NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

IN THE INTEREST OF: E.B., A MINOR	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
APPEAL OF: R.B., FATHER	:	
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	:	
	:	No. 831 WDA 2023

Appeal from the Order Entered May 31, 2023
In the Court of Common Pleas of Jefferson County
Civil Division at No(s): CP-33-DP-0000042-2022

IN THE INTEREST OF: E.B., A MINOR	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
APPEAL OF: R.B., FATHER	:	
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	:	No. 832 WDA 2023

Appeal from the Order Entered May 31, 2023
In the Court of Common Pleas of Jefferson County
Civil Division at No(s): CP-33-DP-0000042-2022

IN THE INTEREST OF: M.B., A MINOR	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
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	:	
APPEAL OF: R.B., FATHER	:	
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	:	No. 833 WDA 2023

Appeal from the Order Entered May 31, 2023
In the Court of Common Pleas of Jefferson County
Orphans' Court at No(s): CP-33-DP-0000046-2022

IN THE INTEREST OF: M.B., A MINOR	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA

APPEAL OF: R.B., FATHER	:	
	:	No. 834 WDA 2023

Appeal from the Order Entered May 31, 2023
In the Court of Common Pleas of Jefferson County
Civil Division at No(s): CP-33-DP-0000046-2022

BEFORE: PANELLA, P.J., OLSON, J., and STEVENS, P.J.E.*

MEMORANDUM BY PANELLA, P.J.: **FILED: JANUARY 22, 2024**

In this dependency action, R.B. ("Father"), appeals Jefferson County Court of Common Pleas' June 2, 2023, orders finding aggravating circumstances and changing the permanency goal of Father's two children, E.B. and M.B., from reunification to adoption. Father admits he has not visited the children in-person since November 2022. Father contends, however, that he had video and phone call contact with the children for the six months preceding the entry of the orphans' court's orders. Given this contact, Father argues the court erred in finding aggravating circumstances existed on the basis that Father failed to maintain substantial and continuing contact with the children for a period of six months. Father also maintains the court erred in finding that changing the children's goal to adoption was in their best interests. As we do not agree the orphans' court erred, we affirm both orders.

* Former Justice specially assigned to the Superior Court.

The factual and procedural history leading up to Father's appeal is as follows. Jefferson County Children and Youth Family Services ("CYS") became involved with the family when the mother of M.B. and E.B., C.P. ("Mother"), tested positive for several controlled substances in the hospital following the birth of E.B. in August 2022. M.B. was four years old at the time.

CYS sought emergency protective custody of both E.B. and M.B. CYS requested the emergency custody because of the erratic behavior of Mother and Father and their suspected drug use while in the hospital. CYS noted Mother had tested positive for several substances and admitted to substance use. Father, meanwhile, refused a drug test because, according to CYS, Father stated he would test "the same as Mother." Application for Emergency Custody, 8/30/2022, at 3. In its application, CYS also stated that Father had been observed "smacking his head off an outside pillar," which Father explained he did because he was "excited that the baby was coming home." ***Id.*** at 3-4.

CYS was granted emergency custody of both children. Following a shelter care hearing on August 30, 2022, the court ordered M.B. and E.B. to be placed with their maternal grandparents. The children were adjudicated dependent the following day, August 31, 2022.

The court ordered Father and Mother to complete a psychological evaluation as well as a drug and alcohol evaluation. Although Father told the court he completed both evaluations, he did not provide any evidence

supporting those assertions. The court also ordered Father and Mother to comply with drug testing prior to the in-person visits with the children they had been given. These visits were scheduled to occur once every two weeks. Mother, however, last visited the children in-person in October 2022. Father, meanwhile, last visited the children in-person in November 2022, at which time he was incarcerated on drug charges. Although Father was released from prison in February 2023, he failed to visit the children in-person after his release.

On May 11, 2023, CYS filed a motion for the finding of aggravated circumstances on the basis that Father and Mother had failed to maintain substantial and continuing contact with E.B. and M.B. for a period of six months. The court held a hearing on the petition at the scheduled permanency review hearing on May 31, 2023.

At the hearing, the family's CYS caseworker, Joanne Welch, testified. Welch testified Mother and Father were scheduled to visit the children in-person once every two weeks for one hour. ***See*** N.T., 5/31/ 2023, at 8. Welch reported Mother had not visited the children in-person since October 2022 and Father had not visited the children since November 2022. ***See id.*** at 7. Welch explained that Father had been incarcerated in November 2022, but had been released in February 2023. ***See id.*** at 7-8. Welch also stated she was not aware of any other contact Mother and Father had with the children. ***See id.*** at 8.

Welch reported CYS was seeking a finding of aggravated circumstances because Father and Mother's compliance with the family case plan had been minimal, and because of Father and Mother's lack of substantial and continuing contact with the children over the previous six months. ***See id.*** at 8, 10, 11. Welch also testified she had been told by the children's maternal grandmother, T.J., that M.B. had stated she wished both of her parents were incarcerated so that she would not have to worry about them. ***See id.*** at 4-5.

T.J. also testified at the hearing. She explained that M.B. and E.B. had both been placed with her since E.B.'s birth. Although T.J. stated she had initially allowed Mother and Father to Facetime M.B., she discontinued the Facetime calls because it was causing M.B. to have nightmares. ***See id.*** at 27. T.J. testified she told Mother and Father they could still call M.B. on the phone. However, T.J. stated Mother and Father stopped calling and did not resume calling T.J.'s house again until the last week in April 2023. ***See id.*** at 27-29. Those conversations, according to T.J., usually lasted between five and ten minutes. ***See id.*** at 33. T.J. also reported that the children's paternal grandparents watched the children some days while she and her husband were at work. ***See id.*** at 32.

Father testified at the hearing as well. He confirmed he was offered the opportunity to visit the children in-person once every two weeks but conceded he had not done so since being incarcerated in November 2022, even though he had been released from prison in February 2023. ***See id.*** at 23. Father

initially contended he had not visited with the children or seen the children in-person because M.B. got upset when he and Mother had to leave at the end of the visit, and that was too difficult on him and M.B. ***See id.*** at 17, 23. He later stated, however, that he did not visit the children when they were at his parents' house because he was not allowed to do so. ***See id.*** at 18.

Father claimed that even though he did not visit his children, he and Mother video chatted and spoke on the phone with M.B. when the paternal grandparents were watching her while the maternal grandparents were at work. ***See id.*** at 18. Father said he began making those calls once he was released from prison. ***See id.*** at 19. According to Father, he spoke to M.B., who was four years old at the time, on the phone for four hours on one occasion. ***See id.*** at 18. Father further stated he and Mother more recently began calling the children at their maternal grandparents once or twice a week. ***See id.*** at 19-20. These calls, Father maintained, were in addition to the video and phone calls he made to M.B. about every "Friday, Saturday and Sunday" while she was in her paternal grandparents' care. ***Id.*** at 20.

Father also asserted he had done a psychological and drug evaluation while in prison, but he conceded he had never given a copy of those evaluations to CYF. ***See id.*** at 20, 22-23. He also claimed he had been drug-free since his release from prison. Father continued to insist he had not failed a drug test since the release, despite the fact that there had been testimony from Ginger Fox, the family resource specialist assigned to the family, that

Father tested positive for fentanyl on the one drug test he had taken since his release. ***See id.*** at 41, 37.

Fox also stated that other than the one positive drug test, her agency had been unable to conduct any other drug tests on Father. She explained the agency had tried several times, but Father would not answer the door or was not available. ***See id.*** at 38.

Following the hearing, the court found CYS had proven aggravating circumstances on the basis that Father and Mother had failed to maintain substantial and continuing contact with M.B. and E.B. for a six-month period. The court stated that, in these circumstances, "[p]hone calls are not substantial and continuing contact." ***Id.*** at 46. The court also ended reunification services and changed both M.B. and E.B.'s goal from reunification to adoption. ***See id.*** On June 2, 2023, the court entered an order reflecting its finding of aggravated circumstances as well as a permanency review order reflecting the goal change and the cessation of reunification services.[1]

Father filed a notice of appeal from each of the orders. This Court consolidated the matters *sua sponte*. Although Father failed to file his Pa. R.A.P. 1925(b) statements of matters complained of on appeal along with his notices of appeal pursuant to Pa. R.A.P. 1925(a)(2)(i), he timely complied

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[1] Mother appealed separately from the court's orders finding aggravating circumstances in the case and changing M.B. and E.B.'s goal to adoption. ***See*** 801-804 WDA 2023.

with this Court's subsequent order supplying a deadline in which to file those Rule 1925(b) statements. ***See*** Per Curiam Order, 8/18/2023 (single page).

In its responsive opinion, the orphans' court opined it had not abused its discretion by finding aggravating circumstances and that a goal change to adoption was in the children's best interests. Father challenges both findings on appeal.

In dependency cases, we employ an abuse of discretion standard of review. ***See in re R.J.T***., 9 A.3d 1179, 1190 (Pa. 2010). We must accept the findings of fact and credibility determinations of the orphans' court unless they are not supported by the record. ***See id***. This deference to the court's fact-finding function stems from the reality that the orphans' court is not only able to observe the parties during the hearing at issue but has usually "presided over several other hearings with the same parties and ha[s] a longitudinal understanding of the case and the best interests of the [children] involved." ***Id.*** However, the same deference does not apply to the orphans' court's legal conclusions as we are not required to accept the orphans' court's inferences or conclusions of law. ***See id.***

We first address Father's argument that the orphans' court abused its discretion by finding aggravating circumstances existed because of his failure to maintain substantial and continuing contact with the children. Father asserts that although he was incarcerated from November 2022 until February 2023 and has not visited the children in-person since November 2022, he

maintained video and phone contact with M.B. when she was in the care of her paternal grandparents and resumed calling M.B. at her maternal grandparents' house in April 2023. Given this contact, Father asserts "there has never been a six-month period with a lack of substantial continuing contact." Appellants' Brief at 13. He argues the orphans' court erred by concluding otherwise and then finding aggravating circumstances on the basis of that conclusion. We disagree.

The Juvenile Act provides that either a county agency or the child's attorney may allege the existence of aggravated circumstances in the case of a dependent child. ***See*** 42 Pa. C.S.A. § 6341(c.1). The Act, in turn, defines aggravated circumstances in relevant part as circumstances where the child is in the custody of a county agency and the "identity or whereabouts of the parents is known and the parents have failed to maintain substantial and continuing contact with the child for a period of six months." 42 Pa. C.S.A. § 6302(1)(ii).

If the court finds from clear and convincing evidence that aggravated circumstances exist, the Act gives the court the discretion to "determine whether or not reasonable efforts to prevent or eliminate the need for removing the child from the home or to preserve and reunify the family shall be made or continue to be made." 42 Pa. C.S.A. § 6341(c.1); ***In re A.H.*** 763 A.2d 873, 878 (Pa. Super. 2000). As such, when the court finds aggravated circumstances exist, "it is well within its discretion to order the cessation of

reunification services." ***A.H.,*** 763 A.2d at 878. Further, "a trial court's finding of aggravated circumstances lends strong support for a change in a child's permanency goal to adoption." ***Id.***

Here, the orphans' court found aggravating circumstances based on Mother's and Father's lack of contact with the children. Father does not dispute that he has not visited his children in-person since November 2022, when he was incarcerated, or after his release in February 2023. Instead, he argues that the phone and video call contact he had with M.B. constitutes substantial and continuing contact with the children. In rejecting this contention, the orphans' court stated:

> Phone calls and virtual visits [ ] did not constitute substantial and continuing contact with [M.B.] – not when Father had at least three full months from the date of his release until the May 31 hearing to have contact visits. He said he was drug-free the entire time, which amounted to an admission that he was free the entire time to hold, hug, play with, and otherwise physically interact with his daughter (and his son) in accordance with the established visitation schedule.
>
> Furthermore, the Court did not believe that Father was talking and Facetiming with [M.B.] nearly as much as he claimed. He said he was talking to the girl at Maternal Grandmother's house "usually like once a week, twice a week," but Maternal Grandmother credibly testified otherwise. Regarding the duration and content of their calls, moreover, she described a loquacious child who was done after chattering at Father for five to ten minutes about whatever was on her mind, whereas Father proffered the unfathomable proposition that M.B., not yet five years old at the time, had stayed on the phone with him "just the other day" for at least four hours. Furthermore, that [M.B.] was not at [Father's parents'] house every weekend belied Father's assertion that he "video chat[ted with] her and talk[ed] to [M.B.] on the phone about every … Friday, Saturday and Sunday."

> Be that as it may, and as the court noted above, a few telephone and or Facetime conversations with [M.B.] each week was not "substantial and continuing contact" – not where [M.B] was concerned and certainly not where [E.B., who, as an infant, lacked the developmental ability to connect over the phone] was concerned – when person-to-person visits were an option the entire time.

Trial Court Opinion, 8/11/2023 at 2-3 (citations to notes of testimony omitted).

We see no abuse of discretion in the court's conclusion that the video chats and phone calls did not constitute substantial and continuing contact. In reaching this conclusion, the court made clear that upon his release from prison, Father could have, but did not, see his children in-person as opposed to merely speaking with them over the phone. Moreover, the court explicitly discredited Father's testimony about the length and quantity of Father's phone calls with M.B., and instead credited the testimony of the maternal grandmother about the phone calls. These were credibility determinations the orphans' court was free to make. ***See In re Staico***, 143 A.3d 983, 987 (Pa. Super. 2016) (stating that the orphans' court, as the fact-finder, determines the credibility of the witnesses). In addition, Father's reliance on his phone calls with M.B. completely fails to consider his other child, E.B., who the court found, as an infant, could not form a meaningful connection over the phone.

Father also argues that although the court found his phone calls were insufficient contact given that Father could have visited the children in-person, the court erred by not considering the reasons Father provided for why he did

not visit the children in-person. According to Father, those reasons include: the fact that he was "at work or out of the residence" when those responsible for administering drug tests prior to the in-person visits stopped by; Father's admittedly incorrect belief that he was subject to a partial no-contact order preventing him from visiting the children while they were at the paternal grandparents' house; and the consideration he gave to M.B.'s emotional well-being by stopping the in-person visits because M.B. got upset when the visits ended. ***See*** Appellant's Brief at 8, 14-15. This claim fails.

In the first place, Father's argument regarding the drug tests completely fails to account for the responsibility he had to make himself available for the drug tests that were a prerequisite to the in-person visits. As the orphans' court stated, Father conveyed "a mindset that everyone else should make reunification as easy as possible without requiring him to make any significant effort [or] investment." Trial Court Opinion, 8/11/2023, at 1. Father's argument also fails to acknowledge that the orphans' court specifically found that Father failed the one drug test he had taken since his release from prison, which precluded him from attending the scheduled in-person visit. ***See*** N.T., 5/31/2023, at 43.

As for Father's assertion that he did not attend in-person visits because of M.B.'s emotional reaction to the end of those visits, the orphans' court called this "purported reason" for not visiting M.B. an "after-the-fact rationalization" and a "complete fabrication." Trial Court Opinion, 8/11/2023, at 2. Therefore,

contrary to Father's assertions, the court did consider this excuse by Father, it just did not credit it as the reason Father did not visit M.B. in-person. Again, these credibility determinations were for the orphans' court to make.

Moreover, the orphans' court added that this reason regarding M.B.'s reaction to the in-person visits "demonstrated a complete disregard for [Father's] parental obligations to [E.B.]" and E.B.'s need for in-person visits with his father. ***Id***. The court noted that Father was a "veritable stranger" to E.B., having spent mere hours with E.B. before being incarcerated, and that E.B. lacked the developmental capacity to meaningfully connect with Father over the phone. ***Id.***

Father also asserts the orphans' court should have considered his belief that there was a partial no-contact order against him when the children were with the paternal grandparents and this belief prevented him from visiting the children in-person when they were there. In the first place, Father concedes this belief was incorrect, without cogently explaining why he held this belief or why he failed to clarify that there was not, in fact, such a partial no-contact order in place. ***See*** Appellant's Brief at 8. Father tries to liken his case to ***In re A.C.***, 945 A.2d 182, 184 (Pa. Super. 2008), where this Court held that an agency could not use an incarcerated parent's compliance with a court order that he have no contact with his child as a basis for a finding that aggravated circumstances existed for lack of contact. Of course, this is not the situation here, as there is no evidence that any such no-contact order existed.

In any event, as the orphans' court observed, Father's argument about a partial no-contact order contradicts his earlier assertions that he did not visit the children in-person because such visits were too upsetting for M.B., not because he was prohibited from doing so.

Despite Father's arguments, we see no error in the court's finding of aggravating circumstances on the basis that Father did not have substantial and continuing contact with M.B. and E.B. for a six-month period. Father's arguments to the contrary have simply not persuaded us otherwise. No relief is due.

In his second claim, Father argues the court abused its discretion by changing the children's goal from reunification to adoption. This claim also fails.

We note that our analysis must begin from the premise, stated above, that when an orphans' court finds the existence of aggravating circumstances, as it did here, such a finding lends strong support to changing a child's goal to adoption. ***See A.H.***, 763 A.2d at 878. Generally, when considering whether to change a dependent child's permanency goal to adoption, the court must consider: 1) the continuing necessity for and appropriateness of the placement; 2) the extent of compliance with the single case plan objectives; 3) the extent of progress made towards alleviating the circumstances which necessitated the original placement; 4) the appropriateness and feasibility of the current placement goal for the child; and 5) a likely date by which the goal

of the child might be achieved. ***See In re S.B.***, 943 A.2d 973, 977 (Pa. Super. 2008); ***see also*** 42 Pa. C.S.A. § 6351(f). The court must look to the best interests of the child involved, ***see R.J.T.***, 9 A.3d at 1183-1184, and focus on the safety, permanency, and well-being of the child when considering whether a goal change is warranted, ***see S.B.,*** 943 A.2d at 978.

Here, we can discern no abuse of discretion in the court's conclusion that it was in the best interests of M.B. and E.B. to change their permanency placement goal to adoption. ***See In re A.K.***, 936 A.2d 528, 532-533 (Pa. Super. 2007) (stating that the appellate court applies an abuse of discretion standard of review when reviewing an orphans' court's order changing a dependent child's placement goal to adoption). As discussed above, the court found aggravating circumstances due to Mother and Father's failure to maintain substantial contact with the children for a period of six months, and this alone lends strong support to the propriety of the goal change.

Moreover, the court found that Father had not made reasonable efforts with CYF to reunify with the children and had "completely failed" with his court-ordered objectives. ***See*** N.T., 5/31/2023, at 45. The court further found that Father had "demonstrated that his children were not a priority." Trial Court Opinion, 8/11/2023, at 1. To that end, the court noted Father did not visit the children in-person, and instead proffered excuses for his failure to do so, excuses which the court did not credit.

The court also found that Father was a "veritable stranger" to E.B., who was removed from Father's care when he was a newborn and had not seen Father since Father was incarcerated. ***See id.*** at 2. The court observed that the only caregivers E.B. had ever known were his grandparents, given that he had been placed with them since birth. As for M.B., the court pointed out that she had expressed fear for her parents' safety and indicated she felt "anxious and insecure" in her parents' care. ***Id.*** at 3. The court also discredited Father's testimony regarding the length and quantity of the phone and video calls he claimed to have had with M.B.

In contrast, the court found that the children were thriving in their current placement with the maternal grandparents. In support, the court pointed to Caseworker Welch's testimony regarding the children's development and progress under their maternal grandparents' care. ***See*** Trial Court Opinion, 8/11/2023, at 3; N.T., 5/31/2023, at 4-5.

Father takes issue with the court's changing of the goal to adoption because, according to Father, the court did not assess the bond between Father and either child before doing so. Father baldly asserts he shares a "loving bond" with M.B. He does not describe his bond with E.B., which is unsurprising in light of the fact that he has spent very little time with E.B. and the two do not know each other. In any event, Father's claim is meritless, as the discussion above demonstrates that the court did consider the bond between Father and the children. And, even if Father did establish he had a

bond with M.B., any bond the child has with the parent is but one factor to consider in determining whether a goal change is in the child's best interests. ***See In re A.K.***, 936 A.2d at 536.

Father also maintains that the court abused its discretion in changing the children's goal to adoption because M.B. and E.B. had been in placement for only nine months at the time of the hearing, and not the 15-month window identified in Section 6351(f)(9) of the Juvenile Act. Again, we do not agree.

Section 6351(f)(9) provides in pertinent part that when evaluating at a permanency hearing whether the current placement of a child is appropriate, the court shall determine:

> If the child has been in placement for at least 15 of the last 22 months or the court has determined that aggravated circumstances exist and that reasonable efforts to prevent or eliminate the need to remove the child from the child's parent, guardian or custodian or to preserve and reunify the family need not be made or continue to be made.

42 Pa. C.S.A. § 6351 (f)(9).

Of course, Father's argument completely ignores the plain language of this statute which speaks of either the passage of 15 months in placement or a finding of aggravated circumstances such as the one made by the orphans' court here. Moreover, the argument ignores that our Supreme Court has stated that the 15-month timeframe of Section 6351 (f)(9) is not a litmus test but is "merely one of a number of factors a trial court must consider in ultimately determining whether the current placement is appropriate." ***R.J.T.***, 9 A.3d at 1190. Similarly, this Court has stated:

> [t]he fifteen-to-twenty-two-month timeframe set forth in the Juvenile Act is not [a] prerequisite to a goal change, but rather is an aspirational target in which to attain permanency. While trial courts should not rush to change a child's permanency goal to adoption in circumstances where a parent is making progress toward reunification, neither should courts persist in attempting to reunite a family when further reunification efforts would be futile and/or contrary to a child's best interest.

In re J.D.H., 171 A.3d 903, 909 (Pa. Super. 2017)(citation omitted).

Here, the court found that Father's progress towards reunification had been minimal. He had not supplied CYF with either the drug or the mental health evaluation the court had ordered, did not complete the court-ordered drug tests following his release from prison with the exception of the one test he failed, and chose not to attend in-person visits with his children when he had the opportunity to do so. As this Court has repeatedly stated: "a child's life simply cannot be put on hold in the hope that the parent will summon the ability to handle the responsibilities of parenting." ***Id.*** at 908 (citation omitted).

In the end, the orphans' court found Mother and Father had not visited the children and did not have substantial and continuing contact with them for a period of six months and based on this failure, the court concluded that aggravating circumstances existed and that changing the children's goal to adoption was in their best interests. Father has failed to convince us, and we fail to see, how the court abused its discretion by reaching either conclusion.

Orders affirmed.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

DATE: 1/22/2024