[J-48A-B-C-D- 2011]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: R.I.S. & A.I.S Appeal of: C.S., Father	: Nos. 27 & 28 MAP 2011 :
	: Nos. 29 & 30 MAP 2011
IN THE INTEREST OF R.I.S. & A.I.S Appeal of: C.S., Father	: : Appeal from the Orders of the Superior Court at Nos. 791, 792, 828 & 829 MDA 2010 dated 12/22/10, reversing the orders of the York Co. CCP dated 4-19-10 & 4-22-10 at Nos. 2009-141, 2009-142, CP-67-DP-4-2009 & CP-67-DP-4-2009
	: ARGUED: May 10, 2011

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: November 23, 2011**

I join the Majority Opinion but write separately to distance myself to the extent the opinion can be read to create or perpetuate a bright-line rule that "a parent's incarceration, standing alone, cannot constitute proper grounds for termination of his or her parental rights." Maj. Slip Op. at 1. The issue is too nuanced to be addressed with a bright-line rule. While the mere fact that the parent was incarcerated or is incarcerated during the pendency of a dependency case does not serve as grounds for termination, the length of a parent's incarceration, standing alone, can satisfy the statutory grounds for termination under 23 Pa.C.S. § 2511 and, thereby, legally support a trial court's decision to terminate parental rights. Secondly, while I agree that the case must be remanded for reconsideration of the goal change petition due to the trial court's failure to present a full analysis of this distinct question, I write to note that the lower tribunal has been properly pursuing concurrent planning to allow for either adoption or reunification, dependent upon the subsequent

development of the facts in this case, notwithstanding its unfortunate conflation of the termination and goal change issue in its verbal opinion deciding the question now before the Court.

A. Termination of Parental Rights

I agree with the Majority "that this Court has never adopted or countenanced a view that incarceration alone is per se evidence of parental incapacity." Maj. Slip Op. at 11. However, this statement can be misleading. There is no question that the fact of incarceration, regardless of why, is not in and of itself determinative of parental incapacity. Moreover, the fact of incarceration during an ongoing dependency action will not disqualify a parent from resuming parental responsibility so long as the parent will be released quickly enough to permit the court to provide the child with timely permanency upon reunification. If, however, the length of parent's incarceration will preclude the court from unifying the (former) prisoner and the child on a timely basis in order to provide the child with the permanent home to which he or she is entitled, then the length of sentence, standing alone, should and does meet the legal criteria for involuntary termination of the incarcerated parent's parental rights under 23 Pa.C.S. § 2511(a), as discussed below.

Although this Court previously stated that "incarceration is not conclusive" on issues of termination, see In re McCray's Adoption, 331 A.2d 652, 655 (Pa. 1975), it has not considered the relevance of parental incarceration to termination of parental rights since the enactment of the federal Adoption and Safe Families Act of 1997, Pub.L. 105-89 (ASFA), which altered our national view of dependency policy. Prior to the mid-1990s, our national policy toward dependent children was to await reunification of parents and children. While undoubtedly a laudable goal, this single-minded focus on reunification led to 560,000 children in foster care as of September 1998, one-third of whom had been languishing in the foster care system for over three-years and drifting from placement to placement, while their parents were unable to remedy the problems that led to the

children's placement. See U.S. Dept. of Health and Human Services, Admin. for Children and Families, Child Welfare Outcomes 1998: Annual Report, *available at* http://www.acf.hhs.gov/programs/cb/pubs/cwo98/sec1.htm#faces. In reaction to this dire situation, the United States Congress enacted ASFA, thereby altering the focus of dependency proceedings to include consideration of the need to move children toward adoption in a timely manner when reunification proved unworkable. See In re Adoption of S.E.G., 901 A.2d 1017, 1019 (Pa. 2006). One year after ASFA, in 1998, the Pennsylvania General Assembly amended our Juvenile Act in response to the federal legislation. Our statutory scheme was modified to shift the statute's focus from a singular concern with reunification of the family to the dual purposes of preserving family unity when possible, and providing an alternative permanent family for a child when reunification of the biological parent and child could not be timely achieved. See 42 Pa.C.S. § 6301(b)(1).[1]

Although the General Assembly did not amend the provisions of the Adoption Act addressing termination of parental rights following the adoption of ASFA, the Act's language has never prohibited consideration of a parent's incarceration. Significantly, the Act does not provide specific protection to incarcerated parents, even though it specifically instructs that termination cannot result "solely from environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent." 23 Pa.C.S. §2511(b); cf. Neb. Rev. Stat § 43-292.02(2) (a petition to terminate parental rights shall not be filed by the state "if the sole factual basis for the petition is that … (b) the parent or parents of the juvenile are incarcerated."). Accordingly, I find no statutory basis in the Adoption Act to justify ignoring the parent's

[1] For a full discussion of the social crisis that led to the passage of ASFA and the amendments to the Pennsylvania Juvenile Act, see this Court's decision in S.E.G., 901 A.2d at 1018-1019.

incarceration generally and the length of the parent's sentence specifically in considering the propriety of termination of parental rights.

As correctly stated by the Majority, termination of parental rights is governed by 23 Pa.C.S. § 2511.[2] A parent's incarceration is relevant to several of the enumerated grounds.

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[2] In relevant part, 23 Pa.C.S. § 2511, "Grounds for involuntary termination", provides 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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> (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.
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> (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.

(continued…)

For example, under Section 2511(a)(2), parental rights may be terminated where "[t]he repeated and continued incapacity . . . 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 . . . cannot or will not be remedied by the parent." It is beyond cavil that in many cases, including the one at bar, an incarcerated parent is confined twenty-four hours a day, seven days a week; obviously resulting in his being incapable of providing the essential parental care, control or subsistence necessary for a child's physical and mental well-being. Id.

The question, in such a case, is then whether the incapacity can be remedied, and the length of the prison sentence is the determinative factor. To exemplify, I submit the easy case. If the parent is in jail for life with no possibility of parole, it is obvious that, notwithstanding all of his sincerity or activism, he is unable to alter the reality that he lacks the capacity to provide the child with the essential parental care required for his healthy upbringing. Thus, under 23 Pa.C.S. §2511(2), the length of incarceration standing alone meets the statutory criteria for termination. Similarly, under subsection (5), a trial court may find grounds for termination of parental rights where a child "has been removed from the care of the parent by the court . . . for a period of at least six months" and "the parent cannot . . . remedy those conditions within a reasonable period of time." 23 Pa.C.S.

(…continued)

> (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.

§ 2511(a)(5). Again, a lengthy prison sentence may be determinative of the question, as suggested by the Majority Opinion, see Maj. Slip Op. at 11 n.4. If the child has been removed from the parent's care for at least six months because, inter alia, the parent is incarcerated and the incarceration is going to last for years into the future, it is self-evident that the condition which led to the child's removal will continue to exist, and the parent will not be able to remedy it within a reasonable period of time. Under these circumstances, Pennsylvania law allows for termination. Finally, the length of a parent's incarceration is also relevant to the issues raised in Section 2511(a)(8), which directs the court to determine whether the conditions that led to removal continue to exist after twelve months. 23 Pa.C.S. § 2511(a)(8) ("The child has been removed from the care of the parent by the court, . . . 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 . . . .").

However, the fact that the grounds set forth in Section 2511(a) are met by a lengthy incarceration does not end a trial court's inquiry. Section 2511(b) instructs: "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." 23 Pa.C.S. § 2511(b).[3] This statutory imperative requires that the trial court carefully review the individual circumstances for every child to determine, inter alia, how a parent's incarceration will factor into an assessment of that child's best interest. For example, assume that a parent has provided a twelve-year old with all of his essential care from birth, that the parent now finds himself incarcerated for two to four years, and that incarceration is the sole reason the child is declared dependent. In such a case, the child will certainly have substantial emotional bonds to his parent, and an excellent case could be made that termination would

[3] Indeed, Section 2511(a)(8) also directs that the court look to whether a termination "would best serve the needs and welfare of the child." 23 Pa.C.S § 2511(a)(8).

not be in the child's best interest, even though the parent's incapacity to care for the child will continue for several years. Indeed, if the child was fifteen, this could be so even if the incarceration would last many years.

However, as noted by the trial court in this case, a parent of a very young child who is serving a lengthy term of incarceration presents a very different calculation, involving minimal emotional bonding and substantial delay prior to any hope of reunification. Notes of Testimony (N.T.), March 2, 2010 at 84 ("If it was a longer period of time, if he was going to be in jail for ten years . . . I would say, well, the kids are going to be 15 years old before they know him. That's way too late. They deserve to have permanency.") I agree with the trial court. It is incumbent upon the judicial system to be child-focused. Regardless of the heartbreak to a parent, children are entitled to every opportunity for a successful life, and a permanent, loving parental relationship greatly fosters that opportunity. See e.g. In re B.,N.M., 856 A.2d 847, 856 (Pa. Super. 2004) (holding that a parent's rights must yield "to the child's right to have proper parenting and fulfillment of his or her potential in a permanent, healthy, safe environment. A parent cannot protect his parental rights by merely stating that he does not wish to have his rights terminated." (internal citations omitted)). Accordingly, I write to emphasize my conclusion that incarceration, and particularly the length of a sentence may provide the proof sufficient to establish by clear and convincing evidence that termination can occur in accord with 23 Pa.C.S. § 2511(a), and should be considered when the best interest of the child is analyzed in accord with Section 2511(b).

Indeed, our Superior Court has recognized in a number of recent cases that a parent's incarceration can support a court's decision to terminate parental rights by serving as evidence of the parent's incapacity to provide for a child. In In re Adoption of K.J., 936 A.2d 1128 (Pa. Super. 2007), the court upheld the termination of a mother's parental rights because her minimum prison sentence of eighteen years prevented her from rectifying the

condition causing her incapacity to care for her children, namely, her imprisonment. Id. at 1134. Despite her efforts to maintain contact with her children, the court held her incarceration supported termination under Section 2511(a)(2), (5), and (8). Id.; see also In re A.S., 11 A.3d 473, 480 (Pa. Super. 2010) (parent's recurrent incarceration is evidence of his parental incapacity because it created an environment that left children without care they need); In re E.A.P., 944 A.2d 79, 85 (Pa. Super. 2008) (termination under Section 2511(a)(2) supported by mother's repeated incarcerations and failure to be present for child, which caused child to be without essential care and subsistence for most of her life and which cannot be remedied despite mother's compliance with various prison programs); id. at 84 ("Each case of an incarcerated parent facing termination must be analyzed on its own facts, keeping in mind . . . that the child's need for consistent parental care and stability cannot be put aside or put on hold simply because the parent is doing what she is supposed to do in prison.").

Similarly, several of our sister states have explicitly allowed courts to consider a parent's term of incarceration by incorporating incarceration into the statutory factors for termination of parental rights. For example, North Dakota has defined its aggravating circumstances, which excuse the provision of reasonable efforts aimed at reunification, to include where a parent "[h]as been incarcerated under a sentence where the latest release date is: (1) [i]n the case of a child age nine or older, after the child's majority; or (2) [i]n the case of a child, after the child is twice the child's current age, measured in days." N.D. Cent. Code § 27-20-02(3)(f). While our legislature has not provided guidance on the relevance of incarceration to termination, I conclude that a parent's incarceration, and the potentially resulting incapacity, can be considered in determining whether the facts create grounds for termination under Section 2511(a) and whether termination is in the best interest of the children under Section 2511(b).

In my view, the trial court in the case at bar considered the length of father's incarceration as well as the efforts father had made before and during incarceration to maintain and build a relationship with the children, and concluded that the moving party had not proven by clear and convincing evidence a ground for termination pursuant to 23 Pa.C.S. § 2511(a). The court also opined that the moving party had not proven that termination was in the best interest of the children under Section 2511(b). N.T. at 81-85. As noted above, the court observed that termination would have been appropriate if the sentence had been longer, for example ten years, because the children "deserve to have the permanency." Id. at 84. Likewise, the court observed the situation would be reversed, and the decision to deny termination would be obvious, if father's release date was imminent. Given that the record supports the trial court's analysis, I conclude that the trial court was within its discretion to deny the petition to terminate father's parental rights. See In re Adoption of Atencio, 650 A.2d 1064, 1066 (Pa. 1994). Accordingly, I join in the decision of the majority to reverse the Superior Court.

B. Goal Change

As noted by the Majority, the trial court in this case erred by failing to perform the legal analysis attendant to the issue of the goal change when it placed its opinion on the record, and, instead, asserted that the goal change petition was "simply another way of making the same arguments addressed" in relation to the termination of parental rights petition. Tr. Ct. Op., May 8, 2010, at 4-5. The Majority correctly observes that goal change petitions and termination of parental rights petitions are discrete inquiries that should be addressed separately and fully. See Maj. Slip Op. at 121; see also 23 Pa.C.S. § 2511 (Grounds for involuntary termination); 42 Pa.C.S. § 6351 (Disposition of dependent child). Accordingly, a remand to address the goal change petition is appropriate. I note, however,

that the trial court should consider the best interest of the children as they exist presently, rather than the facts at the time of the original petition.

I write separately to highlight that while the trial court failed to provide the necessary analysis, it nonetheless has been appropriately engaging in concurrent planning for some time. Although not mentioned in the Majority Opinion or the Superior Court opinion below, the trial court in July 2009 and again in December 2009 ordered that the "current permanent placement goal" be "return to parent or guardian" but that the "concurrent placement goal" be "adoption." Permanency Review Orders of July 7, 2009 and December 10, 2009. Given the court's acknowledgement that this case presents a very close case for termination, its use of concurrent planning is noteworthy and laudable in that it allows for a potential reunification with father, but also acknowledges the tenuous nature of father's connection and the not insignificant likelihood that reunification will be unsuccessful for any number of reasons, including the possibility of father's continued incarceration. "Rather than waiting to pursue adoption options until all reunification attempts fail, concurrent planning allows children to move more quickly through the dependency system and into the permanent placement best suited to their individual situation through simultaneous pursuit of reunification and alternative permanent placement." R.J.T., 9 A.3d at 1186. Accordingly, I commend the trial court and urge it to stand ready to pursue aggressively both reunification and termination and adoption when the facts as presented resolve themselves in favor of one of these permanent goals.

Accordingly, I join the Majority Opinion.