No.

In The

Supreme Court of the United States

Appeal of T.H.-H.,

Petitioner

v.

In Re C.Y.F., *Et. Al.*

Respondent

On Petition For Writ Of Certiorari
To The Pennsylvania Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. May a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition the statutorily granted right to counsel representing the legal interest of a party on the party's ability to satisfactorily verbalize their preferred outcome in a contested involuntary termination of parental rights proceeding?

PARTIES TO THE PROCEEDING BELOW

The petitioner is mother T.H.-H., the Appellant in the courts below.

The Respondent is the Allegheny County's Office of Children, Youth and Families. The Children T.S. and E.S. are also parties.

TABLE OF CONTENTS

QUESTION PRESENTED.....2

PARTIES TO THE PROCEEDING.....3

TABLE OF CONTENTS.....4

TABLE OF AUTHORITIES.....5

PETITION FOR WRIT OF CERTIORARI.....6

OPINIONS BELOW.....6

JURISDICTION.....6

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.....7

STATEMENT OF THE CASE.....8

REASON FOR GRANTING THE WRIT.....10

CONCLUSION.....17

Table of Authorities

CASES Page

In re L.B.M., 161 A.3d 172 (Pa. 2017) 8, 10, 11, 15

In re D.L.B., 166 A.3d 322 (Pa.Super. 2017).....8

In re T.S., 192 A.3d 1080 (Pa. 2018) 10, 11, 12, 13

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 14

Meyer v. Nebraska, 262 U.S. 390 (1923) 11,13

Santosky v. Kramer, 455 U.S. 745 (1982) 14

Skinner v. State of Okla. Ex rel. Williamson, 316 U.S. 535 (1942) 11

Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816 (1977).....14

Stanley v. Illinois, 405 U.S. 645 (1972).....14

STATUTES AND RULES

28 U.S.C. §1257(a) 6

23 Pa.C.S.A. §2313(a) 10, 11, 13

42 Pa.C.S.A § 6301 et. seq. 12

42 Pa.C.S.A. § 6311.....12, 13

Pa.R.J.C.P. Rule 1151 12

Pa.R.J.C.P. Rule 1154 12

Pa.R.J.C.P. Rule 1800 12

Pa.R.P.C Rule 1.7 13

Pa.R.P.C. Rule 1.8 13

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania.

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OPINIONS BELOW

The order of the Pennsylvania Supreme Court denying the application for allowance of appeal is docketed as In Re T.S., 192 A.3d 1080 (Pa. 2018) and attached.

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JURISDICTION

The Pennsylvania Supreme Court entered its order on February 1, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

- U.S. Const. amend. XIV, § 1

Section 1 of the Fourteenth Amendment to the United States Constitution states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law[.]

- U.S. Const. amend. V, § 1

Section 1 of the Fifth Amendment to the United States Constitution states in pertinent part:

> No person shall be deprived of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

T.H.H. (petitioner) had her parental rights terminated to her two children, T.S. and E.S., on February 3, 2017. At the contested involuntary termination of parental rights ("TPR") proceeding the children were represented by a Guardian *ad litem* ("GAL")[1] who is an attorney. The children were 3.5 years old and 2.5 years old respectively at the time of the contested involuntary TPR proceeding. T.H.H. timely appealed the termination of her parental rights to the Superior Court of Pennsylvania.

Prior to the Superior Court issuing briefing schedules the Supreme Court of Pennsylvania decided *In re L.B.M.*, 161 A.3d 172 (Pa. 2017) wherein the Court ruled that the appointment of an attorney GAL did not satisfy 23 Pa.C.S.A. § 2313(a) which mandates appointment of Counsel for children in contested involuntary TPR proceedings and that failure to appoint Counsel representing the legal interests of the child constituted structural error requiring reversal and remand. T.H.H. raised the issue in her brief to the Superior Court.

After briefs for all parties were submitted on the appeal, the Superior Court decided In re D.L.B, 166 A.3d 322 (Pa.Super. 2017). Although Counsel representing the children's legal interests had not been appointed in D.L.B., the Superior Court instead of remanding the matter due to structural error proceeded to engage in harmless error analysis considering whether there was a conflict of interest between the children's legal and best interests. The Superior Court concluded there was no conflict and upheld the termination of parental rights in D.L.B. The GAL representing T.S. and E.S. sought post submission communication with the Superior Court and the Superior

[1] As a matter of local custom, the GAL that is appointed in the dependency matter automatically represents dependent children who are subjects of contested involuntary TPR proceedings under the Adoption Act without a formal appointment order. It is also customary that the GAL does not routinely file an entry of appearance in the Adoption matter.

Court accepted supplemental argument. On August 25, 2017 the Superior Court issued a memorandum decision affirming the trial court and reiterating that L.B.M. does not require appointment of Counsel representing the children's legal interests when there is no conflict of interest between the children's legal and best interests.[2]

T.H.H. filed a petition for allowance of appeal seeking and obtaining review by the Supreme Court of Pennsylvania. The matter was argued before the Court on April 10, 2018 and the order affirming the decision of the Superior Court was issued on August 22, 2018. This instant appeal follows.

[2] The conflict of interest analysis was not something the trial court contemplated or ruled upon in D.L.B. or petitioner's appeal. Rather it was a harmless error analysis conducted by the appellate court based on the trial record.

REASON FOR GRANTING THE WRIT

May a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition the statutorily granted right to counsel representing the legal interest of a party on the party's ability to satisfactorily verbalize their preferred outcome in a contested involuntary termination of parental rights proceeding?

The Pennsylvania Adoption Act, 23 Pa.C.S.A. § 2313(a)[i], provides that the court shall appoint Counsel to represent a child in an involuntary termination of parental rights ("TPR") proceeding when the proceeding is being contested by one or both parents. In March of 2017 the Supreme Court of Pennsylvania after conducting statutory interpretation analysis concluded that 23 Pa.C.S.A. § 2313(a) is not satisfied by the appointment of a Guardian *ad litem* ("GAL") who is an attorney. *In re L.B.M.*, 161 A.3d 172 (Pa. 2017). The Court concluded that the term "Counsel" was unambiguous and the use of the same in the statute meant that the legislature made the policy judgment that a lawyer who represents the child's legal interests and who is directed by the child is a necessity in a contested involuntary TPR proceeding. Id. at 180. The Court also determined that the failure to appoint Counsel was structural error that required remand.

Nevertheless, in August of 2018 the Pennsylvania Supreme Court concluded that 23 Pa.C.S.A. § 2313(a) was satisfied even though Counsel had not been appointed to represent the legal interests of children who were parties to an involuntary contested TPR proceeding. *In re T.S.*, 192 A.3d 1080, 1092-93 (Pa. 2018).[3] In both *L.B.M.* and *T.S.* an attorney GAL had been appointed to represent the children's best interests. The difference between the two cases was the presumed inability of the children in T.S. to satisfactorily verbalize their preferred outcome. Thus, the true

[3] The case **In re T.S.** was on appeal (but not yet briefed) before the intermediate appellate court when the decision in **In re L.B.M.** was decided. In light of the decision in L.B.M. one of the issues raised on appeal in T.S. was the structural error of failure to appoint Counsel as mandated in 23 Pa.C.S.A. § 2313(a).

question in fact that needed to be addressed was and remains: If a party with a legal interest in the outcome of a contested involuntary TPR proceeding is incapable of satisfactorily verbalizing a preferred outcome how does appointed Counsel represent that party's legal interest? Instead of answering the true question in fact the Court chose to return to the question they already answered in the negative in *L.B.M.*, i.e. Can an attorney GAL be deemed to have fulfilled the requirement of Counsel as statutorily mandated under the Adoption Act? *In re T.S.*, 192 A.3d 1080, 1089 (Pa. 2018). The Court had no choice but to find some basis to answer this question in the positive to avoid finding structural error requiring remand. But resolving the structural error requiring remand problem resulted in a solution that is not faithful to the legislative intent behind the statutory provision of appointment of Counsel found in 23 Pa.C.S.A. § 2313(a) *In re T.S.*, 192 A.3d 1080, 1094-95 (Pa. 2018) J. Donohue Concurring & Dissenting Opinion, and fails to adequately protect the party's actual legal interest in the ongoing viability of the family bond which is at stake in a contested involuntary TPR proceeding. The U.S. Supreme Court has found protection for the integrity of the family unit in both the Due Process Clause *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) and the Equal Protection Clause S*kinner v. State of Okla. Ex rel. Williamson*, 316 U.S. 535, 541 (1942).

Instead of protecting the party's legal interest in the familial bond by establishing a rebuttable presumption for a party who is unable to satisfactorily verbalize a preferred outcome in a contested involuntary TPR proceeding as petitioner suggested was necessary, the Court chose to protect an alleged other interest of the party by transforming the role of Counsel and altering the duties owed by Counsel to their client. The Court theorized that if a party's legal interest is defined as their preferred outcome and the party is unable to satisfactorily verbalize their preferred outcome then the party has no knowable legal interest and, thus, appointed Counsel is free from the duty to

represent the party's legal interest. *In re T.S.*, 192 A.3d 1080, 1089-90 (Pa. 2018). The problem with the Court's theorizing is its circular nature wherein the Court presumes as true the assumption it sets out to prove which is that one has no legal interest unless one can satisfactorily verbalize their preferred outcome. Furthermore, if the Court is correct that being able to satisfactorily verbalize a preferred outcome is a condition precedent to having a legal interest then why does the person lacking a legal interest remain a party to the proceeding?

The Court then proceeds to effectuate its reasoning by turning to a provision in another statute that allows an attorney GAL to advocate for a child's legal interests and so called "best interests." That statute is the Juvenile Act 42 Pa.C.S.A § 6301 et. seq. and the provision referenced is § 6311. Guardian ad litem for child in court proceedings.[ii] The Court summarily concluded that if Counsel cannot know or ascertain a child's legal interest it would be appropriate for Counsel to substitute their preferred outcome as argument on behalf of the child's "best interest" by virtue of 42 Pa.C.S.A. § 6311 (b) Powers and Duties. *In re T.S.*, 192 A.3d 1080, 1094-95 (Pa. 2018)

It must be noted that the Juvenile Act identifies the type of representation a child receives in dependency proceedings contingent upon the basis of dependency being pled. See 42 Pa.C.S.A. § 6311 (a) Appointment. Counsel for the child in a dependency proceeding can either be appointed Counsel representing the child's legal interest or Guardian *ad litem* representing both the child's legal interests and so called "best interests." The ability of the child to satisfactorily verbalize a preferred outcome plays no part in the determination of what type of representation the child receives in a dependency proceeding. Determination of whether there is a conflict of interest between the child's legal interests and best interests requires review of the Juvenile Act (42 Pa.C.S.A. § 6311 (b) Powers and Duties), the Rules of Juvenile Court Procedure (Pa.R.J.C.P. Rule 1800 (3),[iii] Pa.R.J.C.P. Rule 1154. Duties of the Guardian *Ad Litem*[iv] and Pa.R.J.C.P. Rule 1151.

Assignment of Guardian *Ad Litem* & Counsel[v]) and the Rules of Professional Conduct (Pa.R.P.C Rule 1.7. Conflict of Interest: Current Clients[vi] and Pa.R.P.C. Rule 1.8 Conflict of Interest: Current Clients: Specific Rules.[vii]).

Despite having concluded that the statutory right to Counsel under 23 Pa.C.S.A. § 2313(a) is satisfied by an attorney GAL representing the best interest of a party who cannot satisfactorily verbalize their preferred outcome by incorporation of the Juvenile Act provision 42 Pa.C.S.A § 6311, the Court proceeded to speculate about whether the Adoption Act, nevertheless, required appointment of another lawyer to represent the child's unknowable legal interest. The Court returned to its circular reasoning and concluded that because the legal interest (child's preferred outcome) is unascertainable it does not exist and therefore could not conflict with the child's best interest (appointed Counsel's preferred outcome) for this class of children and thus there is no need to appoint another lawyer to represent the child's legal interest. *In re T.S.,* 192 A.3d 1080, 1090 (Pa. 2018).

What the Court's opinion did not adequately address is:

1. The significance of the difference in the legal interest at stake in a contested involuntary TPR proceeding under the Adoption Act versus that in a dependency proceeding under the Juvenile Act and the impact of selective incorporation of a provision from one Act into the other on the process due;

   The legal interest at stake in a contested involuntary TPR proceeding is the ongoing viability of the family bond which may forever be legally severed while the interest at stake in a dependency proceeding is the temporary revocable award of legal and/or physical custody of the child. The U.S. Supreme Court has referred to the family relationship as "essential" *Meyer*

v. Nebraska, 262 U.S. 390, 399 (1923) and a basic human right *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 846 (1977). The U.S. Supreme Court has declared "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' *Stanley v. Illinois*, 405 U.S. 645, 651 [92 S.Ct. 1208, 1212, 31 L.Ed.2d 551]." *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 101 S.Ct. 2153, 2161, 68 L.Ed.2d 640 (1981). Finally, in *Santosky v. Kramer*, 455 U.S. 745 Justice Rehnquist writing in dissent said "... few consequences of judicial action are so grave as the severance of natural family ties." *Id.* At 787 The process due in a contested involuntary TPR proceeding is clearly different than that due in a dependency proceeding addressing custody issues.

2. The significance of making a party's legal interest in the outcome of a contested involuntary TPR proceeding divisible between the party's legal interest (preferred outcome) and anything else without consideration to the process due;

A party to a legal proceeding by definition has **an interest** in the outcome of the proceeding because they have a substantive right which will be affected by the proceeding. The substantive right affected by a contested involuntary TPR is the ongoing viability of the family bond. The party's preferred outcome will either be to maintain or to sever that bond. To suggest that there is something more than the party's preferred outcome is nothing more than a poorly veiled attempt to infuse the subjective opinion of a third party into the matter that would otherwise never be permitted for lack of standing. When the third party is appointed counsel for the actual party the violation becomes more grievous as this would ordinarily be considered a breach in

the duties owed to the client by the attorney under the Rules of Professional Conduct that govern the practice of law.

3. The significance of making the legal interest of a party contingent upon a matter of presumed incapacity by means of a proxy without consideration to the process due; and

Capacity is always presumed in the law and when a party's capacity is challenged the burden falls to the person making the challenge who must produce evidence in a court of law before both a trier of fact and law. To do otherwise violates public policy constructs concerning individual autonomy and shifts the burden to the alleged incapacitated party requiring them to prove a negative, i.e. that they do not have diminished capacity. It is also a well settled fact that a party may have diminished capacity such as a person of minority status and yet still have both the competence to understand the proceedings and ability to direct counsel. The use of proxies to determine capacity such as age or verbal ability are nothing more than short cuts for the sake of expediency with no consideration to the party's due process rights or individual autonomy.

4. The significance of conducting a harmless error analysis when structural error has occurred, i.e. a failure to appoint statutorily mandated counsel representing the child's legal interest.

A structural error is an error that undermines the framework within which the trial proceeds, rather than simply an error in the trial process itself. Structural errors are not subject to harmless error analysis and require reversal without the need to demonstrate prejudice. A court of law cannot choose to ignore or engage in speculation when the error is structural in nature and therefore the only proper course is reversal and remand. *In re L.B.M.*, 161 A.3d 172, 182-183 (Pa. 2017).

These issues are significant in that they concern distortions to fundamental values, principles and tenets of law that have grave consequences impacting among other things the autonomy of parties, the fundamental liberty interest in the familial bond, and public confidence in the integrity of our legal and judicial systems. These issues are not isolated to Pennsylvania but rather are confronted in every state's termination statutes to one degree or another and those parties impacted, children, are limited at best in their ability to raise them before trial judges and are even more powerless to raise the concerns on appeal. All of these are compelling reasons for this Court to grant the Petition for Writ of Certiorari.

Absent clarification from this Court about the fundamental liberty interest at the heart of this matter and the protections afforded under the Due Process and Equal Protection Clauses of the Fourteenth Amendment children will remain forever merely the subject-matter of contested involuntary termination of parental rights proceedings instead of what they truly are parties with a direct and vital interest in the decision that may forever sever their familial bond leaving them a legal stranger to their parents, siblings, grandparents, aunts, uncles, cousins, etc. The appointment of an attorney GAL to advocate the attorney's opinion about what is in their client's best interest is a "solution" that serves expediency at the cost of undermining our adversarial system of law, basic principles of legal representation and does not properly limit risk when the severity of error is so great to the child. Whether it is a worse fate to be the voiceless subject matter of the proceeding or to be a party and have your legal interest redefined in such a way to allow your appointed counsel to substitute their voice for yours may be a matter of opinion but the loss to the party's autonomy is the same and the end is a denial of Due Process and in this particular case where such deprivation is limited to a specific class of parties it is also a denial of Equal Protection

under the law. Wherefore, the petitioner prays that this Court will grant the petition for Writ of Certiorari.

Respectfully submitted,

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[i] **23 Pa.C.S.A §2313 (a) Child.--**The court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents. The court may appoint counsel or a guardian ad litem to represent any child who has not reached the age of 18 years and is subject to any other proceeding under this part whenever it is in the best interests of the child. No attorney or law firm shall represent both the child and the adopting parent or parents.

[ii] **42 Pa.C.S.A. § 6311. Guardian ad litem for child in court proceedings.**

(a) Appointment.--When a proceeding, including a master's hearing, has been initiated alleging that the child is a dependent child under paragraph (1), (2), (3), (4) or (10) of the definition of "dependent child" in section 6302 (relating to definitions), the court shall appoint a guardian ad litem to represent the legal interests and the best interests of the child. The guardian ad litem must be an attorney at law.

(b) Powers and duties.--The guardian ad litem shall be charged with representation of the legal interests and the best interests of the child at every stage of the proceedings and shall do all of the following:
(1) Meet with the child as soon as possible following appointment pursuant to section 6337 (relating to right to counsel) and on a regular basis thereafter in a manner appropriate to the child's age and maturity.
(2) On a timely basis, be given access to relevant court and county agency records, reports of examination of the parents or other custodian of the child pursuant to this chapter and medical, psychological and school records.
(3) Participate in all proceedings, including hearings before masters, and administrative hearings and reviews to the degree necessary to adequately represent the child.
(4) Conduct such further investigation necessary to ascertain the facts.
(5) Interview potential witnesses, including the child's parents, caretakers and foster parents, examine and cross-examine witnesses and present witnesses and evidence necessary to protect the best interests of the child.
(6) At the earliest possible date, be advised by the county agency having legal custody of the child of:
(i) any plan to relocate the child or modify custody or visitation arrangements, including the reasons therefor, prior to the relocation or change in custody or visitation; and
(ii) any proceeding, investigation or hearing under 23 Pa.C.S. Ch. 63 (relating to child protective services) or this chapter directly affecting the child.
(7) Make specific recommendations to the court relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety.
(8) Explain the proceedings to the child to the extent appropriate given the child's age, mental condition and emotional condition.
(9) Advise the court of the child's wishes to the extent that they can be ascertained and present to the court whatever evidence exists to support the child's wishes. When appropriate because of the age or mental and emotional condition of the child, determine to the fullest extent possible the wishes of the child and communicate this information to the court. A difference between the child's wishes under this paragraph and the recommendations under paragraph (7) shall not be considered a conflict of interest for the guardian ad litem.

Credits
2000, May 10, P.L. 74, No. 18, § 1, effective in 60 days.

Editors' Notes

SUSPENDED IN PART

<For purposes of dependency proceedings, Pa.R.J.C.P. No. 1800(3) suspends 42 Pa.C.S.A. § 6311(b)(9) insofar as inconsistent with Pa.R.J.C.P. Nos. 1151 and 1154, which allow for appointment of separate legal counsel and a guardian ad litem when the guardian ad litem determines there is a conflict of interest between the child's legal interest and best interest.>

[iii] Pa.R.J.C.P Rule 1800. Suspensions of Acts of Assembly

This rule provides for the suspension of the following Acts of Assembly that apply to dependency proceedings only:
(3) The Act of July 9, 1976, P.L. 586, No. 142, § 2, 42 Pa.C.S. § 6311(b)(9), which provide that there is not a conflict of interest for the guardian *ad litem* in communicating the child's wishes and the recommendation relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety, is suspended only insofar as the Act is inconsistent with Rules 1151 and 1154, which allows for appointment of separate legal counsel and a guardian *ad litem* when the guardian *ad litem* determines there is a conflict of interest between the child's legal interest and best interest.

[iv] Pa.R.J.C.P. Rule 1154. Duties of Guardian ***Ad Litem***

A guardian *ad litem* shall:
(1) Meet with the child as soon as possible following assignment pursuant to Rule 1151 and on a regular basis thereafter in a manner appropriate to the child's age and maturity;
(2) On a timely basis, be given access to relevant court and county agency records, reports of examination of the guardians or the child, and medical, psychological, and school records;
(3) Participate in all proceedings, including hearings before juvenile court hearing officers, and administrative hearings and reviews to the degree necessary to adequately represent the child;
(4) Conduct such further investigation necessary to ascertain the facts;
(5) Interview potential witnesses, including the child's guardians, caretakers, and foster parents, examine and cross-examine witnesses, and present witnesses and evidence necessary to protect the best interests of the child;
(6) At the earliest possible date, be advised by the county agency having legal custody of the child of:
(a) any plan to relocate the child or modify custody or visitation arrangements, including the reasons, prior to the relocation or change in custody or visitation; and
(b) any proceeding, investigation, or hearing under the Child Protective Services Law, 23 Pa.C.S. § 6301 *et seq.* or the Juvenile Act, 42 Pa.C.S. § 6301 *et seq.*, directly affecting the child;
(7) Make any specific recommendations to the court relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety, including the child's educational, health care, and disability needs;
(8) Explain the proceedings to the child to the extent appropriate given the child's age, mental condition, and emotional condition; and
(9) Advise the court of the child's wishes to the extent that they can be ascertained and present to the court whatever evidence exists to support the child's wishes. When appropriate because of the age or mental and emotional condition of the child, determine to the fullest extent possible the wishes of the child and communicate this information to the court.
Comment: If there is a conflict of interest between the duties of the guardian *ad litem* pursuant to paragraphs (7) and (9), the guardian *ad litem* for the child may move the court for appointment as legal counsel and assignment of a separate guardian *ad litem* when, for example, the information that the guardian *ad litem* possesses gives rise to the conflict and can be used to the detriment of the child. If there is not a conflict of interest, the guardian *ad litem* represents the legal interests and best interests of the child at every stage of the proceedings. 42 Pa.C.S. § 6311(b). To the extent 42 Pa.C.S. § 6311(b)(9) is inconsistent with this rule, it is suspended. *See* Rules 1151 and 1800. *See also* Pa.R.P.C. 1.7 and 1.8.

[v]Pa.R.J.C.P. No. 1151

Rule 1151. Assignment of Guardian ***Ad Litem*** & Counsel

A. Guardian *ad litem* for child. The court shall assign a guardian *ad litem* to represent the legal interests and the best interests of the child if a proceeding has been commenced pursuant to Rule 1200 alleging a child to be dependent who:
(1) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the physical, mental or emotional health, or morals;
(2) has been placed for care or adoption in violation of law;
(3) has been abandoned by parents, guardian, or other custodian;
(4) is without a parent, guardian or legal custodian; or
(5) is born to a parent whose parental rights with regard to another child have been involuntarily terminated under 23 Pa.C.S. § 2511(relating to grounds for involuntary termination) within three years immediately preceding the date of birth of the child and conduct of the parent poses a risk to the health, safety, or welfare of the child.
B. Counsel for child. The court shall appoint legal counsel for a child:
(1) if a proceeding has been commenced pursuant to Rule 1200 alleging a child to be dependent who:

(a) while subject to compulsory school attendance is habitually and without justification truant from school;
(b) has committed a specific act or acts of habitual disobedience of the reasonable and lawful commands of the child's guardian and who is ungovernable and found to be in need of care, treatment, or supervision;
(c) is under the age of ten years and has committed a delinquent act;
(d) has been formerly adjudicated dependent, and is under the jurisdiction of the court, subject to its conditions or placements and who commits an act which is defined as ungovernable in paragraph (B)(1)(b);
(e) has been referred pursuant to section 6323 (relating to informal adjustment), and who commits an act which is defined as ungovernable in paragraph (B)(1)(b); or
(f) has filed a motion for resumption of jurisdiction pursuant to Rule 1634; or
(2) upon order of the court.

C. Counsel and Guardian *ad litem* for child. If a child has legal counsel and a guardian *ad litem*, counsel shall represent the legal interests of the child and the guardian *ad litem* shall represent the best interests of the child.

D. Time of appointment.

(1) *Child in custody.* The court shall appoint a guardian *ad litem* or legal counsel immediately after a child is taken into protective custody and prior to any proceeding.
(2) *Child not in custody.* If the child is not in custody, the court shall appoint a guardian *ad litem* or legal counsel for the child when a dependency petition is filed.

E. Counsel for other parties. If counsel does not enter an appearance for a party, the court shall inform the party of the right to counsel prior to any proceeding. If counsel is requested by a party in any case, the court shall assign counsel for the party if the party is without financial resources or otherwise unable to employ counsel. Counsel shall be appointed prior to the first court proceeding.

Comment: See 42 Pa.C.S. §§ 6302, 6311, and 6337.
The guardian *ad litem* for the child may move the court for appointment as legal counsel and assignment of a separate guardian *ad litem* when, for example, the information that the guardian *ad litem* possesses gives rise to the conflict and can be used to the detriment of the child. To the extent 42 Pa.C.S. § 6311(b)(9) is inconsistent with this rule, it is suspended. *See* Rule 1800. *See also*Pa.R.P.C. 1.7 and 1.8.

[vi] Pa.R.P.C. Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent.

[vii] Pa.R.P.C. Rule 1.8. Conflict of Interest: Current Clients: Specific Rules
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close familial relationship.
(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.
(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
(h) A lawyer shall not
(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
(i) A lawyer shall not acquire a proprietary interest in a cause of action that the lawyer is conducting for a client, except that the lawyer may:
(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.
(j) A lawyer shall not have sexual relations with a client unless a consensual relationship existed between them when the client-lawyer relationship commenced.
(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

No.

In The

Supreme Court of the United States

Appeal of T.H.-H.,

Petitioner

v.

C.Y.F., *Et. Al.*

Respondent

PROOF OF SERVICE

I, , do swear or declare that on this date, November 19, 2018, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS and* PETITION FOR A WRIT OF CERTIORARI each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows:

Jonathan Budd, Esquire
KidsVoice
700 Frick Building
437 Grant Street
Pittsburgh, PA 15219

Melaniesha Abernathy, Esquire
OCYFS, Adoption Legal Unit
Fort Pitt Commons
445 Fort Pitt Blvd., Suite 101
Pittsburgh, PA 15219

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 19, 2018.

Benjamin Zuckerman, Esq.

No.

In The

Supreme Court of the United States

Appeal of T.H.-H.,

Petitioner

v.

C.Y.F., *Et. Al.*

Respondent

PROOF OF SERVICE

I, , do swear or declare that on this date, December 7, 2018, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* with redacted affidavit and PETITION FOR A WRIT OF CERTIORARI with supplemented appendix on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows:

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Pittsburgh, PA 15219

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 7, 2018.

Catherine Volponi

Catherine Volponi, Esq.

192 A.3d 1080
Supreme Court of Pennsylvania.

IN RE: T.S., E.S., Minors
Appeal of: T.H.-H., Natural Mother

Nos. 50 & 51 WAP 2017
|
Argued: April 10, 2018
|
Decided: August 22, 2018

Synopsis

Background: The county office of children, youth and families (CYF) filed a petition to terminate mother's parental rights to her two children. The Court of Common Pleas, Allegheny County, Nos. CP-02-AP-0000208-2016 and CP-02-AP-0000209-2016, granted the petition. Mother appealed. The Superior Court, No. 364-365, affirmed. Mother appealed.

Holdings: The Supreme Court, Nos. 50 & 51 WAP 2017, Saylor, C.J., held that:

[1] the issue of whether the common pleas court erred when it failed to appoint a separate attorney to represent the children's legal interests, while the guardian ad litem represented the children's best interests during termination of parental rights proceeding, was non-waivable;

[2] counsel appointed to represent the legal interests of a child in involuntary termination of parental rights proceeding could also represent the child's best interests, where the child's legal and best interests did not diverge; and

[3] a separate attorney was not required to be appointed to represent the legal interests of the children.

Dougherty, J., joined Part I and II of the opinion, as well as the mandate, and filed a concurring opinion.

Donohue, J., filed a concurring and dissenting opinion.

Wecht, J., filed a dissenting opinion.

West Headnotes (7)

[1] **Infants**
Issues and questions in lower court in general

The issue of whether the common pleas court erred when it failed to appoint a separate attorney to represent the children's legal interests, while the guardian ad litem represented the children's best interests during termination of parental rights proceeding, was non-waivable, and thus failure to any party to raise the issue could not constitute waiver. 23 Pa. Cons. Stat. Ann. § 2313(a); Pa. R. App. P. 302(a).

17 Cases that cite this headnote

[2] **Appeal and Error**
Structural, fundamental, or constitutional error

Structural error means that no harmless-error analysis is relevant; however, it does not always imply non-waivability.

Cases that cite this headnote

[3] **Infants**
Scope, Standards, and Questions on Review

When reviewing an order granting or denying termination of parental rights, the Court of Appeals accepts factual findings and credibility determinations supported by the record, and it assesses whether the common pleas court abused its discretion or committed an error of law.

Cases that cite this headnote

[4] **Infants**
Trial or review de novo

When reviewing an order granting or denying termination of parental rights, the Supreme Court resolves all questions of law de novo.

Cases that cite this headnote

[5] **Infants**
Eligibility and qualifications of counsel;conflicts of interest

Counsel appointed to represent the legal interests of a child in involuntary termination of parental rights proceeding could also represent the child's best interests, where the child's legal and best interests did not diverge. 23 Pa. Cons. Stat. Ann. § 2313(a).

35 Cases that cite this headnote

[6] **Infants**
Dependency, permanency, and rights termination in general

In the case of a child who could not communicate information relevant to the termination of parental rights proceeding, due to age or other issue, there could be no presumed preference as to whether child desired reunification with parents or termination of parental rights. 23 Pa. Cons. Stat. Ann. § 2313(a); 42 Pa. Cons. Stat. Ann. §§ 6311(a), 6311(b)(9).

Cases that cite this headnote

[7] **Infants**
Eligibility and qualifications of counsel;conflicts of interest

Since two year old and three year old children were too young to express a preference as to reunification with mother or termination of parental rights, it was presumed that there was no conflict between attorney guardian ad litem's duty to advance a subjective preference on the children's part and the attorney's concurrent obligation to advocate for the child's best interests as she understood them to be, and thus a separate attorney was not required to be appointed to represent the legal interests of the children. 23 Pa. Cons. Stat. Ann. § 2313(a); 42 Pa. Cons. Stat. Ann. §§ 6311(a), 6311(b)(9).

21 Cases that cite this headnote

*1081 Appeal from the Order of the Superior Court entered on 8/25/17 at Nos. 364-365 WDA 2017, affirming the order of the Court of Common Pleas of Allegheny County entered 2/3/17 at Nos. CP-02-AP-0000208-2016 and CP-02-AP-0000209-2016, Paul E. Cozza, Judge

Attorneys and Law Firms

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Kiersten M. Frankowski, Esq., Allegheny County Bar Foundation, Catherine L. Volponi, Esq., Juvenile Court Project, for T.H.-H., Appellant.

Melaniesha Abernathy, Esq., CYF Adoption Legal Unit, Paula Jean Benucci, Esq., Allegheny County Law Department, for OCYF-Legal Unit-Adoption, Appellee.

Jonathan Budd, Esq., Kidsvoice, Cynthia B. Moore, Esq., for T.S., Appellee, E.S., Appellee.

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

CHIEF JUSTICE SAYLOR

This appeal involves a proceeding in which parental rights were involuntarily terminated. Throughout the termination proceedings, up to and including the hearing on the termination petition, an attorney ***1082** guardian *ad litem* represented the best interests of the children involved. The primary issue is whether the common pleas court erred in failing to appoint a separate attorney to represent their legal interests.

I. Background

A. *In re Adoption of L.B.M.*

The present appeal follows closely upon our decision in *In re Adoption of L.B.M.*, 639 Pa. 428, 161 A.3d 172 (2017). In that matter, this Court interpreted and applied Section 2313(a) of the Adoption Act. *See* 23 Pa.C.S. § 2313(a) (relating to representation in proceedings under the Adoption Act). Although multiple opinions were filed in *L.B.M.*, a majority of the Court agreed on several points: (a) in the context of contested termination-of-parental-rights ("TPR") proceedings, the first sentence of Section 2313(a) requires that the common pleas court appoint an attorney to represent the child's legal interests, *i.e.*, the child's preferred outcome; [1] (b) where there is a conflict between the child's legal interests and his best interests, an attorney-guardian *ad litem* (an "attorney-GAL"), who advocates for the child's best interests, cannot simultaneously represent the child's legal interests; [2] and (c) in such a circumstance, the failure to appoint a separate attorney to represent the child's legal interests constitutes structural error, meaning it is not subject to a harmless-error analysis.

While the lead opinion indicated that there must always be a separate attorney representing the child's legal interests, *see L.B.M.*, 639 Pa. at 442-43, 161 A.3d at 180-81 (plurality in relevant part), that portion of the opinion represented the views of three Justices – Justices Wecht, Donohue, and Dougherty. The four Justices in a responsive posture were of the view that an attorney-GAL can fill the role required by Section 2313(a), while also advancing the child's best interests, so long as there is no conflict between the child's legal interests and best interests. [3]

***1083** In terms of disposition, *L.B.M.* vacated the TPR decree and remanded to the trial court for further proceedings. Of the five members who supported that result, the three lead Justices did so because no separate counsel had been appointed for the children involved, thereby violating the rule they favored broadly prohibiting one attorney serving both roles in any contested TPR proceeding. *See id.* at 446, 161 A.3d at 183 (plurality in relevant part). The two Justices concurring in the result supported the outcome on narrower grounds, namely, that the trial court had failed to conduct a conflict analysis to determine whether the attorney-GAL could fulfill both roles in that specific case. *See id.* at 448, 161 A.3d at 184 (Saylor, C.J., concurring). Notably, at the time of the TPR hearing in *L.B.M.*, the children were four and eight years old, and the hearing transcript reflected that the eight-year-old in particular was able to articulate his feelings and beliefs about the case and respond rationally to the judge's questions concerning his preference as to the outcome of the TPR proceedings. *See id.* at 436, 161 A.3d at 177.

B. Factual and procedural history of this case

Turning to the present controversy, T.S. and E.S. were born to Appellant T.H.-H. ("Mother") in June 2013 and August 2014, respectively. The Allegheny

County Office of Children, Youth and Families ("CYF") became familiar with Mother shortly after E.S.'s birth.

Mother admitted to using marijuana while pregnant with E.S., and she tested positive for THC (a cannabinoid) shortly after giving birth. CYF did not initially file a dependency petition, opting instead to provide services to help Mother implement her goals. However, Mother was not substantially compliant with treatment and failed to discontinue her drug use. Also, she admitted to smoking marijuana in the presence of the children, exhibited minimal parenting skills – often leaving Children in a bedroom unattended with the television "blaring," and failing to undertake basic parenting tasks such as feeding the children or changing their diapers – and did not follow through with E.S.'s medical appointments. *See* N.T., Feb. 3, 2017, at 8, 13-14. [4]

Beginning in January 2015, home visits were conducted by a caseworker from an independent social services agency, who helped Mother with various aspects of parenting and budgeting. On one visit, the caseworker developed concerns for the safety of the children when she observed an open oven being used to heat the residence, the presence of a cigarette lighter and a large knife where T.S. could access them, and a used condom on the floor which she believed could constitute a choking hazard. *See* N.T., Feb. 3, 2017, at 52-53. Although she discussed these matters with Mother, Mother downplayed their significance and generally did not appear to appreciate that they could compromise the children's safety.

In July 2015, a CYF caseworker made an unannounced visit and noticed that the home smelled of marijuana and Mother was under the influence of drugs or alcohol. Because CYF believed it could no longer ensure the safety of the children in Mother's care, it sought an emergency custody authorization and the children were removed that day. They were adjudicated dependent and placed with foster parents. For the placement and permanency review period that followed, the court appointed KidsVoice (a child-advocacy organization in *1084 Pittsburgh) to represent the children's best interests and legal interests in compliance with Section 6311 of the Juvenile Code. *See* 42 Pa.C.S. § 6311; Pa.R.J.C.P. 1154.

After the foster care placement, Mother's court-ordered goals were, *inter alia*, to participate in drug and alcohol treatment (which included random urine screens), mental health treatment, and parenting classes, and to visit her children and maintain contact and cooperation with CYF. The court appointed Beth Bliss, Psy.D., a licensed forensic psychologist, to conduct evaluations. Dr. Bliss evaluated Mother individually and performed interactional evaluations between the children and Mother, and between the children and their foster parents. [5]

In late 2016, CYF filed a petition to terminate Mother's parental rights, which Mother contested. [6] The court held a hearing on the petition on February 3, 2017. At the hearing, CYF was represented by Melaniesha Abernathy, Esq.; Mother was represented by Kiersten Frankowski, Esq., of the Allegheny County Bar Foundation's Juvenile Court Project; and, as reflected on the hearing transcript and the TPR docket sheet, the children were represented by Cynthia J. Moore, Esq., from KidsVoice. The orders appointing KidsVoice to represent the children in the dependency proceedings stated it was to represent their legal and best interests, and it is undisputed that this dual function carried over into the termination proceedings. Thus, the children had continuity of representation between the dependency and TPR proceedings. However, no independent counsel represented *solely* the children's legal interests in the latter proceedings.

The CYF caseworker, the ACHIEVA employee, and Dr. Bliss were among the witnesses called by CYF. According to their testimony, Mother was inconsistent or non-compliant with most of the treatment programs to which CYF referred her – including dual-diagnosis (*i.e.*, mental health and substance abuse) treatment – and had difficulty providing clean urine screens, *see* N.T., Feb. 3, 2017, at 10-11; she was unable to understand or manage the needs of both children simultaneously

during supervised visits, including their safety needs, *see id.* at 13, 31, 36, 39, 64; *see generally id.* at 37 (reflecting the ACHIEVA worker's assessment that Mother "would need 24/7 supports if she were alone with the children"); and she only minimally complied with the court's permanency plan, *see id.* at 31. More generally, the conditions leading to the children's removal had not been remedied, nor were they likely to be within a reasonable timeframe. *See, e.g., id.* at 24. In foster care, moreover, T.S.'s speech and overall behaviors "improved greatly," and E.S.'s feeding problems resolved. *Id.* at 21. The CYF caseworker expressed that it would be best for the children to remain with the foster parents and ultimately to be adopted by them. *See id.* at 24.

Dr. Bliss testified that Mother did not prioritize being a parent, as she missed numerous visits with the children because she had "other things she had to do," *id.* at 72, and she continued to use drugs although she was aware such conduct would negatively impact the likelihood of reunification. Dr. Bliss also expressed that, ***1085** whereas the children were indifferent to Mother's presence in the visiting room and did not seem bonded with her, they appeared emotionally bonded with their foster parents. In this respect, Dr. Bliss stated that T.S. repeatedly sought attention from his foster mother, referred to the latter as "Mommy," and showed her physical affection. Further, according to Dr. Bliss, the foster parents were effective in attending to the children's needs, providing them with affection, and promoting developmentally appropriate skills.[7] Dr. Bliss opined to a reasonable degree of psychological certainty that the children would not suffer any harm from not seeing Mother again, and she recommended that the current foster placement continue. *See id.* at 78-79.

Later that day, the court granted the petition, finding that CYF had established by clear and convincing evidence grounds for termination under paragraphs (2), (5), and (8) of Section 2511(a) of the Adoption Act, *see* 23 Pa.C.S. § 2511(a)(2), (5), (8),[8] and that termination would serve the children's needs and welfare. *See id.* § 2511(b) (providing that, in terminating parental rights, the court "shall give primary consideration to the developmental, physical and emotional needs and welfare of the child").

While Mother's appeal to the Superior Court was pending, this Court decided *L.B.M.* on March 28, 2017.[9] Accordingly, in her appellate brief Mother claimed for the first time that the children should have been represented by appointed counsel separate from the GAL at the termination proceeding.[10] Mother argued that the trial court's failure to appoint such counsel constituted ***1086** structural error, thereby entitling her to a new TPR proceeding. Mother also maintained that her failure to raise the issue previously should be excused because this Court had not yet ruled in *L.B.M.* at the time of the February 3, 2017, hearing.

In a supplemental brief, the GAL argued that, under the Superior Court's interpretation of *L.B.M.* in *In re D.L.B.*, 166 A.3d 322 (Pa. Super. 2017), a guardian *ad litem* may serve as legal counsel for a child in an involuntary TPR proceeding as long as the child's legal interests and best interests are not in conflict.[11] The GAL asserted that no such conflict had been identified here. In response, Mother did not contend that the children's best interests and legal interests were in conflict. Rather, she argued that the *D.L.B.* panel had misapprehended *L.B.M.*, which, she argued, requires the appointment of independent legal counsel for children in every involuntary TPR proceeding.

A three-judge panel of the Superior Court affirmed in an unpublished decision. The panel observed that, regardless of Mother's suggestion that *D.L.B.* was wrongly decided, *D.L.B.* represented binding precedent which the panel was not at liberty to overrule. *See In re T.S.*, Nos. 364 & 365 WDA 2017, *slip op.* at 5, 2017 WL 3669504, at *2 (Pa. Super. Aug. 25, 2017). The court noted that, per *D.L.B.*'s analysis, *L.B.M.* does not require appointment of independent legal counsel for a child in a contested TPR proceeding unless the child's legal and best interests conflict. *See id.* (citing *D.L.B.*, 166 A.3d at 329). The court ultimately concluded that a remand was unnecessary as Mother did not argue that the children's legal and best interests were in conflict

and, in the court's view, the record did not indicate that any such conflict existed. *See id.* [12]

We granted further review to determine whether the common pleas court erred in failing to appoint separate counsel to represent the children's legal interests pursuant to Section 2313(a), 23 Pa.C.S. *See In re T.S.*, — Pa. —, 173 A.3d 266 (2017) (*per curiam*).

II. Waiver

[1] CYF and the GAL both maintain that Mother waived the issue of whether the common pleas court should have appointed a separate attorney to represent the children's legal interests by waiting until her appeal to raise it. [13] *See* Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). They argue the timing of this Court's *L.B.M.* decision is immaterial since the separate-counsel requirement is alleged to be based on Section 2313(a), which was extant long before *L.B.M.* was decided. Mother counters that failure to appoint counsel to represent a ***1087** child's legal interests at a contested TPR hearing is not subject to waiver because it constitutes structural error. *See* Brief for Appellant at 21.

[2] Mother's focus solely on structural error does not resolve the waiver question without further analysis (which she does not provide). First, and as noted, structural error means that no harmless-error analysis is relevant; however, it does not always imply non-waivability. *Accord Weaver v. Massachusetts*, — U.S. —, 137 S.Ct. 1899, 1910, 198 L.Ed.2d 420 (2017); *see, e.g., Commonwealth v. Rega*, 620 Pa. 640, 657, 70 A.3d 777, 786-87 (2013) (observing that a violation of the right to a public trial "is a particular type of structural error which is waivable" (citations omitted)); *cf. Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 896, 111 S.Ct. 2631, 2648, 115 L.Ed.2d 764 (1991) (Scalia, J., dissenting) (positing that non-waivability is more closely aligned with jurisdictional defects than with whether an error is structural). *See generally Commonwealth v. Martin*, 607 Pa. 165, 218, 5 A.3d 177, 208–09 (2010) (Saylor, J., concurring) (surveying jurisdictions and discussing policy concerns).

Nevertheless, we conclude this particular type of alleged error is non-waivable. The statutory right under Section 2313(a) belongs to the child, not the parent. *Accord In re E.F.H.*, 751 A.2d 1186, 1189 (Pa. Super. 2000). There was no attorney representing solely the children's legal interests who could have raised their rights in the trial court, and the children plainly could not have done so themselves. *See In re K.J.H.*, 180 A.3d 411, 413 (Pa. Super. 2018) ("Child, due to his minority and lack of representation in the orphans' court, could not raise this issue himself."); *cf.* Pa.R.J.C.P. 1152(A)(2) (stating minors can waive counsel in dependency cases only if the waiver is knowing, intelligent, and voluntary, and the court conducts a record colloquy). We conclude, then, that the failure of any party, including Mother, to affirmatively request separate counsel for the children cannot have constituted waiver. Accordingly, the substantive question on which we granted review is properly before the Court. We now turn to that issue.

III. Dual-role representation

[3] [4] When reviewing an order granting or denying termination of parental rights, we accept factual findings and credibility determinations supported by the record, and we assess whether the common pleas court abused its discretion or committed an error of law. *See In re D.C.D.*, 629 Pa. 325, 339-40, 105 A.3d 662, 670-71 (2014). We resolve all questions of law *de novo*. *See id.*

Mother has abandoned her original challenge to the county court's exercise of its discretion, *see supra* note 12, and instead asserts that the Superior Court erred in not recognizing that *L.B.M.* required it to remand this matter to the trial court for a new termination proceeding at which the children's legal interests would be represented by appointed counsel. She structures her advocacy in terms of rebutting what she perceives as three erroneous assumptions made by the *D.L.B.* court. *See* Brief for Appellant at 13. [14] We address them in turn.

***1088 A. Prevailing law**

[5] First, Mother asserts *D.L.B.* wrongly assumed that counsel appointed pursuant to Section 2313(a) may represent a child's best interests. She states that, in *L.B.M.*, the three-Justice plurality, joined by the concurrence, agreed that Section 2313(a) requires that the legal interests of the child be represented, and further, that the appointment of counsel is a necessary measure to ensure such representation occurs. *See* Brief for Appellant at 14-17. She concludes by suggesting that a majority of the *L.B.M.* Court disapproved the concept that Section 2313(a) counsel can ever represent a child's best interests. *See id.* at 17-18.

As developed above, four Justices in *L.B.M.* agreed that, where a child's legal and best interests do not diverge in a termination proceeding, an attorney-GAL representing the child's best interests can also fulfill the role of the attorney appointed per Section 2313(a) to represent the child's legal interests. *See supra* note 3.[15] This majority view of the Justices was apparent from the face of the opinions in *L.B.M.*, as the Superior Court has recognized on multiple occasions. *See D.L.B.*, 166 A.3d at 329; *In re Adoption of T.M.L.M.*, 184 A.3d 585, 588 (Pa. Super. 2018).

Furthermore, all four Justices in a responsive position indicated that, where a child is too young to express a preference, it would be appropriate for the GAL to represent the child's best and legal interests simultaneously. *See L.B.M.*, 639 Pa. at 448, 161 A.3d at 184 (Saylor, C.J., joined by Todd, J., concurring); *id.* at 461, 161 A.3d at 192 (Mundy, J., joined by Baer, J., dissenting). Although that circumstance was not before the *L.B.M.* Court, we now expressly reaffirm these legal principles in the context of the present case, as they are material to the result. *See generally Pap's A.M. v. City of Erie*, 553 Pa. 348, 357, 719 A.2d 273, 278 (1998) (explaining that a holding arises from a fragmented decision when a majority of Justices are in agreement on the legal point at issue), *rev'd on other grounds*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). Therefore, we disagree with Mother's contention that *L.B.M.* reflects "prevailing case law of the Commonwealth" that an attorney-GAL representing the child's best interests can never satisfy the mandate embodied in the first sentence of Section 2313(a), Brief for Appellant at 17, and that *D.L.B.*'s "assumption" along these lines was incorrect.

B. Presumption for non-communicative *1089 children[16]

[6] Next, Mother addresses the presumed legal interests of a child who cannot communicate information relevant to termination proceedings. She does not claim that the children in this case would have been able meaningfully to express their preferred outcome or otherwise direct counsel's representation of their legal interests. Rather, she agrees the children would not have been able to do so and states that, therefore, "the question is what presumption should be made about the child's legal interest, *i.e.*, their preferred outcome, when the child is nonverbal or unable to satisfactorily verbalize their preferred outcome." Brief for Appellant at 23. Mother contends that the Superior Court assumed there can be no conflict of interest between the child's best and legal interests in such circumstances. She argues that such assumption was in error. Instead, she maintains, the child should be presumed as a matter of law to oppose termination – thereby creating a conflict whenever the GAL believes that termination would be in the child's best interests.

The parties agree that, due to the children's very young age (two and three years old), they cannot have formed a subjective, articulable preference to be advanced by counsel during the termination proceedings, and this is entirely consistent with the record.[17] It follows that the legal interests to be represented by Section 2313(a) counsel – which, again, are synonymous with the child's preference, *see In re L.B.M.*, 639 Pa. at 432, 161 A.3d at 174 – were not ascertainable during the termination proceedings. The question then becomes whether the requirement of Section 2313(a), that counsel be appointed to "represent the child" in a contested TPR proceeding, can be deemed to have been fulfilled by an attorney-GAL who has already been

appointed and is present in those proceedings, advocating for the child's best interests (which may be denial of the TPR petition, depending on the facts of the case).

[7] The statute does not provide a clear answer to this question, as it does not expressly contemplate the circumstance that the child's wishes cannot be ascertained. We therefore look for guidance to the analogous provision of the Juvenile Act, which does contemplate that situation. Section 6311 of the Juvenile Act initially states that the guardian *ad litem* is to "represent the legal interests and the best interests of the child." 42 Pa.C.S. § 6311(a). It then specifies that the guardian *ad litem* must "[a]dvise the court of the child's wishes *to the extent that they can be ascertained* and present to the court whatever evidence exists to support the child's wishes." 42 Pa.C.S. § 6311(b)(9) (emphasis added).[18] By straightforward implication, if the wishes of the child cannot be ascertained, ***1090** the GAL has no duty to "advise the court" of such wishes. For purposes of the proceeding, such wishes do not exist. That is not merely a legal fiction. As explained above, it comports with reality to the extent any participant in the proceedings can discern it. Moreover, and contrary to Mother's argument, it would be tenuous to simply presume a particular preference by the child as a matter of law.

Such a circumstance does not negate the mandate of Section 2313(a) that counsel be appointed to "represent the child" in contested TPR proceedings. It does, however, bear on the question of whether a conflict arises if the trial court allows the attorney-GAL to fulfill that mandate. As a matter of sound logic, there can be no conflict between an attorney's duty to advance a subjective preference on the child's part which is incapable of ascertainment, and an attorney's concurrent obligation to advocate for the child's best interests as she understands them to be. Thus, we conclude that where an attorney-GAL is present in such proceedings undertaking the latter task (advocating for the child's best interests), Section 2313(a) does not require the appointment of another lawyer to fulfill the former (advancing the child's unknowable preference).[19]

Mother disagrees with the above based on her contention that, in the case of a pre-verbal child, the law should indeed presume a preference on behalf of the child, and that it should presume the child opposes termination. Mother rests her argument in this regard on certain passages from the Supreme Court's decision in *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). *See* Brief for Appellant at 23-25.

In *Santosky*, the Court reviewed a New York State statute which bifurcated termination proceedings into two phases: a fact-finding phase designed to ascertain whether the parent was unfit – or, in the words of the statute, the child was "permanently neglected" – and a dispositional phase to determine what placement would serve the child's best interests. *See Santosky*, 455 U.S. at 748, 102 S.Ct. at 1392. The second phase would only be reached if the parent was found to be unfit at the conclusion of the first phase. Under the New York enactment, the party petitioning for termination could prevail in the fact-finding phase through proof of parental unfitness by a fair preponderance of the evidence. The question before the Court was whether that relatively low evidentiary standard satisfied due process. The Court held that it did not and that, in view of the nature of a parent's right to her natural children, proof by at least clear and convincing evidence was constitutionally required. *See id.* at 769, 102 S.Ct. at 1403. Mother notes that, in rejecting the preponderance-of-the-evidence ***1091** standard, *Santosky* indicated that "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship," and that in this phase the state cannot simply assume that a child and his parents are adversaries. *Id.* at 760, 102 S.Ct. at 1398.

However, it is important to recognize the context in which these statements were made. The Supreme Court's entire discussion related to how the risk of erroneous fact-finding should be allocated *as between the state and the parent.* The Court first recognized that, under due process, the function of a standard of proof is to allocate the risk of error between competing parties through consideration of the comparative loss each would

suffer as a result of erroneous fact-finding. The Court recited the well-known concept that the preponderance-of-the-evidence standard applies in civil disputes over money damages because society has only a minimal interest in the outcome and, in fairness, the litigants should share the risk of error equally. On the other hand, the majority observed, when the government initiates criminal proceedings to deprive an individual of life or liberty, the beyond-a-reasonable-doubt standard obtains because of the severe consequences to the individual and the substantial societal loss occasioned when an innocent person is imprisoned. *See id.* at 755-58, 102 S.Ct. at 1395-97; *see also Commonwealth v. Maldonado*, 576 Pa. 101, 109, 838 A.2d 710, 715 (2003) (discussing the function of the various standards of proof in similar terms). Turning to a state-initiated petition under New York law, the Court concluded that an erroneous finding of permanent neglect would result in a more significant loss than an erroneous finding of parental fitness. *See Santosky*, 455 U.S. at 761, 102 S.Ct. at 1399. Given this "disparity of consequence," *id.*, the Court concluded that clear and convincing evidence of parental unfitness was constitutionally necessary.

When viewed in this context, it is evident that the Court's expressions about the child's interest were made solely to emphasize that the proceeding is a contest between the state and the parent, and not one in which equal but opposite interests of the parent and child are pitted against each other. *See id.* at 759, 102 S.Ct. at 1398 (explaining that the fact-finding phase under New York law is not intended to "balance the child's interest in a normal family home against the parents' interest in raising the child," but instead, it "pits the State directly against the parents"). Along these lines, the Court clarified that, although the child and his foster parents may be "deeply interested in the outcome of the contest," at the fact-finding phase "the focus emphatically is not on them." *Id.*; *see also id.* at 761, 102 S.Ct. at 1399 ("Since the factfinding phase of a permanent neglect proceeding is an adversary contest between the State and the natural parents, the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous factfinding *between these two parties.*" (emphasis added)). That being the case, as long as trial courts require the state to prove parental unfitness – or, under Pennsylvania's law, grounds for termination, *see* 23 Pa.C.S. § 2511(a) – by at least clear and convincing evidence, the child's status as a non-adversary has been folded into the analysis and the Due Process Clause is satisfied.

Notably, the question of what a very young, pre-verbal child's legal interests should be presumed to be within proceedings that satisfy due process was not before the *Santosky* Court.[20] Further, the ***1092** Court did not indicate that such a child is deemed to have a constitutionally protected interest in remaining with his natural parents, and its emphasis that the proceeding only involves the parents' and the state's respective interests contradicts any such precept. If this were not so, moreover, it would call into question whether due process requires proof by clear and convincing evidence in circumstances where an older, verbal child directs his attorney to advocate in favor of termination. *Santosky* cannot reasonably be understood to suggest that due process would permit the state to prove its case by a less exacting evidentiary standard in that situation – again, because the Supreme Court's focus was not on the child's legal interests, but on those of the parent.

In light of the above, when the passages of *Santosky* on which Mother relies are understood in their context, they do not undermine our conclusion that it would be inadvisable for us to impose a legal presumption as to the preferred outcome of a child who is too young to formulate a subjective, articulable preference.

C. Presumption that harmless-error analysis can be used

Finally, Mother maintains *D.L.B.* wrongly assumed that a post-hoc appellate conflict analysis can be performed to assess whether the failure to appoint Section 2313(a) counsel was error. She notes that failure to appoint counsel as required constitutes structural error and posits that a remand for the appointment of counsel is always necessary due to the nature of the child's rights, as the

intermediate court previously recognized in *In re Adoption of G.K.T.*, 75 A.3d 521 (Pa. Super. 2013). *See* Brief for Appellant at 20.

To the extent Mother indicates that structural error is not subject to harmless error analysis, by definition she is correct. However, structural error cannot arise unless the trial court erred. While a majority of the *L.B.M.* Court agreed that the error under review was structural, the children in that matter were able to express their thoughts concerning whether they wanted to stay with their natural parent. Here, by contrast, and as developed above, the children were too young to have had any such capability. We have determined an attorney-GAL who is present and representing a child's best interests can properly fulfill the role of Section 2313(a) counsel where, as here, the child at issue is too young to be able to express a preference as to the outcome of the proceedings. Thus, the trial court did not err in allowing KidsVoice, the children's guardian *ad litem*, to act as the sole representative for T.S. and E.S. Moreover, *G.K.T.* is distinguishable in that, although the child in that case was very young and pre-verbal, no attorney represented the child at all.

IV. Conclusion

In sum, we hold that a child's statutory right to appointed counsel under Section 2313(a) of the Adoption Act is not subject to waiver. We additionally reaffirm certain principles agreed upon by a majority of Justices in *L.B.M.*, namely, that during contested termination-of-parental-rights proceedings, where there is no conflict between a child's legal and best interests, an attorney-guardian *ad litem* representing the child's best interests can also represent the child's legal interests. As illustrated by the present dispute, moreover, if the preferred outcome of a child is incapable of ascertainment because the child is very young and pre-verbal, there can be no conflict between the child's legal interests and his or her best interests; as such, the mandate of Section 2313(a) of the Adoption Act that counsel be appointed "to represent ***1093** the child," 23 Pa.C.S. § 2313(a), is satisfied where the court has appointed an attorney-guardian *ad litem* who represents the child's best interests during such proceedings.

For the reasons given, we affirm the order of the Superior Court.

Justices Baer, Todd and Mundy join the opinion.

Justice Dougherty joins Parts I and II of the opinion, as well as the mandate, and files a concurring opinion.

Justice Donohue files a concurring and dissenting opinion.

Justice Wecht files a dissenting opinion.

JUSTICE DOUGHERTY, concurring

I join Sections I and II of the majority opinion, and concur in the result as to the remainder. I write separately to note what is, in my view, a critical difference between this case and *In re Adoption of L.B.M.*, 639 Pa. 428, 161 A.3d 172 (2017).

In *L.B.M.*, the termination of parental rights (TPR) proceedings were initiated by the guardian *ad litem* (GAL) on behalf of an eight-year-old, articulate child who equivocated over his preferred outcome. *Id.* at 176-177. The unanswerable question giving rise to structural error under those circumstances was how the child's preferences might have been advanced more definitively had legal counsel been appointed as required under 23 Pa.C.S. § 2313(a). *Id.* at 182. There was manifest potential for a conflict of interest between the child's best interests and legal interests in the GAL-attorney's zealous pursuit of the termination of the mother's parental rights.

Here, there is no dispute over the children's preference: the parties agreed they cannot have formed one. *See* Majority Opinion, op. at 1089.[1] Moreover, the Allegheny County Office of Children Youth and Families (CYF) initiated the TPR proceedings, and was involved with the children almost since birth, having custody of the two-year-old and three-year-old for over half their young lives. *Id.* at 1083–84. The GAL-attorney represented the children's best interests and legal

interests without an apparent conflict of interest. Under the circumstances presently before us, I consider the appointment of separate counsel to represent the child's legal interests to be unnecessary.

JUSTICE DONOHUE, concurring and dissenting

As this Court held in *In re L.B.M.*, 639 Pa. 428, 161 A.3d 172 (2018), the clear and unambiguous language of 23 Pa.C.S. § 2313(a) requires that the orphans' court "appoint counsel to represent the child" in a proceeding to terminate her parents' rights, which we further stated means "the child's preferred outcome." *Id.* at 174. Given the age of the children and the facts of record, we were not asked in *L.B.M.* to decide the question presented here – what is the legal interest of a child too young to express a desired outcome? [1] For the reasons explained in this Concurring and Dissenting Opinion, it is my view that there is a presumption that a child's legal interest is aligned with her parent, and in a contested termination proceeding a non-expressive child is presumed to oppose termination of her parent's rights.

The Majority has concluded that since a non-expressive child cannot make her desired outcome known to counsel, the answer is self-evident – the child has no wishes for purposes of the termination ***1094** proceeding. *See* Majority Op. at 1089–90 ("[I]f the wishes of the child cannot be ascertained, the GAL has no duty to "advise the court" of such wishes. For purposes of the proceeding, such wishes do not exist."). The problem with this conclusion is readily apparent – section 2313(a) mandates that the orphans' court "appoint counsel to represent the child" in the proceeding. We unanimously agreed in *In re L.B.M.* that section 2313(a) counsel must represent "the child's preferred outcome." The logical extension of the Majority's holding is that a child who cannot express a preferred outcome has no need for the appointment of counsel under section 2313(a) since the child has no legal interest (i.e., no preferred outcome).

Apparently recognizing the dilemma, the Majority resolves it by importing language from section 6311(b) of the Juvenile Act, which governs the powers and duties of a GAL representing a child in a dependency action, to section 2313(a) of the Adoption Act. *Id.* at 1089–90. Respectfully, in my view, the Majority's approach is fundamentally flawed for several reasons. [2]

First, it is a well-settled principle of statutory construction that when interpreting a statute, courts are bound by the plain, unambiguous language of a statute, and "the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). "[W]here the legislature includes specific language in one section of the statute and excludes it from another, the language should not be implied where excluded." *Fonner v. Shandon, Inc.*, 555 Pa. 370, 724 A.2d 903, 907 (1999) (*citing Cali v. City of Philadelphia,* 406 Pa. 290, 177 A.2d 824, 832 (1962)). "Moreover, where a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent." *Id.* (citing *Commonwealth v. Bigelow*, 484 Pa. 476, 399 A.2d 392, 395 (1979)). "In construing a statute, the court must ascertain and give effect to the legislative intention as expressed in the language of the statute, and cannot, under its powers of construction, supply omissions in a statute, especially where it appears that the matter may have been intentionally omitted[.]" *L.S. ex rel. A.S. v. Eschbach*, 583 Pa. 47, 874 A.2d 1150, 1156 (2005) (quoting *Kusza v. Maximonis,* 363 Pa. 479, 70 A.2d 329, 331 (1950)).

Section 6311 of the Juvenile Act provides that a GAL in a dependency proceeding is tasked with representing both the best interest and legal interest of the child, 42 Pa.C.S. § 6311(a), and that in the latter capacity, the GAL must

> [a]dvise the court of the child's wishes **to the extent they can be ascertained** and present to the court whatever evidence exists to support the child's wishes. When appropriate because of the age or mental and emotional condition of the ***1095** child, [the GAL shall] determine **to the fullest extent possible** the wishes of the

> child and communicate this information to the court.

42 Pa.C.S. § 6311(b)(9) (emphasis added). Section 2313(a) of the Adoption Act, on the other hand, simply requires the orphans' court to "appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents." 23 Pa.C.S. § 2313(a). It calls for the appointment of "counsel," not a GAL, which is the role that section 6311 of the Juvenile Act addresses. Section 2313(a) contains no provision to allow for a dual representation role in termination proceedings and makes no exception to the required representation of the child's legal interests for circumstances where the attorney cannot ascertain the child's wishes.

The General Assembly was unquestionably aware that involuntary termination proceedings are often brought when children are very young and unable to express their preferences. In fact, the General Assembly adopted the federal Adoption and Safe Families Act, which was enacted in an effort to curb the number of children that were growing up in foster care by requiring, inter alia, that juvenile courts ensure that petitions to terminate parental rights are filed, in appropriate cases, once a child had been in an out-of-home placement for fifteen of the past twenty-two months. *See* 42 U.S.C. § 675(5)(E); 42 Pa.C.S. § 6351(f)(9); *In re Adoption of S.E.G.*, 587 Pa. 568, 901 A.2d 1017, 1019 (2006).

The General Assembly could have written section 2313 to require the appointment of counsel only where the child could express a desired outcome. The General Assembly could have included a provision in section 2313 that counsel representing the child is only required to communicate the child's wishes to the extent they can be ascertained, as it did in section 6311(b) of the Juvenile Act. It could have provided for a GAL, instead of counsel, to represent a non-expressive child. The General Assembly did not choose any of these options. Because the General Assembly omitted from the Adoption Act provisions that it chose to include under the Juvenile Act, reading this language into the Adoption Act runs directly counter to our rules of statutory construction. [3]

Moreover, the stakes are very different in dependency and termination proceedings. Termination of a parent's rights is, in essence, a death sentence for the parent/child relationship, as it is permanent and irrevocable. *See In Interest of Lilley*, 719 A.2d 327, 329 (Pa. Super. 1998). A finding of dependency, while also very serious, is a temporary intrusion into the life of a family. It is a remediable situation, which, ideally, will conclude with the family remaining intact. *See* 42 Pa.C.S. § 6301(b)(1) (identifying the purpose of the Juvenile Act as, inter alia, "[t]o preserve the unity of the family whenever possible"). For this reason as well, I find section 6311(b)'s explanation of the role of a GAL in a dependency proceeding to be inconsequential and of little value when interpreting the child's statutory right to counsel in a termination proceeding. In my view, it is of the utmost importance that a child's legal interest in a termination proceeding ***1096** is squarely and solely represented by her appointed counsel.

It is a well-settled constitutional principle that a parent has a fundamental liberty interest "in the care, custody, and management of their child." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). I acknowledge that the United States Supreme Court has not yet ruled upon whether a child has a separate and independent constitutionally protected right to be cared for and managed by her parent. *Michael H. v. Gerald D.*, 491 U.S. 110, 130, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship."). In *Santosky*, however, the high Court recognized that a child has a right to the preservation of the parent/child relationship that is intertwined with the right of the parent. In *Santosky*, the Court was tasked with determining the burden of proof that must be met to involuntarily terminate a parent's right to his child, and held that, at a minimum, termination cases must be proven by clear and convincing evidence. *Santosky*, 455 U.S. at 769, 102 S.Ct. 1388. In so concluding, the *Santosky* Court rejected the argument that proof by a preponderance of the evidence was the appropriate standard in a

termination case because "the child's interest in a normal family home" must be given equal weight "against the parents' interest in raising the child." *Id.* at 759, 102 S.Ct. 1388. The Court stated that "the State cannot presume that a child and his parents are adversaries" in a termination proceeding, as they "share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760, 102 S.Ct. 1388.

The Majority focuses on the adversarial posture of a parent versus the state as the driving force in the placement of the burden of proof and the ultimate holding of *Santosky*. *See* Majority Op. at 1091–92. True as this may be, in the same context, we must be cognizant of our General Assembly's mandate that the child at the center of the termination proceeding must have counsel in the proceeding who picks a side in the contest and participates, either for or against the parent's position. *Santosky* teaches that we cannot presume in this regard that the child is adverse to the parent's position.

Santosky reflects a clear recognition that the child in a termination proceeding has a legal interest in maintaining the parent/child relationship, what is referred to as "their natural relationship." *Santosky*, 455 U.S. at 760, 102 S.Ct. 1388. This conclusion is informed not only by the human experience but by logic, as it would be incongruous for a parent to have a fundamental constitutional right to raise his child, but for the child to be born completely untethered in this regard to her parents. The child unquestionably has an interest in the outcome of a termination decision, as it dictates not only whether the parent/child relationship will remain intact, but whether other consanguineous relations will continue and whether the child will have a right to inherit and receive other financial benefits from her parents and their lineage. Our General Assembly has recognized that a child has a protectable legal interest at a termination proceeding based on its decision to require counsel to represent a child in a contested termination proceeding – if a child had no interest to protect, there would be no need for the child to have legal representation.[4]

***1097** The Majority's conclusion that a non-expressive child has no legal interest to protect in a termination proceeding, and that her right to counsel is therefore protected by a GAL representing her best interest, effectively creates a presumption that the child is in favor of termination in every case in which the GAL agrees with the petitioning party's recommendation to terminate parental rights (or where the GAL is the petitioner). *See* Majority Op. at 1090 ("there can be no conflict between an attorney's duty to advance a subjective preference on the child's part which is incapable of ascertainment, and an attorney's concurrent obligation to advocate for the child's best interests as she understands them to be"); *see also* 23 Pa.C.S. § 2512(a) (identifying who may file a petition to terminate parental rights).[5] The reality in the vast majority of termination cases is that the GAL is an active participant providing zealous representation to his or her client through the presentation of evidence in support of termination. In such circumstances, the child is, by necessary implication, an adversary to her parents. Thus, in these cases, the Majority's conclusion that an attorney need only represent a non-expressive child's best interest at a termination proceeding is in direct contravention to *Santosky*'s admonishment against this presumption. *See Santosky*, 455 U.S. at 760, 102 S.Ct. 1388.

Of course, the parent's fundamental right to the care, custody and management of his child is not interminable. A parent can voluntarily waive the fundamental liberty interest that he has in rearing his child and relinquish his parental rights. *See* 23 Pa.C.S. §§ 2501-2504. If the parent does not voluntarily relinquish his parental rights, but the petitioner nonetheless proves, by clear and convincing evidence, that termination is warranted under section 2511(a) and (b), the parent likewise forfeits this constitutional right. *See generally*, 23 Pa.C.S. § 2511(a)-(b); *Santosky*, 455 U.S. at 760-61, 102 S.Ct. 1388.

The child's intertwined legal interest to have the care, custody and management of her parents is likewise malleable. An expressive child can communicate her preference in favor of termination. As a majority of the Court held in

In re L.B.M., in such circumstances, if the child's dependency GAL agrees that termination is in the child's best interest, that attorney can represent the child in the termination proceeding, as there would be no conflict. *See In re L.B.M.*, 161 A.3d at 184 (Saylor, J., ***1098** concurring); *id.* at 185 (Baer, J., dissenting).

Consistent with *Santosky*, the human experience and our General Assembly's mandate that counsel represent a child in a termination proceeding, in my view we must presume that the child's preference (and thus her legal interest) is to maintain the parent/child relationship. Consistent with our holding in *In re L.B.M.* and the obligation of counsel to represent his or her client's wishes (*see* Pa.R.P.C. 1.2(a)), this presumption is rebuttable but only in the circumstance where the child expresses a contrary position. If a child is non-expressive, or if a child does not or cannot otherwise make a determination as to her view, the presumption remains that the child's legal interest is in opposing termination.

In light of the recurring issues surrounding appointment of counsel for the child in termination proceedings, it is critical that the appointment and all proceedings surrounding it must be on the record. Moreover, the appointment must be made sufficiently in advance of the commencement of the termination proceedings to allow parents the opportunity to raise an objection to an appointment based on a conflict of interest and for the orphans' court to rule on the disqualification motion. In light of these considerations and my view that there is a rebuttable presumption against termination of parental rights, I envision the following sequence of events in the orphans' court.

Pursuant to section 2313(a) of the Adoption Act, upon the filing of a petition to terminate parental rights, the orphans' court must undertake the appointment of counsel to represent the child. 23 Pa.C.S. § 2313(a). If the orphans' court wishes to appoint the child's dependency GAL as counsel to represent the child in the termination proceedings, the GAL must first determine whether the child is expressive, and if so, the child's preferred outcome of the termination proceeding. If the child is non-expressive (or is expressive and opposes termination) and the GAL **agrees** that termination of parental rights is not in the child's best interest, the GAL shall so inform the orphans' court and the other parties. The orphans' court thereafter may enter an order appointing the dependency GAL as counsel for the child in the termination proceeding. Otherwise, the orphans' court must appoint new counsel to represent the child.

If, following the exercise of due diligence, the GAL concludes that the child is expressive and that the child does not oppose termination of her parents' rights, and the GAL likewise concludes that termination is in the child's best interest, then the GAL must advise the orphans' court of this conclusion. The child's parents may object to the appointment of the dependency GAL as the child's counsel based on evidence that the child is either non-expressive or that the expressive child opposes termination. Where it is the parent's view that the child is not expressive or that the child does not favor termination, their objection would be premised on the contention that a conflict of interest exists that precludes the GAL's appointment as counsel for the child.[6] Upon parents' objection, the orphans' court must schedule a hearing to determine whether there is a conflict between the child's best and legal ***1099** interests such that the GAL is precluded from being appointed as the child's counsel in the termination proceeding.

The authority of a trial court judge to decide whether an attorney is laboring under a conflict of interest is well settled:

> A trial judge, in the exercise of his inherent power to control litigation over which he is presiding and his duty to supervise the conduct of lawyers practicing before him so as to prevent gross impropriety, has power to act where the facts warrant it. This supervisory power is analogous to a judge's power to hold in contempt

> of court a lawyer guilty of contumacious conduct in the trial of a case. Where a breach of ethics is made to appear, the relief is usually the granting of a motion to disqualify and remove the offending lawyer[.]

Slater v. Rimar, Inc., 462 Pa. 138, 338 A.2d 584, 589 (1975) (footnotes omitted). If, following a hearing, the orphans' court finds that there is a potential conflict between the GAL's representation of the child's legal interest and the concurrent representation of the child's best interests in the ongoing dependency proceedings, the orphans' court must appoint new counsel to represent the child at the termination hearing. *See Seifert v. Dumatic Indus. Inc.*, 413 Pa. 395, 197 A.2d 454, 455 (1964) ("The test in such cases is not the actuality of conflict but the possibility that conflict may arise."). If, however, the orphans' court is satisfied that the child has expressed her preference in support of termination, the orphans' court may appoint the GAL as the child's counsel in the termination proceeding. Whether it is the GAL or a new attorney, the orphans' court shall thereafter issue an order appointing counsel to represent the child.

Based on my proposed construct, the failure of the parents to object to the appointment of the dependency GAL to represent the child as her counsel prior to the commencement of the termination proceeding would result in waiver of that claim. Nonetheless, I agree with the Majority that in the case at bar, Mother did not waive her argument that the orphans' court improperly failed to appoint counsel to represent the child's legal interests, as the claim currently is not waivable. *See* Majority Op. at 1087.

In the case at bar, it is uncontested that the children (ages two and three at the time of termination) were unable to express their preferred outcome regarding termination. *See* Mother's Brief at 23; KidsVoice's Brief at 14; CYF's Brief at 18. Therefore, I conclude that we must vacate the decrees terminating Mother's parental rights to T.S. and E.S. and remand for a new termination proceeding, prior to which the orphans' court must appoint counsel to represent the children's presumptive interest in opposing termination.

In summary, I agree with the Majority's determination, in Part II of its decision, regarding the question of whether Mother waived the issue of the appointment of separate legal counsel to represent the children in the termination proceeding. Otherwise, for the foregoing reasons, I respectfully dissent.

JUSTICE WECHT, dissenting

By statute, our General Assembly has mandated:

> The court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents....

23 Pa.C.S. § 2313(a). This is neither a guideline nor a suggestion. It is the law.

In view of this unequivocal statutory command, we very recently held: "Section 2313(a) requires the appointment of counsel who serves the child's legal interests in ***1100** contested, involuntary TPR proceedings." *In re Adoption of L.B.M.*, 639 Pa. 428, 161 A.3d 172, 180 (2017). We observed that, "when a child's relationship with his or her birth family could be severed permanently and against the wishes of the parents, the legislature made the policy judgment, as is evident from the plain, unambiguous language of the statute, that a lawyer who represents the child's legal interests, and who is directed by the child, is a necessity." *Id.* [1] We held that "the failure to appoint counsel for a child involved in a contested, involuntary termination of parental rights proceeding is a structural error and is not subject to a harmless error analysis." *Id.* at 183. We remanded for appointment of counsel and for a new TPR proceeding. *Id.*

Because four *L.B.M.* justices agreed that a guardian ad litem ("GAL") who is an attorney can proceed

at a TPR hearing to represent both a child's legal interests and her best interests in the event that those interests do not conflict with one another, today's learned Majority approves the trial court's failure to appoint counsel here. In so doing, the Majority validates the lower courts' violation of Section 2313(a). [2]

I respectfully dissent. [3]

As I observed for the plurality in *L.B.M.*, concerns arise when the dependency GAL serves as legal counsel in the TPR proceeding. *L.B.M.*, 161 A.3d at 181. When the same lawyer acts in the dual capacity of GAL in dependency proceedings and legal counsel in the TPR hearing, role confusion is likely, particularly in circumstances where the child may direct counsel in the TPR hearing, but may not direct the GAL in the dependency proceeding. *See id.* The likelihood that dependency proceedings will continue after the TPR petition is filed (as indeed happened here [4] and in *L.B.M.*, *id.* at 176) renders toggling between the roles of counsel (serving the child's legal interests) and GAL (serving the child's best interests) unsustainable. "To permit the dependency GAL to serve also as the TPR counsel while proceedings in each matter are ongoing increases the risk of confusion and may force the attorney to take conflicting stances in the proceedings depending on the role being performed at the time." *Id.* Section 2313(a) mandates an independent attorney; the GAL cannot serve both functions. *Id.* at 181 n.14. The Majority's desire to foster "continuity of representation," Maj. Op. at 1084, does not ameliorate this "two-hat" problem. Nor does it permit us to fashion a judicial nullification of the General Assembly's mandate of legal counsel. For these reasons, I maintain that the attorney-GAL cannot represent the child's legal interests at a contested TPR hearing without running afoul of Section 2313(a).

***1101** Further, as we held in *L.B.M.*, the child's best interests are for the trial court to determine. *L.B.M.*, 161 A.3d at 174. Section 2313(a) reflects the General Assembly's policy determination that counsel is required to advocate on behalf of the child's legal interests. Those legal interests may align with or diverge from the child's best interests. Those legal interests may also align with termination or with preservation of the family unit. Because Section 2313(a) counsel represents solely the child's legal interests, I do not support a presumption that a pre-verbal child's legal interests always dovetail with the child's best interests. Nor do I support a presumption that a pre-verbal child's legal interests always equate with preservation of the putative familial bond. [5] The Majority sufficiently refutes Mother's position that our law supports a presumption of preservation. *See* Maj. Op. at 1092. Instead of leaning on a presumption, Section 2313(a) counsel must make an independent assessment of the child's legal interests. If the child is pre-verbal, then counsel must make use of whatever means are available and appropriate to make that assessment, including, but not limited to, observation of the child with the parents and foster parents and interviews of those involved in the child's case. [6]

I recognize that a majority of Justices in *L.B.M.* nonetheless would allow an attorney-GAL to wear both hats at a contested TPR hearing, albeit only in the event that the child's best interests and legal interests are not in conflict. Still, today's Majority takes us further afield. The Majority's approach ensures that any such conflicts will likely be obscured and overlooked, and effectively validates *post hoc* justifications for trial court violations of Section 2313(a)'s commands. At best, today's Majority has failed to provide adequate guidance for determining whether a conflict in fact exists.

In the case at bar, because the children were very young and thus unable to articulate their wishes, the Majority concludes that "there can be no conflict" between the children's best interests and legal interests. Maj. Op. at 1092. Thus, holds the Majority, Section 2313(a) is "satisfied," *id.*, because the attorney-GAL could represent the children in the contested TPR hearing. The Majority ventures that a child may be able to express "opinions which are entitled to weight in legal proceedings" by the age of "five or six." *Id.* at 1089 n.17 (*quoting* Pa.R.P.C. 1.14, Explanatory Comment 1). Quite apart from the issue of whether an explanatory comment to an attorney conduct rule can afford a

precedential guide for our courts,[7] the Majority's discussion *1102 effectively begs the question: no standard is provided to guide trial judges.

The determination of whether a particular child can or cannot express her interests or desires must be made by the trial court. Often, this will be a highly fact-specific inquiry based not only upon the child's age, but also upon her relative abilities or disabilities, among many other factors. Further, legal counsel often may be able to glean information about even a pre-verbal child's wishes by observing interactions between the child and parent. This Court cannot create and pronounce a bright-line rule that children of a specific age are able or unable to express their legal interests. The trial court, which can observe the children closely and hear testimony about their particular abilities and circumstances, must do so.[8]

Who makes the decision as to whether a conflict exists between legal interests and best interests? One of the *L.B.M.* dissenters went so far as to suggest that the attorney-GAL herself should be authorized to make that decision, on the basis of her own assessment of professional conduct standards.[9] I disagree. The General Assembly *1103 mandated that, in a contested TPR hearing, the court must appoint counsel for the child. The matter is not up for debate, much less for judgment call by an individual attorney-GAL. At a minimum, it is the trial court's duty to determine, following argument and likely following hearing,[10] whether the attorney-GAL can continue as legal counsel or whether a new attorney must be appointed. Any other procedure would pay mere lip service to the child's right to counsel, and would work a judicial nullification of that right.

To be sure, the attorney-GAL's opinion as to the existence or non-existence of a conflict between the child's legal interests and best interests is relevant and material to the court's decision. But, before making its determination, the court must hear from the other parties as well. As today's Majority concedes:

> The statutory right under Section 2313(a) belongs to the child.... There was no attorney representing solely the children's legal interests who could have raised their rights in the trial court, and the children plainly could not have done so themselves.

Maj. Op. at 1087 (citations omitted). That there will be no one who solely represents the child's legal interests at the time that the trial court appoints Section 2313(a) counsel is precisely why the court must itself determine whether there is a conflict. This analysis may not be delegated or off-loaded to the attorney-GAL.

Following argument (and, preferably, hearing) on the conflict inquiry, the trial court must ensure that the child's right to counsel is protected and must remind all involved that, if the attorney-GAL is permitted to serve as the Section 2313(a) legal counsel, her role has changed from representing best interests to representing legal interests. Additionally, the entry of an appointment order is necessary at the start of the TPR proceedings to drive home the change in role and to provide a reviewing court with the certainty that the child's statutory right to counsel was fully vindicated.[11] I emphasize that it is undisputed that no such order was ever entered by the trial court in this case.

Further complicating the matter is the issue of how these cases should be analyzed on appeal. In *L.B.M.*, a majority of this Court held that the failure to appoint counsel for a child in a contested TPR hearing was a structural error. *L.B.M.*, 161 A.3d at 183. Section 2313(a) mandates that counsel be appointed, a circumstance which ensures that all parties, including the child, will have a full and fair opportunity to participate in a contested TPR hearing. "The denial of mandated counsel compromises the framework of the proceedings and constitutes a structural error." *Id.*

Today's Majority acknowledges this holding, but determines that, because an attorney-GAL representing a child's best interests purportedly satisfies Section 2313(a) when the child cannot verbalize a preference, there was no error in

permitting the attorney-GAL here to continue to *1104 represent the children in the TPR proceedings. The Majority proceeds to conclude that, because there was no error, there also could be no structural error. Maj. Op. at 1092. By declaring *post hoc* that Section 2313(a) was not infringed, the Majority puts the proverbial bunny in the hat. I do not believe that this *ex post facto* validation suffices. Because the trial court erred in failing to appoint counsel, and in failing to inquire of any potential conflict, the Majority errs in allowing the disposition below to stand untroubled.

The infirmities in the Majority's perspective are illustrated by the lower courts' application of *L.B.M.* to TPR cases. Unfortunately, it appears that courts are taking a harmless error approach: determining retrospectively that there is no record evidence of conflict between the child's best interests and legal interests, and then proceeding on a bootstrap basis to render an after-the-fact finding that there was no structural error; all this, notwithstanding that there was no opportunity at trial to develop a record of any such conflict or even to provide argument on the question. It is for these reasons that I disagree with the Majority's tacit endorsement of *In re D.L.B.*, 166 A.3d 322 (Pa. Super. 2017).

In *D.L.B.*, a Superior Court panel reviewed a challenge to the termination of the father's parental rights. After reciting the trial court's findings regarding the father's failure to meet his goals and participate fully in services provided to him, the Superior Court reviewed and analyzed the trial court's basis for terminating the father's parental rights. *Id.* at 326-29. After determining that the trial court had sufficient grounds for termination, the Superior Court addressed the father's challenge that the trial court had failed to appoint legal counsel for the child, in violation of *L.B.M.* The Superior Court reasoned that four Justices in *L.B.M.* would have permitted the GAL to represent the child in the TPR hearing when the child's best interests and legal interests did not conflict. The entire extent of the Superior Court's analysis of that conflict inquiry was simply the following: "As our decision discusses, [the child's] best interests and legal interests were unquestionably well represented by [the GAL] in this case and such interests were never in conflict." *Id.* at 329. The Superior Court never identified, much less discussed, the child's legal interests. This type of *post hoc* ratification of the GAL's continued representation of the child in a TPR hearing is not in accord with *L.B.M.*'s holding regarding structural error, nor does it satisfy the statutory requirement of counsel.

It appears that lower courts are concluding solely that, if there was sufficient evidence to terminate parental rights, there was necessarily no conflict between the child's best interests and legal interests and, *ipso facto*, no error. This is a textbook harmless error analysis, and it patently defies *L.B.M.*'s structural error holding. [12]

Having spent several years presiding in juvenile cases, I recognize and appreciate the importance of delivering permanency to the children involved in these contested TPR proceedings and the value of doing so without undue delay. Nonetheless, in our desire to do right by these children, we cannot overlook or override the right to counsel that the General Assembly has bestowed upon them. By providing *post* *1105 *hoc* justification for the failure to appoint independent counsel, that is exactly what today's decision does.

All Citations

192 A.3d 1080

Footnotes

1 That provision states:

> **(a) Child.**—The court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents. The court may appoint counsel or a guardian ad litem to represent any child who has not reached the age of 18 years and is subject to any other proceeding under this part whenever it is in the best interests of the child. No attorney or law firm shall represent both the child and the adopting parent or parents.

23 Pa.C.S. § 2313(a).

2 The difference between legal interests and best interests is summarized in a comment to a rule governing the GAL's duties in dependency matters:

> "Legal interests" denotes that an attorney is to express the child's wishes to the court regardless of whether the attorney agrees with the child's recommendation. "Best interests" denotes that a guardian *ad litem* is to express what the guardian *ad litem* believes is best for the child's care, protection, safety, and wholesome physical and mental development regardless of whether the child agrees.

Pa.R.J.C.P. 1154, cmt., *quoted in L.B.M.*, 639 Pa. at 431 n.2, 161 A.3d at 174 n.2.

3 *See id.* at 447-48, 161 A.3d at 184 (Saylor, C.J., concurring, joined by Todd, J.) ("[T]he propriety of permitting the same individual to serve in both capacities should be determined on a case-by-case basis, subject to the familiar and well-settled conflict of interest analysis."); *id.* at 455, 161 A.3d at 188-89 (Baer, J., dissenting, joined by Mundy, J.) ("Section 2313(a), in my view, does not mandate the appointment of counsel distinct from the GAL Attorney serving in the same dual capacity in the dependency proceedings, absent a conflict of interest between the child's best interests and legal interests."); *id.* at 459, 161 A.3d at 191 (Mundy, J., dissenting, joined by Baer, J.) (concluding that, per the applicable court rules, an attorney GAL can represent the best interests and legal interests unless there is a conflict of interest).

4 Both children had special needs. T.S. had speech delays and severe tantrums, and E.S. had feeding problems. *See id.* at 21.

5 Separately, Mother was referred to ACHIEVA due to an intellectual disability. According to the record, the ACHIEVA program in which Mother took part supports parents with an IQ score of 70 or below. *See* N.T., Feb. 13, 2017, at 33.

6 The petition also sought termination of the biological father's parental rights. His rights were terminated and he has not appealed. Only the mother's appeal is before us.

7 The bond with the foster parents was corroborated by the CYF caseworker. *See id.* at 22. Still, the ACHIEVA employee did report observing affection between Mother and her children during at least some of the visits she supervised. *See id.* at 40.

8 That provision states, in relevant part:

> **(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:
>
> * * *
>
> (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.
>
> * * *
>
> (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.

23 Pa.C.S. § 2511(a)(2), (5), (8).

9 On May 23, 2017, we filed revised opinions in *L.B.M.* clarifying which parts of the lead opinion reflected the views of a majority of the Court. *See L.B.M.*, 639 Pa. at 432 n.1, 161 A.3d at 174 n.1. The timing of those clarifications in relation to the parties' Superior Court filings is not material to this appeal.

10 In her Rule 1925(b) statement, Mother had only challenged the trial court's ruling that that the children's needs and welfare would be best served, for purposes of Section 2511(b), by terminating her rights. *See* 23 Pa.C.S. § 2511(b).

11 *D.L.B.* was decided in mid-June 2017, after the Superior Court briefing schedule had closed. The intermediate court granted the parties' request to file supplemental briefs addressing the impact of *D.L.B* on the present case.

12 The panel separately held that the county court did not err in concluding that termination of her parental rights would best serve the children's needs and welfare pursuant to Section 2511 of the Adoption Act. *See id.* at 8-9, 2017 WL 3669504, at *4. Mother has not challenged that aspect of the Superior Court's decision.

13 The GAL filed her brief on behalf of the children inasmuch as she has served as their counsel throughout these proceedings. In light of the substantive issue in this appeal, however, and for the sake of clarity, where the GAL's advocacy is concerned we depart from our usual custom of attributing arguments to the party. *Cf. Commonwealth v. Wright*, 621 Pa. 446, 456 & n.9, 78 A.3d 1070, 1076 & n.9 (2013) (citing cases and departing from such custom where counsel's and the party's positions were at odds).

14 A joint amicus brief supporting Mother's position was submitted by Professor Kara R. Finck of the University of Pennsylvania Law School, together with the following organizations: Juvenile Law Center; American Civil Liberties Union of Pennsylvania; Community Justice Project; Community Legal Services, Inc.; National Association of Counsel for Children; National Coalition for a Civil Right to Counsel; and Pennsylvania Legal Aid Network (collectively, the "Amici for Reversal").

A joint amicus brief supporting CYF and the GAL was submitted by Professor Lucy Johnston-Walsh of the Penn State Dickinson School of Law, together with the following organizations: Support Center for Child Advocates; Defender Association of Philadelphia; and Dauphin County Social Services for Children & Youth (collectively, the "Amici for Affirmance").

15 The GAL highlights Justice Baer's observations that termination proceedings often arise from dependency proceedings, and continuity of representation can be beneficial. *See L.B.M.*, 639 Pa. at 454, 161 A.3d at 188 & n.6 (Baer, J., dissenting). She proffers that, where no conflict exists, requiring two attorneys to represent the child would impose unnecessary financial burdens on public agencies. *See* Brief for Appellees at 25; *accord* Brief for Amici for Affirmance at 22 ("[T]he Pennsylvania counties that would be asked to pay for separate Section-2313(a) lawyers are and are likely to remain in difficult financial condition with a great many critical needs vying for terribly limited resources. It is one thing to impose expense on those budgets ... when there is a conflict; it is quite another to impose that expense when neither the law nor the facts ... suggest such a conflict."); *cf. id.* at 17-18 (asserting that since *L.B.M.* was decided, amicus Defender Association has litigated approximately 200 TPR petitions where the court appointed separate counsel, and in virtually every case there has been no conflict between the GAL's and counsel's respective positions).

16 We have reversed the order of Mother's second and third arguments for ease of discussion.

17 Conversely, Pennsylvania's Rules of Professional Conduct refer to "children as young as five or six years of age ... having opinions which are entitled to weight in legal proceedings concerning their custody." Pa.R.P.C. 1.14, Explanatory Comment 1.

18 The third sentence of paragraph (b)(9) – which provides that no conflict of interest arises from a difference between the child's wishes and the GAL's needs-and-safety recommendation as to the child's placement and services – has been suspended insofar as it "is inconsistent with [Juvenile Court] Rules 1151 and 1154, which allows for appointment of separate legal counsel and a [GAL] when the [GAL] determines there is a conflict of interest between the child's legal interest and best interest." Pa.R.J.C.P. 1800(3); *see L.B.M.*, 639 Pa. at 433 n.4, 161 A.3d at 175 n.4.

19 Mother observes there was no order appointing the dependency GAL as GAL for the termination proceedings. *See* Reply Brief for Appellant at 1. However, she concedes that Attorney Moore "verbally" entered her appearance as GAL at the time of the hearing. Brief for Appellant at 20. She has also explained that, as a matter of local custom in Allegheny County, the GAL appointed for dependency proceedings "automatically" represents the same dependent child in any follow-on involuntary TPR proceedings. *In re T.S.*, Nos. 364 & 365 WDA 2017, 175 A.3d 1118 (Pa. Super.), Appellant's Reply to Supplemental Argument at 5 n.1 (filed July 20, 2017).

It would be a better practice for the court to place an order on the record formalizing the GAL's role for termination purposes. *See L.B.M.*, 639 Pa. at 454, 161 A.3d at 188 (Baer, J., dissenting). Nevertheless, we are disinclined to elevate form over substance. *See id.*; *cf. Commonwealth v. D'Amato*, 579 Pa. 490, 517-18, 856 A.2d 806, 822 (2004) (holding that, where a lawyer who had not entered his appearance pursuant to

the criminal procedural rules effectively represented a defendant during a critical stage of trial, the technical defect did not deprive the defendant of his right to counsel).

20 Pennsylvania's proceedings satisfy due process as set forth in *Santosky*, as the grounds for termination must be proved by clear and convincing evidence. *See In re T.R.*, 502 Pa. 165, 166-68, 465 A.2d 642, 642-43 (1983); *In re T.S.M.*, 620 Pa. 602, 628, 71 A.3d 251, 267 (2013).

1 I would not hold the preferences of very young or pre-verbal children, either in favor of termination of parental rights or opposed to it, may never be ascertained.

1 For purposes of this Concurring and Dissenting Opinion, I refer to such child as a "non-expressive" child.

2 The Majority further suggests that a majority of Justices in the responsive posture in *In re L.B.M.* already held that "where a child is too young to express a preference, it would be appropriate for the GAL to represent the child's best and legal interests simultaneously," stating that it was now "expressly reaffirm[ing]" this determination here. Majority Op. at 1088 (citing *In re L.B.M.*, 161 A.3d at 184 (Saylor, C.J., joined by Todd, J., concurring); *id.* at 192 (Mundy, J., joined by Baer, J., dissenting). Respectfully, we cannot reaffirm a statement that was never affirmed as a holding. As the Majority recognizes, "that circumstance was not before the *L.B.M.* Court," as *L.B.M.* involved an expressive child whose legal interest was contrary to the position represented by his GAL in the termination proceeding. *See In re L.B.M.*, 161 A.3d at 175-77. Clearly, those statements were pure dicta, which "has no precedential value." *Castellani v. Scranton Times, L.P.*, 633 Pa. 230, 124 A.3d 1229, 1243 n.11 (2015). This case is the first case that requires the Court to decide, based on developed advocacy, whether there is a legal interest recognized in a non-expressive child.

3 I also find it significant that when counsel (and not a GAL) represents a child in a dependency matter, the Juvenile Act makes no provision for counsel to represent the child's best interest or to limit the representation of the child based on what counsel can "ascertain" from the child. *See* 42 Pa.C.S. § 6337.1(a); Pa.R.J.C.P. 1151. Rather, as in section 2313 of the Adoption Act, where "counsel" represents a child in a dependency proceeding, the attorney solely represents the child's legal interests, without exception. 42 Pa.C.S. § 6337.1(a); Pa.R.J.C.P. 1154.

4 The legislative session notes from the consideration of House Bill 213 (which contained the original version of section 2313, *see* 1980, Oct. 15, P.L. 934, No. 163, § 1, effective Jan. 1, 1981) by the General Assembly support my conclusion here. At one point during consideration of the bill by the House, one state representative proposed an amendment thereto that would strike the requirement for the appointment of an attorney to represent the child in contested termination proceedings. *See* H.B. 213, 48 Pa. Legis. J. – House at 1582 (June 16, 1980) (amendment proposed by Representative Dorr). A majority of the House opposed the amendment, however, with the proponent of the original bill, Representative J. Michael Schweder, explaining, "One of the most important parts or tenets of this current legislation is that for the first time we are going to **make the rights of the child equal** to those of the natural parents and to the adoptive parents, and one of the necessary requirements for doing that is to provide legal representation for the child in those proceedings." *Id.* (statement of Representative Schweder) (emphasis added).

5 Justice Wecht takes no position as to whether a non-expressive child's legal interests are equivalent to the child's best interests. *See* Dissenting Op. (Wecht, J.) at 1100–01. However, this is the precise issue that is before this Court in this matter, as all participants are in agreement that the children are not capable of expressing a desired outcome. *See infra*, p. 1099. Justice Wecht further writes to advance a protocol where the orphans' court is tasked with making the determination, in all cases (including this one), whether the child is expressive of her wishes in the termination proceeding. He does not state, one way or the other, what the orphans' court is to do if it agrees with all of the participants in this case that the children are incapable of expressing a preference.

6 Dependency proceedings continue at the time of the termination hearing and thereafter. Consistent with our Rules of Professional Conduct, an attorney cannot advocate in support of adoption in the dependency proceedings and simultaneously represent the child in opposition to termination in the termination proceeding, as the attorney's representation in the dependency proceeding would be directly adverse to the child's interest in the termination proceeding. *See* Pa.R.P.C. 1.7(a)(1).

1 We defined the terms: "the law acknowledges two separate and distinct categories of interest: a child's legal interests, which are synonymous with the child's preferred outcome, and a child's best interests, which the trial court must determine." *L.B.M.*, 161 A.3d at 174 (citations omitted). Depending on the case and upon the child involved, these interests can diverge.

2 *See also In re D.L.B.*, 166 A.3d 322 (Pa. Super. 2017). I discuss *D.L.B.* and its jurisprudential infirmity *infra.*

3 I concur with the Majority on two points. First, I agree that the waiver arguments advanced by Allegheny County's Office of Children, Youth and Families and by the GAL are unavailing. *See* Maj. Op. at 1086–87. Second, I agree that T.H.-H. ("Mother")'s contention that a presumption should exist to the effect that young, pre-verbal children's legal interests equate to preservation of a family bond is both unsupported in law and unnecessary. *See id.* at 1090–92.

4 After the TPR petition in this case was filed on November 9, 2016, the trial court held a permanency review hearing in the dependency proceeding on November 29, 2016, whereupon it scheduled another permanency review hearing for March 28, 2017.

5 In general, county agencies do not petition for termination of parental rights unless and until the child has been dependent for a significant amount of time. *See generally* 42 Pa.C.S. § 6351 (requiring the trial court to determine whether the agency had filed for termination of parental rights when the child has been in placement for fifteen of the last 22 months). During that time, the agency, the court, and the parents work toward reunification. Only when it appears that those efforts are in vain does the agency petition to terminate a parent's rights. While assessment of a pre-verbal child's legal interest must include respect for and consideration of the value of retaining the familial connection, there is often in practice very little of a familial bond by the time a case reaches a TPR hearing.

6 Contrary to the assertion in the Concurring and Dissenting Opinion, *see* Conc. & Diss. Op. at 1097 n.5, while I do not support a presumption regarding a non-verbal child's legal interests, I do state that Section 2313(a) counsel is tasked to determine the child's legal interests and the trial court must determine the child's best interests. These are separate inquiries and separate obligations.

7 *See Womer v. Hilliker*, 589 Pa. 256, 908 A.2d 269, 279 (2006) (noting that an explanatory comment is not part of a rule); *Estate of Paterno v. Nat'l Collegiate Athletic Ass'n (NCAA)*, 2017 PA Super 247, 168 A.3d 187, 200 n.13 (2017) (stating that "explanatory comments express the opinion of the rules drafting committee and therefore are not binding").

8 Justice Donohue interprets my position as advancing a protocol for determining whether a child is capable of expressing his or her wishes, but not indicating what the court is to do if it finds that the child is non-expressive. *See* Conc. & Diss. Op. at 1097 n.5. This is incorrect because I only offer this protocol as a comment on the Majority's position that the best interests equate to legal interests when the child is pre-verbal.

As I have explained here and in *L.B.M.*, the trial court's task is to determine the child's best interests in deciding whether to terminate parental rights while Section 2313(a) counsel represents only the child's legal interests. Because I would not permit the attorney-GAL to be Section 2313(a) counsel, there would be no need to determine whether there is a conflict of interest between legal interests and best interests. Also, because I would not create a presumption in favor of equating a child's best interest to that child's legal interests when the child is pre-verbal, there would be no need for the court to determine if the child is pre-verbal. Instead, as I stated above, *see supra* at 1101, Section 2313(a) counsel would make an assessment of legal interests using available means.

The only reason that I discuss any protocol, and possibly the reason for Justice Donohue's misstatement of my position, is because a majority of the Court would permit the attorney-GAL to represent the child's legal interests (absent a conflict with best interests). The Court equates those legal interests to best interests when a child is pre-verbal. Hence, I am compelled to work within that framework. So constrained, I suggest the above protocol for determining whether a child is unable to express his or her interests and a protocol for determining whether there is a conflict between those interests. Both of these would offer more protection of the child's statutory right to legal counsel.

9 See *L.B.M.*, 161 A.3d at 188 (Baer, J. dissenting) (citing Pa.R.P.C. 1.7). Rule 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

Pa.R.P.C. 1.7.

10 In many cases, a factual record will need to be developed, as (for example) when there is disagreement about whether a child is capable of expressing his or her legal interests.

11 For these reasons, I note my disapproval of the practice described in this case regarding local custom, whereby the dependency GAL automatically shifts to representing the child in the TPR proceeding. *See* Maj. Op. at 1090 n. 19. Such a practice gives short shift to the child's statutory right to legal counsel, and, indeed, flouts the legislative mandate.

12 To be sure, I do not maintain that this happens in every (or even in a majority of) cases. For example, recently, the Superior Court vacated a decree terminating parental rights where the attorney-GAL did not meet with the six-year-old child, did not attempt to ascertain that child's legal interests and, instead, spoke only to the child's best interests at the TPR hearing. *In re Adoption of T.M.L.M.*, 184 A.3d 585 (Pa. Super. 2018). Still, *D.L.B.* demonstrates the need for this Court to clarify governing principles.

End of Document

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

IN RE T.S. AND E.S., MINORS	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: T.H.-H., NATURAL MOTHER	No. 364 WDA 2017

Appeal from the Orders Dated February 3, 2017
In the Court of Common Pleas of Allegheny County
Orphans' Court at No(s): CP-02-AP-208-2016
CP-02-AP-209-2016

IN RE: T.S., E.S., MINORS	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: T.H-.H., NATURAL MOTHER	No. 365 WDA 2017

Appeal from the Order Entered February 3, 2017
In the Court of Common Pleas of Allegheny County
Orphans' Court at No(s): CP-02-AP-0000208-2016
CP-02-AP-0000209-2016

BEFORE: STABILE, SOLANO, and FITZGERALD, JJ.*

MEMORANDUM BY SOLANO, J.: **FILED AUGUST 25, 2017**

Appellant, T.H.-H. ("Mother"), appeals the order that involuntarily terminated her parental rights to her children, T.S. and E.S. (the "Children"),

* Former Justice specially assigned to the Superior Court.

born in June 2013 and August 2014, respectively. We affirm the order on the basis of the trial court's opinion.

In its opinion, entered April 5, 2017, the trial court fully and correctly set forth the relevant facts and procedural history of this case. ***See*** Trial Ct. Op. at 2-6. The Allegheny County Office of Children, Youth and Families ("CYF") became familiar with Mother in August 2014 when E.S. was born. Mother had admitted to marijuana use while pregnant with E.S., and Mother tested positive for marijuana after the birth of E.S. CYF offered in-home services to assist Mother with her parenting and substance abuse issues. Mother continued to use marijuana, admitted to smoking it in the presence of the Children, and exhibited minimal parenting skills. As a result, an Emergency Custody Authorization was issued on July 2, 2015, and the Children were removed from Mother's care. The Children were adjudicated dependent on July 14, 2015. On September 15, 2015, the Children were placed in a foster home, where they have remained to date.

On November 9, 2016, CYF filed a petition for involuntary termination of Mother's parental rights to the Children. The trial court held a hearing on that petition on February 3, 2017. On that same day, it entered its order terminating Mother's parental rights to the Children, pursuant to 23 Pa.C.S. § 2511(a)(2), (5), (8) and (b).[1] On March 2, 2017, Mother filed timely

[1] S.T.F.S. was identified as the Father of the Children. On November 9, 2016, CYF also filed a petition for involuntary termination of Father's
(Footnote Continued Next Page)

separate appeals with respect to her rights regarding T.S. and E.S. We consolidated those appeals *sua sponte*.

On appeal, Mother raises the following question:

> Did the trial court abuse its discretion and/or err as a matter of law in concluding that termination of Appellant's parental rights would serve the needs and welfare of the Children pursuant to 23 Pa.C.S. § 2511(b)?

Mother's Brief at 7.

In the argument section of her brief, Mother raises for the first time an issue not presented in the trial court or in her Statement of Errors under Appellate Rule 1925(b): that the Children were entitled to be represented by appointed legal counsel, separate from the attorney guardian *ad litem*, pursuant to ***In re L.B.M.***, 161 A.3d 172, 183 (Pa. 2017).

In ***L.B.M.***, a mother's parental rights to her two children were terminated by the trial court. At trial, the mother filed a motion requesting the appointment of independent counsel for the children. In the motion, the mother cited 23 Pa.C.S. § 2313(a),[2] and averred that the guardian *ad litem*'s

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parental rights. The trial court terminated Father's parental rights to the Children pursuant to 23 Pa.C.S. § 2511(a)(1), (2), (5), (8) and (b) in its February 3, 2017 order. Father has not appealed that aspect of the trial court's order.

[2] Section 2313(a) states:

> The court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents. The court may appoint counsel or a guardian ad litem to represent any child who has

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position "may be adverse to the [children's] position." ***In re L.B.M.***, 161 A.3d at 176. After the trial court denied the mother's motion, the mother appealed and this Court affirmed. The Supreme Court of Pennsylvania reversed and remanded to this Court, holding that the failure to appoint counsel for a child in a contested, involuntary termination of parental rights proceeding was a structural error. ***Id.*** at 183.

Here, Mother claims that the trial court's failure to appoint independent counsel was a structural error in the proceedings and that a remand for a new trial following the appointment of counsel for the Children therefore is required. Mother contends that her failure to raise this issue before now should be excused because the Supreme Court had yet to rule in ***L.B.M.*** at the time of trial and when Mother filed her Rule 1925(b) Statement.

On June 23, 2017, the guardian *ad litem* for the Children filed an application for leave to file a supplemental brief pursuant to Pa.R.A.P. 2501(a), which this Court granted. In the supplemental brief, the guardian *ad litem* responded to Mother's appointment-of-counsel issue and argued that, under this Court's interpretation of ***L.B.M.*** in ***In re D.L.B.***, ___ A.3d

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> not reached the age of 18 years and is subject to any other proceeding under this part whenever it is in the best interests of the child. No attorney or law firm shall represent both the child and the adopting parent or parents.

23 Pa.C.S. § 2313(a).

___, 2017 WL 2590893 at *5-6 (Pa. Super. 2017), a guardian *ad litem* may serve as legal counsel for a child in an involuntary termination proceeding so long as the child's legal and best interests are not in conflict. ***D.L.B.***, 2017 WL 2590893 at *5. The guardian *ad litem* added that no conflict has been identified here.

In her reply brief, Mother does not argue that the Children's legal and best interests were in conflict. Instead, Mother argues that this Court in ***D.L.B.*** misapprehended the Supreme Court's holding in ***L.B.M.***, and that this Court should interpret ***L.B.M.*** to always require the trial court in an involuntary termination of parental rights proceeding to appoint independent legal counsel for the children.

We respectfully disagree with Mother: a remand is inappropriate in light of our holding in ***D.L.B.***, in which we held that ***L.B.M.*** does not require appointment of independent legal counsel for a child in an involuntary termination proceeding unless the child's legal and best interests are in conflict. ***D.L.B.***, 2017 WL 2590893 at *5. Although Mother contends that ***D.L.B.*** was incorrectly decided, this panel is bound by that decision. Mother does not argue that there was a divergence of the Children's legal and best interests in this case. Absent any indication of such a conflict, the court's appointment of the guardian *ad litem* to represent the Children was appropriate.

Turning to Mother's challenge to the trial court's termination of her parental rights, our standard of review is as follows:

> In an appeal from an order terminating parental rights, our scope of review is comprehensive: we consider all the evidence presented as well as the trial court's factual findings and legal conclusions. However, our standard of review is narrow: we will reverse the trial court's order only if we conclude that the trial court abused its discretion, made an error of law, or lacked competent evidence to support its findings. The trial judge's decision is entitled to the same deference as a jury verdict.

In re L.M., 923 A.2d 505, 511 (Pa. Super. 2007) (citations omitted).

Further, we have stated:

> Where the hearing court's findings are supported by competent evidence of record, we must affirm the hearing court even though the record could support an opposite result.
>
> We are bound by the findings of the trial court which have adequate support in the record so long as the findings do not evidence capricious disregard for competent and credible evidence. The trial court is free to believe all, part, or none of the evidence presented, and is likewise free to make all credibility determinations and resolve conflicts in the evidence. Though we are not bound by the trial court's inferences and deductions, we may reject its conclusions only if they involve errors of law or are clearly unreasonable in light of the trial court's sustainable findings.

In re M.G., 855 A.2d 68, 73-74 (Pa. Super. 2004) (citations omitted).

The trial court terminated Mother's parental rights pursuant to 23 Pa. C.S. § 2511(a)(2), (5), (8) and (b). On appeal, Mother concedes that CYF established clear and convincing grounds for termination of her parental rights pursuant to 23 Pa.C.S. § 2511(a)(2), (5), (8); however, Mother contends that the trial court abused its discretion and erred as a matter of

law in concluding that termination of her parental rights would best serve the needs and welfare of the Children pursuant to 23 Pa.C.S. § 2511(b). Mother's Brief at 12. Specifically, Mother asserts that the trial court focused on her faults as a parent, rather than the welfare of the Children, in concluding that Mother's parental rights should be terminated. ***Id.*** at 15. Mother further argues that the trial court failed to address the effect that termination of her parental rights would have on the Children. ***See id.***

Because Mother does not contest proof of grounds for termination of her rights under Section 2511(a), we shall review the subject orders with respect to Section 2511(b) only. ***See Nicholas v. Hoffman***, 158 A.3d 675, 688 n.17 (Pa. Super. 2017) (issue not raised in Statement of Questions Involved is not before us); ***Krebs v. United Refining Co. of Pa.***, 893 A.2d 776, 797 (Pa. Super. 2006) (stating that any issue not set forth in or suggested by an appellate brief's Statement of Questions Involved is deemed waived under Pa.R.A.P. 2116(a)). Section 2511(b) provides:

> The court in terminating the rights of a parent shall give primary consideration to the developmental, physical and emotional needs and welfare of the child. The rights of a parent shall not be terminated solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent. With respect to any petition filed pursuant to subsection (a)(1), (6) or (8), the court shall not consider any efforts by the parent to remedy the conditions described therein which are first initiated subsequent to the giving of notice of the filing of the petition.

23 Pa.C.S. § 2511(b). Under this provision, the trial court was required to "give primary consideration to the developmental, physical and emotional

needs and welfare of the child." This Court has explained that, "[i]ntangibles such as love, comfort, security, and stability are involved in the inquiry into [these] needs." ***In re C.M.S.***, 884 A.2d 1284, 1287 (Pa. Super. 2005) (citation omitted), ***appeal denied***, 897 A.2d 1183 (Pa. 2006).

In assessing whether to terminate parental rights pursuant to Section 2511(b), "the trial court must take into account whether a natural parental bond exists between child and parents." ***In re C.S.***, 761 A.2d 1197, 1202 (Pa. Super. 2000) (*en banc*). However, the mere existence of an emotional bond does not preclude termination of parental rights. ***In re E.M.***, 620 A.2d 481, 482 (Pa. 1993). Rather, the court must determine whether the bond exists to such an extent that to sever it "would destroy an existing, necessary and beneficial relationship." ***In re C.S.***, 761 A.2d at 1202. "In cases where there is no evidence of any bond between the parent and child, it is reasonable to infer that no bond exists. The extent of any bond analysis, therefore, necessarily depends on the circumstances of the particular case." ***In re K.Z.S.***, 946 A.2d 753, 762-63 (Pa. Super. 2008) (citation omitted).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Paul E. Cozza, we conclude that there is no merit to the issue Mother has raised in her Rule 1925(b) Statement. The trial court's opinion properly disposes of the question presented. ***See*** Trial Ct. Op. at 6-9 (finding that (1) Mother

has never been able to make the progress necessary for the Children to be returned to her care, (2) Mother has not made it a priority to visit the Children during their 17 months in foster care and has been unable to engage the Children or keep them safe during the times that she has visited, (3) the court-appointed psychologist reported that the Children are largely indifferent to Mother and have no bond with her, and (4) termination of Mother's parental rights meets the needs and welfare of the Children). Accordingly, we affirm on the basis of the trial court's opinion. The parties are instructed to include the attached redacted trial court opinion to any filings referencing this Court's decision.

Orders affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/25/2017

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

IN THE INTEREST OF T.S.,
E.S.,
Minor children

APPEAL OF: T.H.H.,
Natural mother

CHILDREN'S FAST TRACK APPEAL

OPINION

Docket No.: AP-208-2016, AP-209-2016
364 WDA 2017, 365 WDA 2017

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

IN THE INTEREST OF: T.S., E.S., Minor children APPEAL OF: T.H.H., Natural mother	**CHILDREN'S FAST TRACK APPEAL** Docket No.: AP-208-2016 & AP-209-2016 364 WDA 2017, 365 WDA 2017

OPINION

Procedural History:

On February 3rd, 2017 this Court granted Children Youth and Families' (hereinafter OCYF) Petition to Terminate the Parental Rights of T.H.H.. (hereinafter Mother) pursuant to 23 Pa. C.S.A. § 2511(a)(2), (5), (8) and (b). Mother filed a timely appeal as to the Court's finding that termination would best serve the needs and welfare of the child pursuant to 23 Pa.C.S.A. §2511 (b). For the reasons set forth below, the order of this Court should be affirmed.

History:

T.S. was born on June 24th, 2013 and E.S. was born on August 17th, 2014. OFYC received a referral shortly after E.S.'s birth after Mother tested positive for marijuana at her birth. Mother reported to smoking marijuana throughout her pregnancy to help with nausea and to improve her appetite. The Father of

both children was identified as T.S.. OCYF did not file a Petition for Dependency at that time and instead implemented In-Home services, referred Mother to the POWER program, and attempted to assist Mother with a mental health evaluation. Mother attended a POWER evaluation in February of 2015 but never followed through with any drug and alcohol treatment [1]. Mother also continuously failed to take E.S. to her scheduled medical appointments. The caseworker had concerns about her parenting abilities as Mother often left the children in a bedroom with the TV blaring. On July 2nd, 2015, the caseworker went to the family home for an unannounced visit and she found Mother to be under the influence of marijuana. She also noted that the home again smelled like marijuana. The caseworker sought and obtained an Emergency Custody Authorization and the children were removed that day. The children were adjudicated dependent on July 14th, 2015. Mother was ordered to engage in dual diagnosis treatment, comply with random urine screens, and to attend a parenting program. Mother was permitted visitation with the children twice a week supervised at the OCYF office.

Permanency review hearings were held on September 17, 2015 and October 15, 2015. Mother failed to appear at either hearing. The Court determined that Mother had made no progress as she was not engaged in treatment and had not attended visits regularly.

[1] The caseworker reported smelling marijuana in the family home on a number of home visits

Dr. Beth Bliss, a court appointed psychologist, from Allegheny Forensic Associated was court ordered to evaluate the family. She first evaluated the family in December of 2015. Mother reported to Dr. Bliss that she only smoked marijuana when the children were sleeping and did not understand why it was an issue. Dr. Bliss was concerned that Mother was at great risk for using marijuana. This opinion was based on Mother's history, her admission that she had smoked while she was pregnant and even after her children had been removed. During the interactional evaluation, the children were indifferent to Mother. Dr. Bliss reported that Mother was unable to attend to both children at the same time, which created unsafe situations. She also reported that Mother abruptly left the evaluation room to use the bathroom. During this time, T.S. pulled a chalkboard down, which would have struck his sister had the evaluator not intervened. Dr. Bliss also noted that the children did not react when Mother left or entered the room again. Dr. Bliss opined that Mother should not be left alone with the children based upon her lack of parenting knowledge and skills. It was her opinion that the children were minimally bonded with Mother. While they recognized Mother, they appeared largely indifferent to her presence.

The parties appeared on February 25th, 2016 for a permanency hearing. Mother was deemed to be in moderate compliance as she had attended domestic violence therapy, and had engaged in dual diagnosis treatment. However, Mother had only attended three visits in the preceding three months and her visits were reduced to once a week. The parties appeared on July 5th,

2016 for a permanency hearing. Mother was deemed to be in minimal compliance. She failed to consistently attend visits or scheduled medical appointments. She was no longer attending dual diagnosis treatment on a regular basis, missed a number of screens, and tested positive for marijuana for some of the screens that she did attend.

Mother was referred to the ACHIEVA[2] program in August of 2016. This referral was based upon Mother's IQ score and intellectual disability. Mother was offered time before the visit to take advantage of additional services from ACHIEVA. However, Mother never took advantage of this opportunity. Furthermore, Mother missed eleven out of 24 visits at this facility. The parenting support staff reported that Mother made very little progress at the visits and required a great deal of verbal and physical direction in parenting the children. The staff member who worked with Mother opined that she would need around the clock support to parent the children and could not do so without supervision. The staff at ACHIEVA also expressed concern over Mother's ability to comfort the children when they were in distress. It was their ultimate opinion that Mother could not ensure the children's safety during visits.

Dr. Bliss conducted an interactional evaluation with the children and the foster parents in September of 2016. T.S. displayed problematic behavior but much less so than with Mother. She opined that the foster parents were often able to calm the child down. T.S. sought out Foster Mother and showed her a lot

[2] This program supports individuals with disabilities, specifically parents with an IQ of less than 70.

of physical affection. Ultimately, Dr. Bliss testified that the children would not suffer any psychological harm if they did not see their mother again.

Dr. Bliss conducted an individual evaluation of Mother in October of 2016. Mother reported to still using marijuana and was not making her weekly visits a priority. During the interactional evaluation, the children again appeared indifferent to Mother. She was more interactive with T.S. but was still unable to attend to both children simultaneously. Mother was unable to redirect T.S. when he displayed problematic behavior. Dr. Bliss opined that Mother had not made any progress and that she would have serious concerns if Mother was left alone to parent the children.

The Petition to Involuntarily Terminate Mother's Rights was filed on November 9th, 2016.

Mother alleges that this Court abused its discretion and/or erred as matter of law in concluding that termination of her parental rights best suits the needs and welfare of the children pursuant to 23 Pa.C.S.A. § 2511(b). 23 Pa.C.S.A. §2511(b) provides in part:

> (b) Other considerations- The court in terminating the rights of a parent shall give primary consideration to the developmental, physical 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. 23 Pa.C.S.A. § 2511 (b).

"Pursuant to 23 Pa.C.S.A. § 2511(b), the trial court must take into account whether a natural parental bond exists between child and parents, and whether termination would destroy an existing, necessary and beneficial relationship". In

re C.S., 761 A.2d 1197, 1202 (Pa.Super.2000). "While a parent's emotional bond with his or her child is a major aspect of the Subsection 2511(b) best-interest analysis, it is nonetheless only one of many factors to be considered by the court when determining what is in the best interest of the child. The mere existence of an emotional bond does not preclude termination of parental rights". In re A.S., A3rd473 (Pa.Super.2010).

During the pendency of this case, Mother has attended 28 out of 79 urine screens. Mother was also ordered to complete Domestic Violence Treatment based upon multiple concerns involving the father of the children. Father appeared very controlling and verbally abusive towards Mother. Mother completed Domestic Violence Therapy at the Women's Center and Shelter in the summer of 2015. However, she maintained a relationship with Father after completing the program. She remained financially dependent on him throughout the case. Father failed to cooperate with any of OCYF's or the Court's directives. A number of In-Home services were instituted for Mother, however they all closed out. Specifically, Holy Family worked with Mother for six months. These services closed out after Father moved into the family home and Mother refused to cooperate with the service. The in-home worker observed many of the same concerns as the caseworker when she visited the family home. During one visit, she observed a knife within reach of the oldest child as well as a used condom on the floor. This worker expressed her concern to

Mother, who failed to recognize the dangers of these items being in reach of a child.

Mother has also missed a great deal of visits. When she did attend visits, it was difficult for Mother to attend to more than one child at a time. At times, T.S. would tantrum and Mother failed to follow prompts to address his behavioral issues. It was reported that she would often ignore T.S. entirely when he misbehaved.

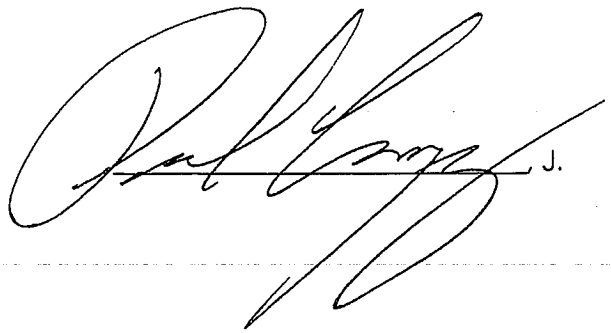
The children were placed in their current foster home on September 15th, 2015. T.S. had behavioral concerns as well as difficulty with his speech when he came into care. Since being placed in this foster home, the child's behavior has improved greatly. His speech has also improved and he is developmentally on track. The caseworker has observed the children in the foster home and noted that they are bonded with their caretakers. The Foster Parents have been diligent in addressing T.S.'s behavioral issues.

This Court finds that OCYF has presented clear and convincing evidence to support the involuntary termination of the parental rights of Mother as to 23 Pa.C.S.A. §2511 (b). Mother has never been able to make the progress necessary for the children to be returned to her care. The children have been in care for 17 months. Mother has not made visiting her children a priority. When she has visited, she has been unable to engage the children or keep them safe during visits. Dr. Bliss reported that the children are largely indifferent to Mother

and have no bond with her. Termination of her parental rights clearly meets the needs and welfare of these children.

For those reasons, the decision of this Court should be affirmed.

BY THE COURT:



J.