No. COA05-843 | 26th Judicial District

NORTH CAROLINA COURT OF APPEALS

****

IN THE MATTER OF:	)	From Mecklenburg County
	)	
M.B.	)	
	)	
	)	

****

BRIEF FOR THE GUARDIAN AD LITEM AS APPELLEE

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STATEMENT OF THE CASE

This is an appeal from an order entered August 30, 2004 in which the trial court ordered the cessation of reunification efforts and changed the child's permanent plan to adoption.

STATEMENT OF THE FACTS

M.B. was born on July 21, 2003. R.p. 66. M.B.'s mother has a history of schizophrenia and bipolar disorder. R.p. 6. M.B.'s father committed suicide before she was born. R.p 176. Although Respondent-Mother was taking Haldol and Resperdal for her mental illness, she stopped taking these medications when she became pregnant. R.pp. 6, 26, 171.

On July 26, 2003, M.B. was hospitalized because of jaundice. R.p. 26. On July 28, 2003, in response to a report raising concerns over Respondent-Mother's ability to properly care for her child, as well as Respondent-Mother's mental health, Mecklenburg Youth and Family Services ("YFS") investigated and developed a Safety Assessment with Respondent-Mother. R.pp. 3, 5. Respondent-Mother's aunt signed the Safety Plan and agreed to have Respondent-Mother and M.B. live at her home and "make sure [Respondent-Mother] kept appointments." R.p. 6.

At the time the first Safety Plan was signed, YFS' concerns included Respondent-Mother's inappropriate sexual behaviors[1], as well as Respondent-Mother's shaking the baby to wake her and limiting the baby's food over "concerns of childhood obesity." R.pp. 5-6. A second safety plan was signed on July 29, 2003, in which Respondent-Mother, the maternal grandmother and the maternal aunt agreed that, during YFS' investigation of the initial report: (1) Respondent-Mother would not be left alone with M.B.; (2) Respondent-Mother would remain in the home with the maternal aunt and maternal grandmother; and (3) Respondent-Mother would arrange to see a therapist and provide YFS with information from the therapist. R.p. 7.

When the social worker visited the maternal aunt's home on August 4, 2003, the maternal aunt told the social worker that Respondent-Mother had left the home with M.B. the night before, and that she did not know where Respondent-Mother had gone. R.p. 7. On August 5, 2003, the maternal aunt reported to the social worker that Respondent-Mother had "thrown the baby's pampers away and is walking around with the baby with no clothes on." R.p. 8. The maternal aunt also indicated that the Respondent-Mother had asked "someone to get the baby and take her to

[1] Respondent-Mother "was observed to touch her own genital and breast [areas] before feeding the baby" and wearing clothing that was unbuttoned so as to expose her "breast and genital area." (R.p. 5, 6).

mental health," but that the Mother would not "allow access to her home or the baby when family arrived." R.p. 8. On the same day as this incident, YFS filed a juvenile petition alleging that M.B. was a dependent and neglected juvenile, the trial court ordered non-secure custody of M.B. to be with YFS, and M.B. was placed in a foster home. R.p. 9. On October 14, 2003, the court entered an order in which M.B. was determined to be a dependent child, while holding the conclusion of neglect in abeyance. R.p. 27.

Since the time YFS assumed custody of M.B., Respondent-Mother has continued to struggle with her mental illness. In her report to the court prepared for the February 17, 2004 review hearing, M.B.'s guardian ad litem ("GAL") wrote that Respondent-Mother "loves her baby but is unable to provide a stable, nurturing and safe environment for her." R.p. 93. The guardian also noted that M.B. had been diagnosed with a medical condition that requires special breathing treatments. The guardian's report continues:

> It is this GAL's belief that [Respondent-Mother] would not be able to be adequately trained to give a breathing treatment and even recognize when one is needed. This could pose a threat to the baby.

R.p. 93.

Pursuant to an order dated August 28, 2003, the trial court ordered a Rule 17 guardian ad litem be appointed to represent Respondent-Mother. R.pp. 24-25. During the hearing that is the subject of this appeal, the

Respondent-Mother's guardian ad litem recommended the court proceed with TPR and adoption. R.pp. 195-96. The guardian for Respondent-Mother agreed with the contents of the lengthy parenting evaluation report ("Nunez Report")[2] presented at the August 31, 2004 hearing. R.p. 195. The Respondent-Mother's guardian told the court,

> [The Nunez Report] just confirms. . . what I've been thinking in the case. . . , based upon the needs of the child and based upon the needs of the mother, is that it would almost take side by side assistance on a daily basis and even then there is not any assurance of any degree of success, so my inclination is to recommend that you proceed with the final plan of TPR and adoption at this point. It is just delaying the inevitable.

R.pp. 195-96.

In the August 30, 2004 hearing, the trial court noted, "[T]here as been a great deal of progress as has been noted through the mother and her parenting classes. . . and she has done the best she can and she has done a very great work in that area." R.p. 10. However, after hearing the parties and reviewing the court reports, the trial court properly concluded that, "[W]e have done what we can do in terms of determining the best opportunity for this child," and made a determination to cease reunification efforts with Respondent-Mother and move towards a permanent plan of adoption. R.p. 201.

[2] Max Nunez's parenting evaluation report is found at R.pp. 168-190.

STANDARD OF REVIEW

The Guardian ad Litem ("Appellee-GAL") does not dispute Respondent-Mother's statement of the standard of appellate review with respect to dispositional hearings. However, Respondent-Mother's statement regarding the standard of review with respect to the statutory mandate is overly broad and does not accurately represent this Court's prior holdings.

In her brief, Respondent-Mother states, "The failure to comply with a statutory mandate is reversible error." (Appellant's Brief, p.9, citing *In re Eades*, 143 N.C.App. 712, 713, 547 S.E.2d 146, 147 (2001)). However, this Court has consistently held that violation of "statutory time lines [is] not reversible error *per se*. . . but that an appropriate showing of prejudice arising from the delay could constitute reversal." *See In re L.G. and R.G.*, 2005 N.C. App. Lexis 2116, at *8, ____ S.E.2d ____ (October 4, 2005) (holding that a delay of over seven months to file a petition for termination of parental rights did not constitute reversible error in the absence of prejudice). *See, e.g., In re C.J.B.*, 2005 N.C. App. Lexis 1168, 614 S.E.2d 368, 369 (2005), *In re B.M.*, 168 N.C. App. 350, 607 S.E.2d 698, 701 (2005).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER BECAUSE RESPONDENT-MOTHER WAIVED HER RIGHT TO APPEAL THE INSUFFICIENCY OF THE COURT'S ORDER BY FAILING TO OBJECT TO THE INCORPORATION OF COURT REPORTS.

In her brief, Respondent-Mother argues that the trial court erred in failing to make findings of fact pursuant to N.C.G.S. § 7B-507(b). Appellee does not dispute that the statute requires such findings of fact. However, Respondent-Mother waived her right to appellate review of this issue by failing to object to the judge's statement, made in open court and on the record, that the judge intended to incorporate "by reference all the notes in the Nunez report." R. p. 201.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires that:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

N.C.R.App.P. 10(b)(1). North Carolina appellate courts have enforced Rule 10(b)(1) to bar arguments on appeal in other juvenile cases, *see In re L.M.C.*, 613 S.E.2d 256, 257, 2005 N.C. App. Lexis 1089, at *4 (June 7, 2005) (noting that the "plain error" analysis exception to Rule 10(b)(1) does not apply in civil cases), as well as in cases involving constitutional

arguments, *see, e.g., State v. Walters*, 357 S.E.2d 344, 354, 357 N.C. 68, 85 (2003).

In the case now before this Court, Respondent-Mother's attorney had ample time and opportunity to object to the trial court's incorporation of the report as a finding of fact, but failed to do so. The record indicates that trial counsel only objected to the trial court's failure to conduct a formal permanency planning hearing in the case. In fact, Respondent-Mother's attorney did so immediately after the court indicated it would incorporate the Nunez Report, but never objected to the incorporation. *See* R.p. 202.

This Court should decline to address Respondent-Mother's argument regarding the sufficiency of the trial court's order because Respondent-Mother did not object to the incorporation of the Nunez Report at the trial level.

II. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER BECAUSE FAILURE TO CONDUCT A PERMANENCY PLANNING HEARING IS NOT REVERSIBLE ERROR.

A. Absent a showing of prejudice, failure to hold a permanency planning hearing within the statutorily mandated time period is not grounds for reversal.

In the absence of demonstrated prejudice, failure to comply with a statutory mandate is not reversible error. *See In re L.G and R.G.*, supra. Although prejudice resulting from delays in the legal process may be

"readily apparent," this Court has noted that, "the party asserting prejudice must actually bear its burden of persuasion" on that issue. *Id.,* at *8. Further, this Court, quoting *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 260, 361 (2005), writes, "Even if prejudice is apparent without argument, 'it is not the role of the appellate courts . . . to create an appeal for an appellant.'"

In her brief, Respondent-Mother's argues that:

> The failure to consider the relevant criteria prejudiced the respondent because the respondent made improvements in her life so that she could care for her daughter and since there was another alternative for the minor child other than termination of her mother's right such as placement with a relative.

Respondent's Brief, p. 14. This argument does not address the failure of the trial court to hold the permanency planning hearing within the statutory time period, but appears to relate to the content of the trial court's order. Even taken out of the context of a "statutory mandate," Respondent-Mother's statement that she was prejudiced because the trial court's alleged failure to consider "improvements in her life" or a relative placement is disingenuous.

N.C.G.S. § 7B-906 permits a party to a juvenile action to motion the trial court for a review hearing at any time after custody of the child has been removed from a parent. The statute further provides, "The court may not waive or refuse to conduct a review hearing if a party files a motion

seeking the review." N.C.G.S. § 7B-906(b). Among the issues that may be raised at a review hearing are the suitability of the parent to regain custody of the child and the appropriateness of the placement of the child. *See* N.C.G.S. § 7B-907. *See also In re Shue*, 311 N.C. 586, 596, 319 S.E.2d 567, 573 (1984).[3] In fact, Respondent-Mother herself points out that the trial court "held many review hearings pursuant to N.C.G.S. § 7B-906." Respondent's Brief, pp. 14-15.

Despite the ability to move for review of M.B.'s placement, at no time did Respondent-Mother, her attorney, or her guardian ad litem seek a review hearing to raise the issues of Respondent-Mother's "improvements" or the appropriateness of a relative placement. For this reason, as well as Respondent-Mother's failure to demonstrate prejudice, this Court should affirm the order of the trial court.

B. Even where prejudice is shown, reversal is not the appropriate remedy where the legislative intent is directory only.

Even if this Court should determine that Respondent-Mother has adequately demonstrated prejudice, this Court should uphold the trial court's order because the 12-month requirement in N.C.G.S. § 7B-907(a) is

[3] This case was decided under the former N.C.G.S. § 7A-657, which is substantially similar to the current N.C.G.S. § 7B-906.

directory in nature.

When reviewing cases regarding compliance with legislative provisions, this Court has looked to the consequences of failure to comply with statutory language to determine if those provisions are mandatory or directory. *See In re B.M.*, 168 N.C. App. at 701.

> 'Mandatory provisions are jurisdictional, while directory provisions are not.' *Comm'r of Labor v. House of Raeford Farms*, 124 N.C. App. 349, 354, 477 S.E.2d 230, 233 (1996). 'Generally, 'statutory time periods are . . . considered to be directory rather than mandatory **unless the legislature expresses a consequence for failure to comply within the time period**.' *Id.* at 353, 477 S.E.2d at 233 (citations omitted).

Id. (emphasis added). N.C.G.S. § 7B-907 contains no consequence for failure to comply with the statutory language.

In 1998, the North Carolina State Legislature revised the existing Juvenile Code to comply with the Adoption and Safe Families Act of 1997 ("ASFA"), 42 U.S.C. § 671, *et seq.* (1997).[4] Without such compliance, North Carolina would have risked its ability to qualify for continued federal funding of its existing child protection system. It is for this reason that the

[4] The legislative history of ASFA reveals that its bipartisan drafters had three very specific goals in mind when drafting the legislation: (1) to minimize delays in making children available for adoption; (2) to provide states with monetary incentives to encourage adoption of all children, including those with special needs; and (3) to require states "to move toward terminating parental rights under most circumstances" for "children under the age of 10 who have been in foster care for at least 18 of the past 24 months." H.R. Rep. 105-77, at 7 (1997), reprinted in 1997 U.S.C.C.A.N. 1, 2739-40.

drafters who revised the North Carolina Juvenile Code revisions wrote many of the time limitations into law.

ASFA "was designed to curb an inappropriate focus on protecting the rights of parents when there is a risk of subjecting children to long term foster care or returning them to abusive families." *In the Interest of C.B. and A.L.,* 861 A.2d 287, 295 (Pa. Sup. Ct. 2004) (citing H.R. Rep. 105-77 (1997))[5]. Along with the revisions to the North Carolina Juvenile Code, ASFA has fundamentally shifted the balance between the often competing interests of parents and children squarely in the child's favor by minimizing the amount of time states are required to engage in "reasonable efforts" to return the child to his or her parents, and by requiring that states proceed to the termination of parental rights stage as quickly as possible so that the child may be placed in an adoptive home.

Through the regulations to ASFA, promulgated by the Department of Health and Human Services, Congress established monetary penalties for a state's failure to comply with certain ASFA requirements. However, the North Carolina General Assembly has not imposed any such penalties, monetary or otherwise, and this Court should not now impose a penalty of a delay in permanency upon M.B.

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[5] Copy attached in Appendix hereto.

III. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S AUGUST 30, 2004 ORDER BECAUSE THAT ORDER IS IN THE BEST INTEREST OF THE CHILD.

Appellee Guardian ad Litem asks this Court to uphold the August 30, 2004 order ceasing reunification efforts and changing the permanent plan because it is in the best interests of M.B.

The best interest of the child is the "polar star" that guides North Carolina courts in cases of neglect and dependency where custody is at issue. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 251-52 (1984). This Court has noted that the best interest of the child is the reason for the existence of statutory mandates, such as timelines, in North Carolina's Juvenile Code. *See In re L.G. and R.G.*, 2005 N.C. App. Lexis, at *7.

In the recent case of *In re R.T.W.*, the North Carolina Supreme Court reaffirmed the critical nature of the child's best interests in cases arising under Subchapter I of the Juvenile Code:

> Even when removal is temporarily necessary, N.C.G.S. § 7B-100 urges returning children to their parents unless doing so would not be in the children's "best interest." . . . This last point is crucial. **For all the statute's concern with preserving families, subdivision (5) of N.C.G.S. § 7B-100 clearly makes the "best interests of the juvenile" the courts' "paramount consideration" when hearing cases arising under Subchapter I.** Moreover, when reunification is against the child's best interest, subdivision (5) favors placing the child "in a safe, permanent home within a reasonable amount of time."

In re R.T.W., 359 N.C. 539, 545, 614 S.E.2d 489, 493 (2005) (emphasis added). Even when addressing the issue of prejudice, this Court has noted that the best interest of the child still remains paramount:

> Whether a party has adequately shown prejudice is always resolved on a case-by-case basis; however, determining prejudice is not a rubric by which this Court vacates or reverses an order when, in our opinion, the order is not in the child's best interest.

In re L.G and R.G., 2005 N.C. App. Lexis, at *6-7.

In this case, the record indicates that M.B. has medical and developmental issues that require parenting skills her mother simply does not possess. *See, e.g.,* R.pp. 168-190. The record also indicates that, without "considerable support and assistance," Respondent-Mother would have great difficulty parenting M.B. *See, e.g.,* R.pp. 183.

Although Respondent-Mother, in her brief, suggests that the trial court should have considered placement of M.B. with the child's maternal aunt, the record indicates that an arrangement with the aunt failed early on in this case. *See* R.p. 7-8. In a number of reports to the trial court, M.B.'s guardian ad litem recommends that the child be placed permanently with her foster mother, despite having contacted "several family members to inquire about their desire to raise [M.B.]." R.pp. 90, 130. In those reports, the guardian notes that M.B. is developmentally delayed and needs special care. *Id.* The guardian's recommendations are based, in part, upon the

foster mother's experience in working with children like M.B., who need special care. R.p. 138. In the guardian's final report to the court before the August 30, 2004 hearing, the guardian writes:

> It is this GAL's belief that it would be in the best interest of both [Respondent-Mother] and M.B. that the baby be raised by her foster mother. There is extensive documented mental illness on both sides of the family, including but not limited to both parents. The foster mother has worked with mentally challenged youths and adults and has an understanding of the symptoms and subsequent services needed (and how to access them). This GAL believes that continuing anything other than TPR will only hurt the mother more. Her understanding of the reality of this situation is limited at best. Although it is the GAL's job to 'worry' just about the child in question it is impossible not to feel compassion for this mother.
>
> It is this GAL's belief that [Respondent-Mother] loves her baby but is unable to provide a stable, nurturing and safe environment for his. It is the GAL's belief that [Respondent-Mother] is unable to make 'good' decisions when it comes to raising children.

R.pp. 138-39.

The Nunez Report indicates that Respondent-Mother continues to deny that she neglected her child and, although she admits to having mental illness, Respondent-Mother believes that her mental illness is limited to depression. R.p. 170. In reality, Respondent-Mother's mental illness is far more serious. The Nunez Report indicates that Respondent-Mother continues to assert that YFS lied in order to "take the baby away" from her, although the report notes that Respondent-Mother "could not explain why

they would want to take the baby away." R.p. 174. The Nunez Report's recommendations to the trial court included the following:

> [Respondent-Mother] has many liabilities in terms of her stability, emotional resources, parenting skills and prognosis for continuing stability. . . If raised by the mother, it is like that the child's emotional development would be limited . . . the mother tends to be passive and to lack initiative in the care of the child. . . . The mother, due to her own affective disorder and cognitive limitations, would not be as attuned to the child's emotions, and would tend to miss opportunities to teach the child to recognize and appropriate express needs and emotions.

R.p.189.

The record in this case is replete with evidence that it is not in M.B.'s best interest to return her to her mother. Based upon the evidence presented at the hearing which is the subject of this appeal, as well as the evidence in the record taken as a whole, this Court should affirm the trial court's order of August 30, 2004 because that order is in the best interest of M.B.

CONCLUSION

For foregoing reasons, the Guardian ad Litem Attorney Advocate respectfully asks this Court to affirm the order of the trial court entered August 30, 2004.

Respectfully submitted this the ______ day of October, 2005.

By: ___________________________

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing **BRIEF FOR THE GUARDIAN AD LITEM AS APPELLEE** was served by enclosing the same in an envelope, with postage fully prepaid and by depositing said envelope in a United States Post Office mailbox, addressed to:

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This ______ day of October, 2005.

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APPENDIX

LEXSEE 861 A.2D 287

IN THE INTEREST OF C.B. AND A.L., MINORS, Appellees; APPEAL OF W.L., Appellant; APPEAL OF W.L., NATURAL FATHER OF MINOR CHILDREN, Appellant; APPEAL OF C.B., NATURAL MOTHER OF MINOR CHILDREN, Appellant

No. 2754 EDA 2003, No. 3007 EDA 2003, No. 3157 EDA 2003

SUPERIOR COURT OF PENNSYLVANIA

2004 PA Super 402; 861 A.2d 287; 2004 Pa. Super. LEXIS 3843

March 10, 2004, Argued
October 20, 2004, Filed

SUBSEQUENT HISTORY: As Amended December 17, 2004.
As Amended November 1, 2004. Appeal denied by *In re C.B., 2005 Pa. LEXIS 588 (Pa., Mar. 29, 2005)*

PRIOR HISTORY: [*1]** Appeal from the Orders of August 13, 2003, in the Court of *Common Pleas of Monroe County, Juvenile Court Division, at No. 9 N.C. 2003.* Appeal from the Order of September 24, 2003, in the Court of *Common Pleas of Monroe County, Domestic Relations Division, at No. 9 N.C. 2003.* Appeal from the Order Entered September 24, 2003, in the Court of *Common Pleas of Monroe County, Juvenile Court Division, at No. 9 N.C. 2003.* Before WORTHINGTON, J.

DISPOSITION: Orders affirmed.

LexisNexis(R) Headnotes

JUDGES: BEFORE: BOWES, McCAFFERY AND POPOVICH, JJ. OPINION BY BOWES, J.

OPINIONBY: BOWES

OPINION:

[289]** OPINION BY BOWES, J.:

Filed: October 20, 2004

[*P1] W.L. ("Father") appeals from the juvenile court's August 13, 2003 order suspending visitation with his son, A.L. n1 He also appeals from the September 24, 2003 order in which the court found the **[**290]** existence of aggravated circumstances which permitted the suspension of all reunification efforts for the family in this dependency proceeding. C.B. ("Mother") also appeals the September 24, 2003 order. We affirm.

n1 This order is a final, appealable order. ***In the Interest of H.S.W. C.-B & S.E. C.-B.****, 575 Pa. 473, 836 A.2d 908 (2003).*

[*2]**

[*P2] The following history is pertinent. C.B. n2 was born on December 10, 1992. Her parents are Mother and a man who is not involved in this appeal. A.L. was born on December 7, 1996. His parents are Mother and Father. On January 24, 2003, the children were taken into protective custody due to deplorable

living conditions and truancy. After a hearing on January 30, 2003, the children were adjudicated dependent and placed into the care and custody of Monroe County Children and Youth Services ("CYS"). Dawn Walker, the intake caseworker, testified on behalf of CYS at that hearing. According to her testimony, CYS's involvement with this family began in January 2001, when it received a referral based on A.L.'s poor hygiene and concerns about Father's abuse of alcohol. The agency made an announced visit, and the caseworker conducted a full assessment. An intermediate unit referral was made for A.L. due to developmental delay, and an appointment was made for Father to attend drug and alcohol counseling. C.B. lived with her grandmother at that time. In October 2001, the agency closed the case because the goals were met.

n2 Since Mother has the same initials as C.B., we refer to Mother as such throughout this decision. For consistency, we refer to Father similarly.

[*3]**

[*P3] On December 23, 2002, CYS received a second referral based on reports that Father was intoxicated while caring for children, that deplorable living conditions existed at the family dwelling, and that the children were not attending school. At that time, C.B. was ten years old, and A.L. was six years old. Ms. Walker conducted an unannounced visit on January 23, 2003. When no one was home, she returned, again unannounced, the following day.

[*P4] Father was at home alone with the children, caring for them while Mother was at work. Ms. Walker stated that "the home was in extreme deplorable conditions," and there were feces "smeared" all over the flooring in the kitchen, bathroom, living room, and shower. N.T. Dependency Hearing, 1/30/03, at 10. The home had an overpowering smell of urine and feces. "The children's bedroom had, approximately, a foot worth of debris and clutter" that constituted a fire hazard. ***Id***. at 11. The bathroom had mold growing and rotting food was found on the stove and countertops of the kitchen. The children were unclean, having "a foul smell" and were in immediate need of hygienic care. ***Id***. at 13. The children had **[***4]** not attended school since October 2002. Ms. Walker immediately took the children into custody, discovering that six-year-old A.L. was not toilet trained. The children were placed together in foster care.

[*P5] Ms. Walker subsequently conducted a full interview with C.B. but was unable to complete one with A.L. because he communicated on the level of a two-year-old. During her interview, C.B. referred to Father as "daddy." She told Ms. Walker that she had been disciplined by being struck with a belt buckle and that Father had touched her underneath her clothing, "that it hurt, [and] that it happened many times." ***Id***. at 20. When asked why it hurt, C.B. responded that Father placed his hands "inside of her." ***Id***. The young girl also stated that she "was afraid" to tell Ms. Walker about the sexual contact because "it was a secret; and that her daddy had told her that it's a secret between him and her and that no one's to know[.]" ***Id***. **[**291]** at 21. When asked who her "daddy" was, C.B. responded with Father's full name. ***Id***. Mother told Ms. Walker that she had no information about C.B.'s biological father. ***Id***. at 19.

[*P6] **[***5]** Ms. Walker immediately scheduled a visit with an abuse specialist, Dr. Andrea Taroli. Ms. Walker also was present. During that interview, C.B. "disclosed that her father ...had stuck his private in her butt." ***Id***. at 25. In addition, C.B. "talked about ...her father forcing her to perform fellatio on him, that she had gagged." ***Id***. Thereafter, Mother and Father were arrested.

[*P7] At the January 30, 2003 dependency hearing, Dr. Taroli was qualified as an expert witness in the area of forensic pediatrics. She confirmed that C.B. described being anally raped by Father and being forced to perform fellatio on Father. C.B. told Dr. Taroli that "dad told her that she'd be grounded if she told anybody and that she wouldn't be allowed to play with A.L., or he'd take away the TV and she'd have to stay in her room." ***Id***. at 62. The child was able to describe the physical manifestations of an erection and its subsequent characteristics during and after ejaculation and an adult sexual device that Father used occasionally during the sexual abuse. This sexual device was recovered by police while executing a search warrant at the home. Dr. Taroli's physical examination **[***6]** of C.B. revealed findings consistent with

"repeated anal penetration" and attempted vaginal penetration. ***Id***. at 67. Dr. Taroli diagnosed C.B. as a victim of sexual abuse. A.L. suffered from stunted physical growth and mental retardation, having the mental acuity of a two-year-old child.

[*P8] Based on this evidence, after the January 30, 2003 dependency hearing, the trial court found by clear and convincing evidence that the children were dependent. At that time, the goal of the CYS family service plan was reunification. CYS immediately moved to amend its petition alleging the existence of aggravated circumstances under *42 Pa. C.S. § 6302(2)*, n3 thus allowing it to suspend efforts at reunification.

N3 That section provides: **Aggravated circumstances**. Any of the following circumstances: ... (2) The child or another child of the parent has been the victim of physical abuse resulting in serious bodily injury, sexual violence or aggravated physical neglect by the parent.

[*7]**

[*P9] The hearing on this request occurred on April 30, 2003. Cynthia Weber, the children's permanent caseworker, indicated the following. As a result of the abuse, Mother had been charged with endangering the welfare of children and corruption of minors while Father was charged with endangering the welfare of children, corruption of minors, rape, statutory rape, involuntary deviate sexual intercourse, and three counts of aggravated indecent assault. n4 The children had been placed in the same foster home. C.B. attended counseling and was enrolled in fourth grade with special education services. A.L. was in individual counseling and was enrolled in day care, receiving developmental educational services.

n4 Father represents that on October 21, 2003, he pleaded guilty to child endangerment and corruption of minors; the rape and related sexual assault charges were dismissed.

[*P10] Mother sent Ms. Weber a letter indicating that Mother was the victim of verbal and physical abuse by her mother, **[***8]** that she was incapable of caring for C.B., and also that she "doesn't believe the accusations, the allegations that [C.B.] is making against [Father]." N.T. Hearing, **[**292]** 4/30/03, at 11. Ms. Weber concluded that aggravated circumstances existed based on Father's sexual abuse of C.B., the deplorable living conditions in the home, neglect, and the children's failure to attend school.

[*P11] Psychologist Judith T. Munoz performed an evaluation of C.B., determined that she was a victim of sexual abuse, and confirmed that C.B. referred to Father as her father. C.B. related the details of Father's abuse consistently with what she previously had told Dr. Taroli. C.B. also told Ms. Munoz that Mother knew about the abuse and told C.B. that **she** should stop having sexual relations. In addition, C.B. related to Ms. Munoz that Father took pictures of his penis and of incidents of sexual abuse and posted them on the internet. Ms. Munoz opined that C.B. is developmentally delayed with "an overall adaptive behavior composite of four years one month," "scores in daily living skills ...of about three years five months, communication was five years eleven months, and socialization was **[***9]** two years eleven months." ***Id***. at 32.

[*P12] Psychologist Michelle Tavormina was C.B.'s sexual abuse therapist and was making inroads in helping C.B. cope with the abuse. C.B. lives with A.L. in the same foster home, and her foster parents received counseling from Ms. Tavormina on how to assist victims of sexual abuse. C.B. indicated to Ms. Tavormina that she "would like" her foster parents to become her "new mommy and daddy." ***Id***. at 58. A representative of C.B.'s elementary school confirmed that C.B. remained enrolled in the fourth grade, after being absent from October through December 2002, and that she was receiving educational support services. Based on this evidence, on September 24, 2003, the court found that aggravated circumstances

existed under *42 Pa. C.S. § 6302(2)* and that CYS was relieved from making further reunification efforts with this family.

[*P13] In the interim, on August 8, 2003, before the trial court suspended reunification efforts, Father filed a motion to compel visitation with A.L. at the jail where he was incarcerated. He stated that, although visits with A.L. had begun on June 30, 2003, he **[***10]** sought more frequent visitation. On August 12, 2003, the court held a hearing on that petition, where the following was established. A.L. started visiting Father in jail every other week at the end of June 2003. Prior to those visits, he did not engage in any inappropriate sexual behavior. After those visits, both his foster parents and his teacher reported that A.L. would display disturbing behavior, including placing his hands on his penis inside his pants and rubbing his penis until it was red and also placing his hands on his neck and face. A.L.'s day care provider testified about this behavior at the hearing and reported that A.L. consistently displayed it after visiting Father.

[*P14] Ms. Weber acknowledged the existence of a "bond" between A.L. and Father, n. t. hearing, 8/12/03, at 12; nevertheless, based on A.L.'s behavior after the visits, Ms. Weber concluded, "I've seen many children that have been sexually abused or have been witnesses of sexual abuse, and I would say that [A.L.] meets that criteria." ***Id***. at 13.

[*P15] Since the April 30, 2003 hearing, Mother had pled guilty to endangering the welfare of a child, had begun work, and was permitted **[***11]** supervised visitation with the children. Ms. Weber noted that the children "are happy to see [Mother] when she visits with them," and Mother "acts appropriately" during those visits. ***Id***. at 17. Even though Mother had been compliant with the agency's goals, CYS was requesting that visits with her be suspended to aid the children's stability. Ms. Weber **[**293]** opined that for "the children to make more progress, continue to be stable in the foster home," visits with Mother should cease. ***Id***. at 20.

[*P16] Ms. Tavormina updated the court about therapy and testified that during one session, C.B. reported to Ms. Tavormina that A.L. was present when Father would rape and sodomize C.B. C.B. told Ms. Tavormina,

> "My brother was in the room when daddy was hurting me. He was in the room. When I was on the couch and daddy was on top of me, [A.L.] didn't save me. I called him to save me. He didn't save me. He was supposed to save me. He saw what daddy did."

Id. at 28.

[*P17] Ms. Tavormina also told the court that C.B. had not exhibited any inappropriate behavior in foster care for five months. Then, a week after her first visit with **[***12]** Mother, C.B. engaged in humping behavior with A.L. and other children in the foster home. C.B. also started rubbing her vagina after visits with Mother began. Ms. Tavormina expressed her "clinical opinion" that "the visits [with Mother were] obviously causing some type of disruption." ***Id***. at 36. In addition, Ms. Tavormina expressed deep concern about a letter from Mother in which she vilified C.B. "in terms of being responsible for the abuse." ***Id***. at 29. Finally, Ms. Tavormina concluded that Mother did not have skills necessary to properly parent C.B. and A.L. because they had been "so severely sexually abused in so many capacities" and to such "an extreme nature." ***Id***. at 37.

[*P18] Cheryl Calandrino, the children's foster mother, confirmed that prior to June 2003, when the children started to visit Father and Mother, they behaved well and were appropriate with each other and other people in the household. After the first visit with Mother, A.L.'s demeanor did not change, but C.B. started to act inappropriately. A.L. started to place his hands on his penis after his first visit with Father. n5 Based on this evidence, on August 13, 2003, the **[***13]** court suspended all visits between Father and A.L.

> n5 We observe that no evidence was presented that A.L. was the victim of sexual abuse; however, testimony was presented that he witnessed C.B.'s abuse.

[*P19] Presently before this Court are Father's appeal from the August 13, 2003 order suspending visitation with A.L., and both parents' separate appeals from the September 24, 2003 order finding the existence of aggravated circumstances and suspending reunification efforts.

Appeal Number 2754 EDA 2003

[*P20] This is Father's appeal from the August 13, 2003 order suspending visits between him and A.L. He raises one issue for our review:

> Did the Juvenile Court, Dependency Division, err by suspending visits between natural father and his son, where [CYS] failed to show by clear and convincing evidence that the visits between father and son constitute a grave threat?

Appellant's brief at 5.

[*P21] In a dependency case,

> The standard against which visitation **[***14]** is measured ... depends upon the goal mandated in the family service plan. Where ... reunification still remains the goal of the family service plan, visitation will not be denied or reduced unless it poses a grave threat. If ...the goal is no longer reunification of the family, then visitation may be limited or denied if it is in the best interests of the child or children.

In re B.G.*, 2001 PA Super 117, 774 A.2d 757, 760 (Pa. Super. 2001)* (quoting ***In Re C.J.****, 1999 PA Super 94, 729 A.2d 89,* **[**294]** *95 (Pa. Super. 1999))*. The "grave threat" standard is met when "the evidence clearly shows that a parent is unfit to associate with his or her children;" the parent can then be denied the right to see them. ***In re C.J., supra*** *at 95*. This standard is satisfied when the parent demonstrates a severe mental or moral deficiency that constitutes a grave threat to the child. ***See id***.

[*P22] Since the family reunification plan was intact when visitation was suspended, the trial court utilized the higher, more difficult standard, whether visitation posed a grave threat to A.L. Trial Court Opinion, 10/28/03, at **[***15]** 6. The trial court concluded that visitation between A.L. and Father posed a grave threat to A.L. Even though the sexual abuse charges were dismissed, the trial court found by clear and convincing evidence that Father sexually abused C.B. Based on the violent nature of the conduct, the trial court determined that ***Green v. Sneeringer****, 431 Pa. Super. 66, 635 A.2d 1074 (Pa. Super. 1993)*, was applicable. In ***Green***, the appellant-father sought visitation with his child after his conviction for the first degree murder of the child's mother. This Court concluded that the murder conviction alone was evidence that the appellant possessed a moral deficiency constituting a grave threat to the child. In the instant case, the trial court determined, likewise, that the evidence of Father's sexual abuse of C.B. was so heinous and repugnant that ***Green*** was applicable.

[*P23] We agree with the trial court. Father has displayed such severe moral deficiency that he constitutes a grave threat to A.L. Regardless of whether his conduct resulted in criminal convictions, numerous CYS witnesses attested to the horrific sexual abuse perpetrated by Father on **[***16]** a ten-year-old girl in his care and custody. We view as entirely irrelevant the fact that this girl, who clearly viewed him as her father, was not actually Father's biological child. Father raped and sodomized this girl in front of A.L., who exhibited inappropriate sexual acting out after visiting Father in prison. We wholeheartedly concur with the trial court that in light of Father's clearly established moral depravity, he poses a threat to A.L. Hence, we affirm the suspension of visitation between him and A.L.

Appeal Number 3007 EDA 2003 and Appeal Number 3157 EDA 2003

[*P24] These appeals are Father's and Mother's separate appeals from the September 24, 2003 order finding the existence of aggravated circumstances and suspending reunification efforts. Initially, we examine the relevant scope and standard of review:

> In dependency proceedings our scope of review is broad. Nevertheless, we will accept those factual findings of the trial court that are supported by the record because the trial judge is in the best position to observe the witnesses and evaluate their credibility. We accord great weight to the trial judge's credibility determinations. Although **[***17]** bound by the facts, we are not bound by the trial court's inferences, deductions, and conclusions therefrom; we must exercise our independent judgment in reviewing the court's determination, as opposed to its findings of fact, and must order whatever right and justice dictate.

***In re W.,M.**, 2004 PA Super 15, 842 A.2d 425, 428 (Pa. Super. 2004)* (quoting ***In the Interest of S. B.**, 2003 PA Super 286, 833 A.2d 1116 (Pa. Super. 2003)).*

[*P25] At issue in this case are the provisions of the newly-enacted revisions to *Pennsylvania's Juvenile Act*. A short examination of the history and purpose of these revisions is important to our resolution of these matters.

[*P26] **[**295]** Due to the requirements of the federal *Adoption and Safe Families Act* ("ASFA"), enacted in 1997, and to obtain vital federal funding, the legislature amended the *Pennsylvania Juvenile Act, 42 Pa. C.S. § § 6301-6365*. ***See In re Adoption of A.M. B.**, 2002 PA Super 321, 812 A.2d 659 (Pa. Super. 2002)*. The significance of these changes to the law cannot be overstated because the focus in dependency **[***18]** proceedings can be shifted under certain circumstances. Essentially, the ASFA directs the emphasis away from the paramount importance previously enjoyed by parental rights to establish "unequivocally that the goals for children in the child welfare system are **safety**, **permanency** and **well-being."** ***In re R.T.**, 2001 PA Super 157, 778 A.2d 670, 678 (Pa. Super. 2001)* (quoting ***In Interest of Lilley**, 719 A.2d 327, 334 n. 5 (Pa. Super. 1998)* (emphasis in original)); ***see** 42 U.S.C. § 671*. "The amendments make clear that the health and safety of the child supercede all other considerations." ***In re R. T., supra** at 678* (quoting ***Lilley, supra** at 333*).

[*P27] The legislative history of ASFA reveals that this act was designed to curb an inappropriate focus on protecting the rights of parents when there is a risk of subjecting children to long term foster care **or** returning them to abusive families. ***See In re J.I. R.**, 2002 PA Super 295, 808 A.2d 934, 939 n. 5 (Pa. Super. 2002)* (examining House Report No. 105-77, April 28, 1997, Cong. Record **[***19]** Vol. 143 (1997), "Purpose and Scope," Page 8). ASFA's purpose is to eliminate the need for family reunification efforts when it is established that the children were exposed to sexual or physical abuse. ***Id***.

[*P28] With this background in mind, we now review the impact of the provisions of the *Juvenile Act* on this case. Family reunification efforts ended in this proceeding based on the existence of this aggravated circumstance: "(2) The child or another child of the parent has been the victim of physical abuse resulting in serious bodily injury, sexual violence or aggravated physical neglect by the parent." *42 Pa. C.S. § 6302*. The juvenile court herein concluded that CYS presented clear and convincing evidence that C.B. was the victim of sexual violence by Father, her parent, justifying the elimination of family reunification efforts.

[*P29] The first question we address is whether the juvenile court erred in applying the definition of "parent" to Father, who was not C.B.'s biological parent. Both Mother and Father raise this question. We conclude that under the circumstances of this case, Father properly was determined to be **[***20]** C.B.'s parent, as envisioned by *42 Pa. C.S. § 6302(2)*. The following facts are relevant to this determination. First, Father and Mother lived together and had a biological child together. C.B. resided with them for

eighteen months prior to being removed. She lived with her maternal grandmother and then with Father and Mother. Father himself assumed the responsibility of caring for C.B. and A.L. on a daily basis while Mother was at work. He told authorities that he was home schooling C.B. Father was the only father figure in her life. C.B.'s biological father was unknown to her. Indeed, Mother could not even provide the biological father's birth date and had no information about his whereabouts. In addition, C.B. never labeled Father as her stepfather; instead, all the witnesses confirmed that C.B. consistently referred to him as daddy. There was, in fact, evidence that when one interviewer referenced Father as C.B.'s stepfather, C.B. corrected the interviewer and stated that he was her daddy.

[*P30] **[**296]** The following must be established to support a conclusion that the legal status of *in loco parentis* exists:

> The phrase "in *loco parentis* **[***21]** " refers to a person who puts oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties. The rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child. The third party in this type of relationship, however, can not place himself *in loco parentis* in defiance of the parents' wishes and the parent/child relationship.

T.B. v. L.R. M.**, 567 Pa. 222, 228-29, 786 A.2d 913, 916-17 (2001)*(citations omitted). The doctrine is applied "where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent." ***Id**. at 230, 786 A.2d at 917*. Another important aspect of this doctrine is "whether the third party lived with the child and the natural **[22]** parent in a family setting, irrespective of its traditional or nontraditional composition, and developed a relationship with the child as a result of the participation and acquiescence of the natural parent." ***Bupp v. Bupp**, 718 A.2d 1278, 1281 (Pa. Super. 1998).*

[*P31] The present facts satisfy all aspects of the doctrine. First, Father assumed parental status and discharged parental duties each day by caring for C.B. while Mother worked and by representing to school authorities he was teaching her. This relationship was sustained over one and one-half years, and there was no biological father to defy Father's assumption of that status. Father unquestionably assumed parental stature in C.B.'s eyes, and she psychologically strongly viewed him as her father. Finally, Father lived with C.B. and her biological Mother in a family setting, and Mother acquiesced in the development of the parental bond between Father and C.B. ***See T.B. v. L.R. M., supra*** (female in homosexual relationship with another female obtained *in loco parentis* status as to biological child of her partner); ***Bupp, supra*** (mother's live-in paramour **[***23]** acquired *in loco parentis* status by having assumed and discharged parental duties with the consent of the biological mother even though parties cohabitated for only one year). Therefore, we consider Father a parent to C.B. under *42 Pa. C.S. § 6302(2)*, irrespective of the absence of any biological or adoptive bond.

[*P32] We must analyze the significance of ***In re Davis**, 502 Pa. 110, 465 A.2d 614 (1983)*, to our holding. ***Davis*** was authored by Justice Rolf Larsen. Only one other justice, Justice Roberts, joined in that case. The other justices concurred in the result. One of the questions presented in that case involved the definition of "parent" for purposes of determining whether a child was a "dependent child," as envisioned by the *Juvenile Act*, which contains no definition of parent. The context of that inquiry revolved around the question of whether a child, Shane, was dependent because he was without a "parent." Shane' mother had been abandoned by her biological parents as a child and raised by a couple who never adopted her. That couple also helped raise Shane, whose biological father was unknown. Shane's **[***24]** mother died, and the question was whether Shane was without "a parent, guardian, or legal custodian," for purposes of *42 Pa. C.S. § 9302*'s definition of "dependent child" so that the local child welfare agency could become involved in his care. The Supreme **[**297]** Court ruled that the doctrine of *in loco parentis* would not be

used to determine whether a person was a parent, legal guardian, or legal custodian for purposes of determining whether a child was a dependent child and that a person who was not a biological or adoptive parent was not a parent.

[*P33] ***Davis*** is a nonprecedential decision, n6 and it is relied upon heavily by Father and Mother. Regardless of its precedential power, ***Davis*** stands for the sound proposition that the doctrine of *in loco parentis* should not be employed when determining whether a child has a parent for purposes of determining whether the child is dependent and thus, whether agency involvement should be initiated. However, the thrust of ***Davis*** supports the more fundamental precept that the *Juvenile Act* should be interpreted to accord the most protection to children. Clearly, the result in **[***25]** ***Davis*** was to enable the local child welfare agency to intervene and to ensure that the child was safe. Thus, ***Davis*** stands for the essential proposition that the *Juvenile Act* should be construed so as to afford the maximum opportunity to safeguard children.

n6 In ***Commonwealth v. Price****, 543 Pa. 403, 672 A.2d 280 (1996)*, the Court observed that a decision that does not command a majority of the votes is a non-precedential plurality decision.

[*P34] Herein, we analyze a different provision of the *Juvenile Act* and conclude that for purposes of defining "parent" in the context of "aggravated circumstances," the doctrine of *in loco parentis* is appropriately applied. Actually, ***Davis*** is conceptually compatible with our holding, which also is motivated solely by the desire to interpret each provision of the *Juvenile Act* in the manner which best serves the protection of children.

[*P35] Importantly, our finding that Father is a parent within the **[***26]** meaning of *§ 6302(2)* strikes at the central purpose of ASFA, which is to remove children from an abusive home environment. The abuse was perpetrated in C.B.'s home. C.B. had no other father but Father; he was the biological father of her brother. Mother allowed Father to assume parental status by committing both her children to his care daily while she worked. In C.B.'s home, Father was the perpetrator of horrific and sustained sexual abuse against this ten year-old girl. Father allowed his biological son to witness this abuse. If we are to heed the mandate of the federal and state legislature that directs us to focus on the **safety** and **well-being** of children, we cannot reach any other conclusion but that Father was a parent for purposes of *42 Pa. C.S. § 6302(2)* in this case.

[*P36] Father also maintains that the evidence regarding the sexual abuse was speculative and did not comply with the necessary standard of clear and convincing evidence. He contends that the allegations were "unsupported by solid and conclusive evidence." Father's brief at 10. We strongly disagree. The evidence of sexual abuse was substantiated by a forensic pediatrician **[***27]** after physical examination, two psychologists, and two caseworkers. All five witnesses opined that C.B. was the victim of repeated sexual abuse by Appellant and rebuked any efforts to cast doubt on the credibility of C.B.'s accusations. The foster mother and A.L.'s day care provider confirmed that A.L. and C.B. exhibited behavioral manifestations consistent with abuse victims.

[*P37] Contrary to Father's assertion that C.B.'s physical examination was inconclusive, Dr. Taroli testified, "The examination finding of the abnormal anal tone and immediate dilation of the anus with separation **[**298]** of the buttocks is abnormal; and consistent with and most often seen with repeated anal penetration." N.T. Dependency Hearing, 1/30/03, at 66-67. Ms. Walker, the intake caseworker, acknowledged the existence of C.B.'s memory difficulties, which are emphasized by Father in his brief. Nevertheless, Ms. Walker unequivocally testified that she did not believe that C.B. had any difficulty discerning the difference between truth and fiction and did not consider C.B.'s reports to be inaccurate. ***Id***. at 31. C.B. was consistent about the existence and type of abuse to both caseworkers, Dr. **[***28]** Taroli, and two psychologists. None of these professionals doubted this child. Her humping and the rubbing of her vagina, which were observed by her caretakers, were described by expert witnesses as behavior consistent with victims of sexual abuse. Witness after witness at each of the three hearings conducted in

this proceeding provided vast amounts of evidence on this question. We agree with the trial court that the evidence in this case was clear and convincing; indeed, it was overwhelming. We reject Father's assertion that the evidence was insufficient to support the finding of child abuse and likewise reject Mother's related assertion that an abuse of discretion was present in this case.

[*P38] In addition, Mother's professed lack of notice of the sexual abuse is beyond belief and highlights the tragic circumstances in which these children lived. C.B. informed her therapist that Mother was aware of the abuse. However, rather than make any attempt to stop Father from sexually abusing the child, Mother told **C.B**. that **she** should not engage in sexual activity with Father N. T., 4/30/03, at 26-29. In a letter to CYS, Mother accused C.B. of lying about the abuse, **[***29]** and then, once faced with irrefutable proof of the facts, Mother blamed the ten-year-old girl as being responsible for the sexual abuse.

[*P39] Mother avers that we cannot rely on the hearsay statement C.B. made to her therapist. However, C.B.'s statement was supported by the fact that C.B., who had engaged in no sexually inappropriate behavior beforehand, started to rub her vagina and hump other children after her first visit with **Mother**. We do not hesitate to conclude that Mother knew what was happening to her daughter.

[*P40] ASFA's purpose is to eliminate the need for family reunification efforts when it is established that children were exposed to sexual or physical abuse. These parents have exhibited no responsibilities attendant with parenting but have been abusive and grossly neglectful; thus, we direct our focus away from any parental "rights" and toward the protection of these innocent, scarred children, who have been subjected to egregious horrors that shake the very foundations of the precious family institution. We affirm the decision of the trial court to suspend reunification efforts in this dependency proceeding.

[*P41] Orders affirmed. **[***30]**