT, and COLVILLE*, JJ.

MEMORANDUM BY WECHT, J.: **FILED MAY 02, 2013**

Appellant, D.O. ("Father"), appeals from the September 13, 2012 orders terminating his parental rights to his son, K.C., and his daughter, E.O. (collectively, "Children"). For the reasons that follow, we reverse the

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* Retired Senior Judge assigned to the Superior Court.

trial court's orders terminating Father's parental rights as to K.C. and E.O., and remand for further proceedings.[1]

The relevant facts and procedural history of this case are as follows:

> 1. [K.C.] . . . is presently thirteen and a half (13 ½) years of age.
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> 2. The biological mother ["Mother"] of the child is deceased.
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> 3. The biological father of the child is [Father, who is] forty one and a half (41 ½) years of age . . . .
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> 4. Monroe County Children and Youth Services ["CYS"] received a referral on August 11, 2009. [CYS] had previous involvement with the family dating back to 1998. [Children] were also dependent in 2007-2008.
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> 5. The referral was regarding the home conditions, supervision concerns, lack of food in the home, [M]other possibly abusing Methadone, [M]other and [F]ather yelling and fighting in the home and around [Children], [K.C.] not receiving his medication and being out of control, and [Mother] being in kidney failure and refusing dialysis. Mother was in the late stages of cancer.
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> 6. [CYS] responded to the home and found the home to be in disarray. There was rotten food and poor home conditions. Mother was supposed to attend dialysis three times a week but was only going sporadically. Mother had no plans for [Children's] care once she passe[d] away. Father was allowed to stay in the home temporarily due to special permission he was given by the Housing Authority. Mother stated [F]ather works often and is not home. Emergency Protective Custody was taken of [Children].
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> 7. On August 12, 2009, a 302 bench warrant[[2]] was issued for [M]other and she was admitted to Pocono Medical Center.

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[1] The two above-captioned cases were consolidated *sua sponte* by order filed on November 8, 2012.

8. The Honorable Arthur L. Zulick approved Emergency Protective Custody of [Children,] and they were removed from the home. A Shelter Care hearing was held on August 14, 2009, at which time Protective Custody was continued. Dependency of [K.C.] was granted to [CYS] by [Judge Zulick] on August 24, 2009. Said Dependency of [K.C.] was reviewed and continued by the Honorable Jonathan Mark on April 8, 2010, September 15, 2010, March 9, 2011, September 22, 2011, January 5, 2012 and April 20, 2012.

9. [Mother] passed away on March 6, 2010.

10. Father . . . has been consistent with his urine screens but has tested positive for Oxycodone, for which he does not have a prescription. [Father] has been accepted into the Suboxone Program, but has not been following all the recommendations. He was accepted into the program after refusing in-patient treatment. [Father] has missed some drug and alcohol appointments.

11. [Father] fails to attend [Children's] appointments, even with the assistance of the caseworker to remind him. [Father] has a history of behaving in a combative manner, which makes it difficult to make progress with any goals. [Father] was 40 minutes late for [Children's] visit about a month ago; however, he normally maintains consistent visits with [Children]. [Father's] visits continue to be supervised, as he makes inappropriate statements during his visitation.

12. [Father] tested positive for cocaine and entered an inpatient rehab on July 17, 2012 at Allenwood.

13. Caseworker has attempted several home visits to get [Father] back on track with his progress but he does not follow through with suggestions and support that [have] been offered.

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[2] This refers to Mother's involuntary commitment pursuant to the Mental Health Procedures Act, 50 P.S. § 7302.

> 14. [K.C.] is very happy in his current foster home. He would prefer to be returned to [Father] but states he would be happy to remain in his current foster home and be adopted.
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> 15. Reasonable efforts have been made by [CYS] to finalize [K.C.'s] permanency plan, in that caseworker has assisted [Father] with following through on his Blended Case Management referral through [Northwestern Human Services]. [C]aseworker completed announced and unannounced visits to his home as well as assess[ed] the safety of [Children]. Caseworker has met with [Father] on several occasions to review any progress or lack of progress. [Children] are placed together in a pre-adoptive foster home.
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> 16. There has not been sufficient progress from [Father,] and [Children] have been in care for a lengthy period of time. Father is not making sufficient progress for [Children] to be able to return home.

Trial Court Opinion (K.C.) ("T.C.O.K."), 9/13/2012, at 1-3.[3]

On the same date that the above-excerpted trial court opinion was filed, the trial court entered a separate opinion addressing the termination of Father's rights with regard to E.O. That opinion differed from the above in only one subtle particular. Specifically, the trial court observed, with regard

[3] In addition to these specific findings of fact, the trial court heard a great deal of evidence, much of it undisputed, militating strongly in favor of termination of Father's parental rights. The evidence in question demonstrated at length Father's evidently intractable substance abuse problem; the questionable, if not criminal, behavior his addiction prompted; the often squalid state in which CYS found his home; and the questionable company he kept throughout the years of Children's dependency, during which CYS made extensive efforts to reunify the family. However, given that we must reverse the trial court's order and remand this case for other reasons, we need not delve deeply into these considerations. Accordingly, in the discussion that follows we add only highlights of this additional evidence.

to E.O., that she "is happy to be residing in her current foster home with her brother. [E.O.] would like to go home with [Father]. She is willing to be adopted by her current foster family should she not be able to return to [Father]." T.C.O. (E.O.) ("T.C.O.E."), 9/13/2012, at 3. The subtle difference resides in the trial court's finding that K.C., although he would prefer to be with Father, would be "happy" to remain with his current foster family. E.O., on the other hand, would merely be "willing" to remain with the foster family, in the event that it is not possible to return to Father.

Undisputed evidence also established the following pertinent and largely undisputed facts: K.C. is a special needs child who suffers from cerebral palsy, oppositional defiant disorder, and mental retardation with a very low IQ. Notes of Testimony ("N.T."), 8/27/2012, at 10. K.C. frequently injures himself, and was injured on occasion by E.O. while the Children were playing, unsupervised, under Father's care. ***Id.*** at 10. K.C. has difficulty communicating due to a lack of movement of certain muscles in his mouth, needs constant prompting as to grooming and hygiene, must be told to shower and brush his teeth, and must be checked afterwards. ***Id.*** at 49-51. Due to his extensive needs, K.C. receives services including a behavioral specialist and a therapeutic support staff person. ***Id.*** at 52.

E.O., although younger than her brother, is very bossy and at times bullies K.C. E.O. and K.C. often fight, and K.C. sometimes is injured. E.O.

receives the services of a behavioral specialist and a therapeutic staff person, due to her defiant behavior with Father. ***Id.*** at 51-52.

Children have remained dependent since August of 2009. Children spent periods of time in the custody of Father and Mother under CYS supervision. Nonetheless, CYS continued to receive referrals for lack of supervision, including injuries to K.C., poor hygiene, and deplorable conditions in the home. Following Mother's death on March 6, 2010, Father sought to move into the family home with the Children, but could not do so because he tested positive for drugs and his name was not on the lease. Consequently, Children were placed into foster care. N.T. at 12. However, on March 26, 2010, subject to a safety plan and CYS supervision, Children returned to live with Father. ***Id.*** at 13. Kate Croll, a CYS caseworker, testified that she visited Father's home once or twice per week. ***Id.*** at 14. CYS continued to receive referrals for Father's drug use, K.C.'s poor hygiene, and a lack of supervision. ***Id***. Father complied with mandatory urine screens, but on several occasions Father admitted to using, or tested positive for, drugs such as oxycodone, cocaine, and Percocet. ***Id.*** at 19, 23-24.

On September 8, 2010, CYS received information that K.C. had arrived at school with feces down his back, ***id.*** at 19; on September 27, 2010, it received a referral that K.C. had arrived at school with one shoe, ***id.*** at 20' and on December 15, 2010, it received a referral that K.C. had pink eye, and

that the school's several efforts to contact Father had been in vain. ***Id.*** at 21. Moreover, CYS learned that Father was sleeping when he should have been supervising Children, and that he was crushing and snorting pain medication. ***Id.*** at 15. On January 19, 2011, CYS received a referral that Father was selling his food stamps on the street and buying narcotics with the proceeds. ***Id.*** at 22. Father often left Children by themselves. ***Id.*** at 15, 18, 21.

The family's financial situation was poor. Father struggled to pay the rent and asked CYS for aid. Despite the fact that the family received Social Security benefits of only $1,288 per month, Father was paying $400.00 per month to Rent-A-Center for stereo equipment. ***Id.*** at 27, 29-30, 34.

CYS has made reasonable efforts to finalize Children's permanency plans. The CYS caseworker assisted Father in complying with his blended case management referral through Northwestern Human Services. ***Id.*** at 43. However, the trial court found that Father had not made sufficient progress toward his goals.

Children have remained in the same pre-adoptive foster home since their placement in August 2011, and are doing well. Both are involved in extracurricular activities. K.C. is on medication and receives mental health services. ***Id.*** at 88-89. Their foster parents would like to adopt Children. ***Id.*** at 90.

On June 6, 2012, CYS filed petitions for the termination of Father's parental rights as to both K.C. and E.O. The trial court held a hearing on August 27, 2012. The guardian *ad litem*, Lori J. Cerato, was present on the Children's behalf.[4] On September 13, 2012, the trial court issued an order granting CYS's petitions pursuant to 23 Pa.C.S.A. §§ 2511(a)(1), (2), (5), (8), and (b).

Father timely filed notices of appeal on October 10, 2012, along with concise statements of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and Pa.R.A.P. 1925(b).

On appeal, Father raises the following two issues:

> 1. Did [CYS] fail to present clear and convincing evidence that termination of [Father's] parental rights served the emotional needs and welfare of [Children]?
>
> 2. Did the trial court err in terminating his parental rights without clear and convincing evidence that termination best served [Children's] emotional needs and welfare?

Brief for Father at 9.

Appellant's issues amount to a single challenge regarding the sufficiency of the evidence to establish the requirements of 23 Pa.C.S. § 2511(b), which furnishes the second part of the bifurcated inquiry that governs petitions to terminate parental rights. We review an appeal from the termination of parental rights in accordance with the following standard:

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[4] Ms. Cerato has filed a brief in support of affirmance.

> [O]ur standard of review requires [us] 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, [we] review [the trial court's ruling] to determine if the trial court made an error of law or abused its discretion. . . . [A]n 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, [we] are not equipped to make . . . fact-specific determinations on a cold record, where the trial judges are observing the parties during the relevant hearing . . . . Therefore, even where the facts could support [a contrary] result, . . . [we] must resist the urge to second[-]guess the trial court and impose [our] own credibility determinations and judgment; instead we must defer to the [trial court] 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 and internal quotation marks omitted).

The party seeking termination of parental rights bears the burden of proving 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.*** (internal quotation marks omitted). When a trial court relies upon more than one of statutory bases under subsection 2511(a) for termination parental rights, we

will affirm if we agree with any one basis asserted by the trial court. ***In re B.L.W.***, 843 A.2d 380, 384 (Pa. Super. 2004) (*en banc*).

Subsections 2511(a) and (b), respectively, govern the two-part inquiry a trial court must consider in determining whether to terminate parental rights. We have held that the distinct provisions must be considered separately, in what amounts to a "bifurcated process." ***See In re I.J.***, 972 A.2d 5, 10 (Pa. Super. 2009). Subsection 2511(a) sets forth various bases upon which, alone or in tandem, the trial court may find that the parent in question so completely has abdicated his or her parental responsibilities, while demonstrating either insufficient will or insufficient ability to regain the ability to provide adequately for the child's needs, that termination is warranted. Should the trial court find that the parent has satisfied one or more of the subsection 2511(a) criteria, it must then consider, as a discrete matter, whether the party seeking termination has satisfied the requirements of subsection 2511(b), which is concerned not with the parent's adequacy as guardian and caregiver for the child, but with the effect on the child of the termination of parental rights. ***See In re C.L.G.***, 956 A.2d 999, 1008 (Pa. Super. 2008) ("[I]nitially, the focus in terminating parental rights is on the parent, under Section 2511(a), whereas the focus in Section 2511(b) is on the child."); ***accord I.J.***, 972 A.2d at 10. Put another way, subsection 2511(a) is directed at the quality of parenting, while subsection 2511(b) is addressed to the welfare of the children not just in

tangible regards, but also with regard to the intangible aspects of the emotionally fraught, often powerful parent-child connection. ***See In re Z.P.***, 994 A.2d 1108, 1121 (Pa. Super. 2010) ("Before granting a petition to terminate parental rights, it is imperative that a trial court carefully consider the *intangible* dimension of the needs and welfare of a child – the love, comfort, security, and closeness – entailed in a parent-child relationship . . . ." (internal quotation marks and citations omitted; emphasis in original)).

In the interest of brevity, and because Father does not offer material argument to the contrary,[5] we assume *arguendo* that CYS introduced sufficient evidence for the trial court to conclude by clear and convincing evidence that Father's conduct warranted termination under one or more of the bases provided by subsection 2511(a). Indeed, in light of the voluminous evidence of Father's continuing lack of fitness or capacity to provide adequate parental care, it would be difficult to conclude otherwise. Nonetheless, our case law makes clear that we may not infer satisfaction of the critical and distinct subsection 2511(b) inquiry even from the strongest subsection 2511(a) case. Thus, of legal necessity and in keeping with Father's argument, we address ourselves only to whether the trial court

[5] Were we not compelled to reverse the termination of Father's parental rights on other grounds, Father's failure to provide argument regarding the sufficiency of the evidence to satisfy any criterion under subsection 2511(a) would result in waiver of any such contention. ***See*** Pa.R.A.P. 2119(a); ***In re Estate of Whitley***, 50 A.3d 203, 209 (Pa. Super. 2012).

abused its discretion in determining that termination was appropriate under subsection 2511(b).

This Court has set forth the substance of the subsection 2511(b) analysis as follows:

> Subsection 2511(b) focuses on whether termination of parental rights would best serve the developmental, physical, and emotional needs and welfare of the child. 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); ***see In re T.D.***, 949 A.2d 910, 920 (Pa. Super. 2008) ("[T]he 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."). Thus, upon the establishment of one or more of the subsection 2511(a) criteria, "the court must engage in three lines of inquiry: (1) the parent's explanation for his or her conduct; (2) the post-abandonment contact between parent and child; and (3) . . . the effect of termination of parental rights on the child." ***Matter of Adoption of Charles E.D.M., II***, 708 A.2d 88, 92 (Pa. 1998).

We unremittingly have demanded that the trial court undertake the subsection 2511(b) inquiry in clear terms, and distinctly from its examination of the subsection 2511(a) factors:

> An inquiry into whether termination of parental rights would best serve the developmental, physical and emotional needs and welfare of the child is a distinct aspect of a termination hearing, to be undertaken only after the statutory requirements of [sub]section 2511(a) have been met. Intangibles such as love, comfort, security, and stability are involved when inquiring about the needs and welfare of the child. The court must also discern the nature and status of the parent-child bond, paying close attention to the effect on the child of permanently severing the bond.

In re C.P., 901 A.2d 516, 520 (Pa. Super. 2006) (citations omitted).

The trial court's findings of fact pay only lip service to subsection 2511(b). In the relevant portion of each of the trial court's materially identical opinions, the trial court used identical language: "The Court finds that it is in the best interests of the child to terminate parental rights and free [him/her] to be raised in an environment where [he/she] will receive the attentive care, love and nurturance that he requires." T.C.O.K. at 6-7; T.C.O.E. at 6-7. The only other pertinent findings by the trial court that might arguably bear on the subsection 2511(b) inquiry are that "[K.C.] is very happy in his current foster home," T.C.O.K. at 3, and that "[E.O.] is happy to be residing in her current foster home with her brother." T.C.O.E. at 3. However, the trial court also found that "[K.C.] would prefer to be returned to father," T.C.O.K. at 3, and that "[E.O.] would like to go home with her father." T.C.O.E. at 3.

We have made clear that a formal bonding evaluation need not be conducted by an expert, in part because direct observation of parent-child interactions may be unnecessary or even detrimental to the child. ***See In re B.C.***, 36 A.3d 601, 611 (Pa. Super. 2012). Moreover, "when there is no evidence of any bond between the parent and child, it is reasonable to infer that no bond exists." ***Id.*** Accordingly, the extent of the necessary analysis of the parent-child bond must be determined on a case-by-case basis. ***Id.***

However, in light of the trial court's limited findings on the matter in this case, and in light of the paucity of evidence of record pertaining to the question, we cannot infer the absence of any bond. According to the trial court, K.C. and E.O. both expressed at least a qualified desire to live with Father. However impractical or ill-advised this might seem in light of the above evidence and what appears to be their much-improved condition in their pre-adoptive home, their preferences preclude any inference that no bond exists. ***See In re E.M.***, 908 A.2d 297 (Pa. Super. 2006) (finding that the trial court abused its discretion in finding termination in teen-aged siblings' best interest when one child would not agree to adoption, as required by law for a child his age to be adopted, and the best interests would not be served by separating siblings). To the contrary, given the hardships Children long have endured in their Father's care, the persistence of any bond, let alone a preference to live with Father, is worthy of

consideration if subsection 2511(b) is to have any independent relevance to the termination inquiry.

We find our decision in ***I.J.***, *supra*, instructive. In ***I.J.***, the mother had three children. She had placed her first-born in the care of a relative. Her second child had been adjudicated dependent and was living with a foster family. Upon the birth of her third child, I.J., the Philadelphia Department of Human Services ("DHS") obtained a restraining order placing I.J. into foster care, based upon the mother's physical limitations, mental health issues, and her inability to care for her two older children, and the father's inability to care for the child. ***I.J.*** 972 A.2d at 7-8.

Approximately twenty-one months later, DHS filed a petition to terminate the parents' parental rights. The trial court denied the petition. The court found that the parents had made progress in remedying the conditions that caused the initial adjudication of dependency, and determined that termination was not in the child's best interest. DHS appealed. ***Id.*** at 8. We found that trial court had abused its discretion in ruling that DHS had failed to establish that termination of parental rights would be appropriate under subsection 2511(a)(8). ***Id.*** at 10-12.

Hence, we moved on to determine whether termination would be in the best interests of the child under subsection 2511(b). We noted that, among the above-stated considerations that animate the subsection (b) inquiry, are intangibles such as love, comfort, security, stability, the nature

and status of the parent-child bond, and the importance of the continuity of relationships to the child, all while "paying close attention to the effect on the child of permanently severing the bond." ***Id.*** at 12 (quoting ***In re C.L.G.***, 956 A.2d 999, 1009 (Pa. Super. 2008)). We determined that the trial court failed to perform such an analysis with respect to either parent. We acknowledged that the evidence of record "appear[ed] to reflect that no natural bond" existed between the child and the mother. However, "the trial court reached no definitive finding as to whether any natural parental bond exists." ***Id.*** at 12-13. While the testimony of DHS's witnesses suggested the absence of a parental bond between the father and the child, that evidence was contradicted by evidence of positive interactions between them. The trial court concluded that it "could not discount the existence of a bond between I.J. and [f]ather," but at that point the trial court's analysis of the child's best interests analysis "stopped for both parents." ***Id.***

Given the mandatory nature of the subsection 2511(b) inquiry, we remanded the case to the trial court for "a comprehensive best interests analysis." ***Id.*** (internal quotation marks omitted). In so doing, we noted that various witnesses all but unanimously determined that there was little bond between I.J. and the parents, and that termination of the parents' rights would be in the child's best interests. But we also noted that this Court had in numerous cases remanded for a proper inquiry into the child's best interest where such was lacking on the record. To conclude upon

review in the first instance that termination served the child's best interest "would force [this Court] to ignore the trial court's credibility determinations" in violation of our standard of review. ***Id.*** Accordingly, we left it to the trial court to determine whether additional evidence would be necessary to in assess the best interests of the child relative to the subsection 2511(b) inquiry, in effect freeing the court to articulate more thoroughly why termination served the child's best interest based upon the evidence already of record. ***Id.***

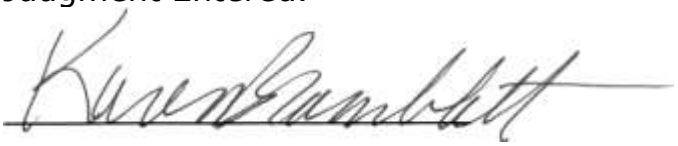
This case resembles ***I.J.*** in several particulars. First, the evidence of record might suffice to support a trial court conclusion that termination is in Children's best interest. The question, perhaps, is not a "slam dunk"; very little **direct** evidence was adduced regarding the effect on Children of severing their bond with Father, an omission of particular concern given the trial court's finding that Father was reasonably consistent in availing himself of the opportunity to visit the Children, and Children's shared preference to return to their Father. But, as in ***I.J.***, rather than wade into assessing the sufficiency of the evidence, a matter for the trial court in the first instance, we believe it prudent to afford the trial court the opportunity to make its own assessment based upon the extant evidence and any additional evidence it deems necessary to complete the inquiry.

For the foregoing reasons, we find that the trial court's failure discretely to assess the best interests of Children, as required by subsection

2511(b), requires the reversal of its order terminating Father's parental rights to both children. We will remand for the trial court to remedy this omission, by whatever methods and procedures it deems appropriate.

Order reversed. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.



Prothonotary

Date: 5/2/2013