NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: C.J.G., A MINOR	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: C.S.	No. 2235 MDA 2012

Appeal from the Decree October 29, 2012
In the Court of Common Pleas of Lycoming County
Orphans' Court at No.: 6310

BEFORE: DONOHUE, J., ALLEN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. **FILED MAY 24, 2013**

C.S. (Father) appeals from the decree of the Court of Common Pleas of Lycoming County, entered October 29, 2012, on the petition of S.H. (Mother), that terminated his parental rights to his son, C.J.G. (Child), and authorized the adoption by Mother and her husband of Child without notice to or consent of Father. Father's counsel has filed a petition to withdraw as counsel pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). We affirm, and grant counsel's petition.

The record supports the following recitation of the facts of this case. Child, who was born in June of 2006, currently lives with Mother; stepfather,

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* Retired Senior Judge assigned to the Superior Court.

R.H., Jr. (Stepfather); and half-sister, E.H., in Montgomery, Lycoming County, Pennsylvania. Mother and Stepfather were married on July 22, 2011. Father resides in Hughesville, Lycoming County, Pennsylvania. Mother and Father lived together when they were 16 and 17 years old respectively, but never married.

Mother obtained a temporary Protection from Abuse order (PFA) against Father on May 5, 2006; a final order was entered on June 21, 2006. Child, who was three weeks old at the time, was not a protected party under the order.

Father saw Child once a week for the first two months of Child's life before Father moved to Texas for about two years. Father called occasionally from Texas but never sent cards, gifts, or money to Child during that time. Father has never provided support of any kind to Child.

Father moved back to Pennsylvania in June of 2008 and contacted Mother about seeing Child. Father visited with Child at a local fair and a public park. Father was unable to keep his next appointment to see Child because he lacked transportation. Father last saw Child at a local mall in November of 2008. He never saw Child after that. Father sent a present to Child through his family in December of 2009, and, in May of 2009, Father's girlfriend at the time contacted Mother to ask about Father seeing Child. Mother agreed to the meeting if Father would submit to a drug test, but Father never responded. At one point, Father contacted Mother via MySpace

and mentioned seeing her in court, but nothing came of this. Mother has maintained contact with Father's family and has allowed them to see Child.

Child refers to Stepfather as Dad, and does not know who Father is. Stepfather dropped out of high school to find employment and provide for Mother and Child. In July of 2011, Stepfather asked Father if he would be willing to terminate his parental rights voluntarily so that he could adopt Child. Father at first agreed but later changed his mind.

Mother filed a petition to terminate Father's parental rights on April 26, 2012. The trial court held a hearing on that petition on October 12, 2012, and entered its order terminating those rights on October 29, 2012. Father filed his notice of appeal on November 20, 2012, and, in response to the trial court's order of December 3, 2012, filed his statement of errors complained of on appeal on December 6, 2012.[1]

The ***Anders*** brief raises the following issues on appeal:

> I. Whether an application to withdraw as counsel should be granted where counsel has investigated the possible grounds for appeal and finds the appeal frivolous[?]
>
> II. Whether the lower court erred in terminating the parental rights of [Father] when the petitioner[ ] did not prove by clear and convincing evidence the grounds for termination[?]

(***Anders*** Brief, at 5).

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[1] We accept Father's late filing of his statement of errors because Mother has not objected to it or claimed that any prejudice resulted from it. ***See In re K.T.E.L.***, 983 A.2d 745, 748 (Pa. Super. 2009).

Father's counsel has filed a petition to withdraw as counsel and an ***Anders*** brief. We begin by addressing the petition to withdraw before reaching the merits of the issues raised in the ***Anders*** brief. ***See Commonwealth v. Rojas***, 874 A.2d 638, 639 (Pa. Super. 2005) ("When faced with a purported ***Anders*** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw.") (citation omitted).

In ***In re V.E.***, 611 A.2d 1267, 1275 (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 a first 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 representation and must submit an ***Anders*** brief. ***Id.*** at 1275. To withdraw pursuant to ***Anders***, counsel must: 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 of his right to obtain new counsel or file a *pro se* brief to raise any additional points that the appellant deems worthy of review. ***Id.*** at 1273. Thereafter, this Court examines the record and determines whether the appeal is wholly frivolous. ***Id.***

Our Supreme Court, in ***Santiago***, ***supra***, stated that an ***Anders*** brief 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;
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> (3) set forth counsel's conclusion that the appeal is frivolous; and
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> (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.

Santiago, ***supra*** at 361.

The ***Santiago*** Court reaffirmed the principle that "indigents generally have a right to counsel on a first appeal, [but] this right does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing such an appeal." ***Id.*** at 357 (citation omitted). The Supreme Court stated:

> In the Court's view, this distinction gave meaning to the Court's long-standing emphasis on an indigent appellant's right to "advocacy." As the Court put it, "[a]lthough an indigent whose appeal is frivolous has no right to have an advocate make his case to the appellate court, such an indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments."

Id. at 357-58 (citations omitted).

Here, Father's counsel has complied with the first prong of the test in ***Santiago*** by providing a summary of the procedural history and facts, with

citations to the record in her ***Anders*** brief. Counsel has also complied with the second prong of the test in ***Santiago*** by referring to anything in the record that counsel believes arguably supports the appeal. Moreover, counsel filed a separate petition to withdraw as counsel, wherein counsel states that she has made an exhaustive review of the record and applicable law, and she has concluded that the appeal is frivolous. Further, counsel has attempted to identify and fully develop any issues in support of Father's appeal. Additionally, counsel states that she sent a letter to Father in which she provided a copy of the ***Anders*** brief. Counsel states that she informed Father that she has filed a petition to withdraw and ***Anders*** brief, and she informed Father of his rights in light of her petition. Thus, Father's appellate counsel has satisfied the requirements of ***Anders*** and ***Santiago***.

Accordingly, we review Father's claims independently to determine if they are wholly frivolous. In the ***Anders*** brief, Father's counsel states that the issues in Father's appeal lack merit.

We review the merits of Father's appeal in accordance with the following standard.

> [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. ***In re: R.J.T.***, 608 Pa. 9, 9 A.3d 1179, 1190 (Pa. 2010). If the factual findings are supported, appellate courts review to determine if the trial court made an error of law or abused its discretion. ***Id.***; [***In re***] ***R.I.S.***, [36 A.3d 567, 572 (Pa. 2011) (plurality opinion)]. As

> has been often stated, an abuse of discretion does not result merely because the reviewing court might have reached a different conclusion. ***Id.***; ***see also Samuel Bassett v. Kia Motors America, Inc.***, 34 A.3d 1, 51 (Pa. 2011); ***Christianson v. Ely***, 838 A.2d 630, 634 (Pa. 2003). Instead, a decision may be reversed for an abuse of discretion only upon demonstration of manifest unreasonableness, partiality, prejudice, bias, or ill-will. ***Id.***
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> As we discussed in ***R.J.T.***, there are clear reasons for applying an abuse of discretion standard of review in these cases. We observed that, unlike 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. ***R.J.T.***, 9 A.3d at 1190. 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 Atencio***, 650 A.2d 1064, 1066 (Pa. 1994).

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

"[T]he burden is upon [the petitioner] to prove by clear and convincing evidence that its asserted grounds for seeking the termination of parental rights are valid." ***In re R.N.J.***, 985 A.2d 273, 276 (Pa. Super. 2009).

Moreover, we have explained that "[t]he 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)).

Here, we conclude that the trial court properly terminated Father's parental rights pursuant to subsection 2511(a)(1), which provides, in pertinent part:

> **§ 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:
>
> (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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> * * *
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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.A. § 2511(a)(1), (b).

To terminate parental rights pursuant to section 2511(a)(1), the person or agency seeking termination must demonstrate through clear and convincing evidence that, for a period of at least six months prior to the filing of the petition, the parent's conduct demonstrates a settled purpose to relinquish parental rights or that the parent has refused or failed to perform

parental duties. ***In re Adoption of M.E.P.***, 825 A.2d 1266, 1272 (Pa. Super. 2003).

With respect to Section 2511(a)(1), our Supreme Court has held,

> Once the evidence establishes a failure to perform parental duties or a settled purpose of relinquishing parental rights, 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) consideration of the effect of termination of parental rights on the child pursuant to Section 2511(b).

In re Adoption of Charles E.D.M., 708 A.2d 88, 92 (Pa. 1998). Further,

> the trial court must consider the whole history of a given case and not 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 or her parental rights, to determine if the evidence, in light of the totality of the circumstances, clearly warrants the involuntary termination.

In re N.M.B., 856 A.2d 847, 855 (Pa. Super. 2004), *appeal denied*, 872 A.2d 1200 (Pa. 2005) (citations omitted).

The Adoption Act provides that a trial court "shall give primary consideration to the developmental, physical and emotional needs and welfare of the child." 23 Pa.C.S.A. § 2511(b). The Act does not make specific reference to an evaluation of the bond between parent and child but our case law requires the evaluation of any such bond. ***See In re E.M.***, 620 A.2d 481, 484 (Pa. 1993). However, this Court has held that the trial court is not required by statute or precedent to order a formal bonding evaluation

performed by an expert. ***In re K.K.R.-S.***, 958 A.2d 529, 533 (Pa. Super. 2008).

At the hearing in this matter, Father testified that the last time he saw Child, Child was three or four years of age. (N.T., 10/12/12, at 53). He thought that was probably at some time in 2008. (***Id.*** at 59). Father testified that he made periodic phone calls to Mother in an unsuccessful attempt to see Child. (***Id.*** at 51-54). Father never filed for custody of Child because he "grew up in the court systems and [he] didn't want that for him." (***Id.*** at 55). Father's family has maintained contact with Child and visited with him at birthday parties. (***Id.*** at 43).

The trial court stated:

> Father's counsel argues Father never intended to relinquish his parental rights even though admittedly he has not seen the child in well over six months. Father's counsel seemed to put the blame on Mother by arguing that Mother did not invite Father to [Child's] birthday parties. The [c]ourt does not agree with Father's argument, Father had the ability and opportunity to see [Child]. Mother made an effort to make [Child] available at Father's request. The onus should not be on Mother to act. Father has taken absolutely no steps to have any type of communication or relationship with his child since their last visit in November of 2008.

(Trial Court Opinion, 1/07/13, at 5-6).

By the trial court's findings and Father's own admission, Father has not had any contact with Child, nor has he attempted to contact Child, since late in 2008, some four years prior to the hearing on Mother's petition. Father's lack of contact, by his own volition, is clear and convincing evidence of a

settled purpose to relinquish his parental claim to Child or a refusal to perform his parental duties. The trial court did not abuse its discretion when it terminated Father's parental rights pursuant to 23 Pa.C.S.A. § 2511(a)(1).

We next turn our attention to the developmental, physical and emotional needs and welfare of Child as required by subsection 2511(b). "[I]n 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 Adoption of J.M.***, 991 A.2d 321, 324 (Pa. Super. 2010) (citation omitted). The last physical contact between Father and Child was a brief meeting in 2008. There is no evidence in the record to demonstrate that Child knows who Father is, nor evidence that there might be any effect on Child's wellbeing if the trial court were to terminate Father's parental rights. Therefore, the record supports the trial court's finding that no bond exists between Father and Child. The trial court did not abuse its discretion when it found: "In the present case, Father does not have a bond with [Child]. The only father that [Child] knows is [Stepfather]. . . . [T]ermination of [Father's] rights would not destroy an existing necessary and beneficial relationship as there currently exists no relationship between Father and [Child.]" (Trial Ct. Op., 1/07/13, at 7).

Accordingly, we determine that Father's claims are wholly frivolous. Therefore, we affirm the trial court's decree terminating Father's parental rights pursuant to 23 Pa.C.S.A. §§ 2511(a)(1) and (b), and we grant Father's counsel's petition to withdraw.

Decree affirmed. Petition to withdraw as counsel granted.

Judgment Entered.

Mary A. Hoyle

Deputy Prothonotary

Date: 5/24/2013