

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

IN THE INTEREST OF: S.M., A MINOR

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

APPEAL OF: J.M., FATHER

Appellant

No. 113 MDA 2013

Appeal from the Order of December 7, 2012,  
in the Court of Common Pleas of Mifflin County,  
Orphans' Court at Paternal Action No. 14 of 2012

BEFORE: SHOGAN, MUNDY and COLVILLE\*, JJ.

MEMORANDUM BY COLVILLE, J.:

**FILED JUNE 04, 2013**

J.M. ("Father") appeals from the order in the Court of Common Pleas of Mifflin County involuntarily terminating his parental rights to the minor female child, S.M. ("Child"), born in April of 2011.<sup>1</sup> We affirm.

Following a shelter care hearing held three days after her birth, Child was placed in the custody of the Mifflin County Children and Youth Social Services Agency ("the Agency") due to the Agency's long history with Mother, Father's use of illegal drugs, and Father's criminal history. When Child was five days old, she was placed with foster parents, who are an adoptive resource and who have adopted two of Child's half-siblings. By order dated May 3, 2011, the trial court adjudicated Child dependent. The Agency established a placement goal of reunification for Child. The Agency

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<sup>1</sup> The parental rights of Child's mother, W.R. ("Mother"), were involuntarily terminated by order of July 9, 2012. Mother did not file a notice of appeal.

\*Retired Senior Judge assigned to the Superior Court.

established the following family service plan ("FSP") goals for Father, in relevant part: obtain and maintain housing; attend drug and alcohol counseling; submit to random drug tests; complete a mental health assessment and follow all recommendations; attend anger management counseling; attend parenting classes and demonstrate skills learned; complete a psychological and bonding assessment; and participate with Family Intervention and Crisis Services ("FICS").

On May 17, 2012, the Agency filed a petition for the involuntary termination of Father's parental rights. The trial court held a hearing on the petition on July 31, 2012, and August 9, 2012.

At the time of the hearing, Father was serving a sentence of incarceration with a minimum date to expire in September of 2012. In addition, a separate criminal charge was pending against Father, for which he was awaiting trial. During Child's lifetime, Father was convicted of charges including possession of a controlled substance, criminal conspiracy, and simple assault. His periods of incarceration were from August 29, 2011, through September 19, 2011; from November 7, 2011, through November 18, 2011; and from March 27, 2012, through the time of the hearing.

With respect to Father's FSP goals, Ms. Sellers, the Agency caseworker, testified that, when not in prison during Child's lifetime, Father had unstable housing, including, but not limited to, residing temporarily with friends, family, and in a homeless shelter. With respect to drug and alcohol counseling, Ms. Sellers testified she offered on multiple occasions to schedule an intake appointment for Father, but he told her he would

schedule it himself. Father never attended an intake appointment for drug and alcohol counseling. With respect to random drug tests, Ms. Sellers testified that, on May 13, 2011, Father told the Agency he would refuse all drug tests offered by the Agency because he believed the Agency would tamper with any drug tests. Therefore, on July 15, 2011, FICS began providing random drug tests for Father. Ms. Cramer, the FICS caseworker, testified she attempted to administer twenty-two random drug tests to Father, but was successful in obtaining only one, which was positive for marijuana. Father refused the additional drug tests by FICS.

With respect to Father's mental health and anger management FSP goals, in February of 2012, it was recommended that Father participate in individual counseling with University Community Behavioral Health, for anxiety, depression, and his anger issues. Father never attended counseling through University Community Behavioral Health. With respect to parenting classes, Ms. Sellers testified she offered on multiple occasions to set up an appointment for Father for the classes, but he stated he would call himself. Father never attended parenting classes.

With respect to Father's FSP goal to participate with FICS, the Agency referred FICS to Father on June 20, 2011, to provide reunification services. Ms. Cramer testified FICS attempted to provide services to Father relating to, in part, supervised visits with Child, parent education, drug and alcohol relapse prevention, and random drug tests. Father attended ten of thirty parenting education sessions offered by FICS. Ms. Cramer testified Father was not sober during the sessions and she concluded that he was not

motivated to follow through with recommendations regarding mental health services, drug and alcohol services, and anger management services.

With respect to supervised visits with Child, Ms. Sellers testified that when Child initially came into care, Father attended twelve out of thirteen visits offered by the Agency. Ms. Cramer testified that when FICS began supervising the visits, Father attended nineteen of twenty-six visits offered. Father's last visit with Child was on February 14, 2012.

Ms. Cramer testified that, on February 21, 2012, FICS recommended closing intensive reunification services for Father because he showed no improvement regarding his FSP objectives, including failing to comply with random drug screens and missing parenting sessions. Moreover, there continued to be concerns regarding Father's housing and financial stability.

Finally, Father testified at the hearing that he is not in a position to provide parental care to Child and he requested that Child be placed in kinship foster care with his parents, Child's paternal grandparents.

By order dated December 7, 2012, the trial court involuntarily terminated Father's parental rights pursuant to 23 Pa.C.S.A. §§ 2511(a)(2), (5), (8), and (b). Father's timely appeal followed.

On appeal, Father presents the following issues for our review:

1. Whether the Trial Court's decision adjudicating the child dependent was supported by clear and convincing evidence?
2. Whether the Trial Court erred in requiring Father to submit to a genetic test when he reported and held himself out as

the child's father and executed an Acknowledgement of paternity?

3. Whether the Trial Court erred in assuming jurisdiction over the case at the outset?
4. Whether Father was deprived effective assistance of counsel?
5. Whether the Trial Court erred in terminating Father's parental rights by failing to adequately consider the circumstances of the paternal grandparents' involvement or attempted involvement in the child's life and as a family placement option?
6. Whether the Trial Court erred in denying the Paternal Grandparents' Request to Intervene/Request for Evidentiary Hearing?
7. Whether the Trial Court's decision terminating Father's parental rights was supported by substantial evidence?
8. Whether the Trial Court erred in terminating Father's parental rights by failing to adequately assess the impact of termination upon the child?

Father's Brief, at 5.<sup>2</sup>

Our standard of review is as follows:

Appellate courts must apply an abuse of discretion standard when considering a trial court's determination of a petition for termination of parental rights. As in dependency cases, our standard of review requires an appellate court to accept the findings of fact and credibility determinations of the trial court if they are supported by the record. ***In re: R.J.T.***, 608 Pa. 9, 9 A.3d 1179, 1190 (Pa. 2010). If the factual findings are supported, appellate courts review to determine if the trial court

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<sup>2</sup> For ease of disposition, we have re-numbered Father's issues on appeal.

made an error of law or abused its discretion. *Id.*; ***R.I.S.***, 36 A.3d [567, 572 (Pa. 2011)]. As has been often stated, an abuse of discretion does not result merely because the reviewing court might have reached a different conclusion. *Id.*; ***see also Samuel Bassett v. Kia Motors America, Inc.***, 34 A.3d 1, 51 (Pa. 2011); ***Christianson v. Ely***, 575 Pa. 647[, 654-655], 838 A.2d 630, 634 (Pa. 2003). Instead, a decision may be reversed for an abuse of discretion only upon demonstration of manifest unreasonableness, partiality, prejudice, bias, or ill-will. *Id.*

As we discussed in ***R.J.T.***, there are clear reasons for applying an abuse of discretion standard of review in these cases. We observed that, unlike trial courts, appellate courts are not equipped to make the fact-specific determinations on a cold record, where the trial judges are observing the parties during the relevant hearing and often presiding over numerous other hearings regarding the child and parents. ***R.J.T.***, 9 A.3d at 1190. Therefore, even where the facts could support an opposite result, as is often the case in dependency and termination cases, an appellate court must resist the urge to second guess the trial court and impose its own credibility determinations and judgment; instead we must defer to the trial judges so long as the factual findings are supported by the record and the court's legal conclusions are not the result of an error of law or an abuse of discretion. ***In re Adoption of Atencio***, 539 Pa. 161[, 165,] 650 A.2d 1064, 1066 (Pa. 1994).

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

Termination of parental rights is controlled by Section 2511 of the Adoption Act, which requires a bifurcated analysis.

Our case law has made clear that under Section 2511, the court must engage in a bifurcated process prior to terminating parental rights. Initially, the focus is on the conduct of the parent. The party seeking termination must prove by clear and convincing evidence that the parent's conduct satisfies the statutory grounds for termination delineated in Section 2511(a). Only if the court determines that the parent's conduct warrants termination of his or her parental rights does the court engage in the second part of the analysis pursuant to Section 2511(b): determination of the needs and welfare of the child under the

standard of best interests of the child. One major aspect of the needs and welfare analysis concerns the nature and status of the emotional bond between parent and child, with close attention paid to the effect on the child of permanently severing any such bond.

***In re L.M.***, 923 A.2d 505, 511 (Pa. Super. 2007) (citing 23 Pa.C.S.A. § 2511) (citations omitted). The burden is upon the petitioner to prove by clear and convincing evidence that the asserted statutory grounds for seeking the termination of parental rights are valid. ***In re R.N.J.***, 985 A.2d 273, 276 (Pa. Super. 2009).

In this appeal, we review the trial court's order pursuant to Section 2511(a)(2) and (b), which provide as follows:

(a) General Rule.—The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

. . .

(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.

. . .

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

which are first initiated subsequent to the giving of notice of the filing of the petition.

23 Pa.C.S.A. §§ 2511(a)(2), (b).<sup>3</sup>

To satisfy the requirements of Section 2511(a)(2), the moving party must produce clear and convincing evidence regarding the following elements: (1) repeated and continued incapacity, abuse, neglect or refusal; (2) such incapacity, abuse, neglect or refusal caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being; and (3) the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied. **See *In re Adoption of M.E.P.***, 825 A.2d 1266, 1272 (Pa. Super. 2003).

In ***In re Adoption of S.P.***, our Supreme Court addressed the relevance of incarceration in termination decisions under Section 2511(a)(2). Our Supreme Court held that “incarceration is a factor, and indeed can be a determinative factor, in a court’s conclusion that grounds for termination exist under § 2511(a)(2) where the repeated and continued incapacity of a parent due to incarceration has caused the child to be without essential parental care, control or subsistence and that the causes of the incapacity cannot or will not be remedied.” ***In re Adoption of S.P.***, 47 A.3d at 828.

With respect to Section 2511(b), this Court has explained the requisite analysis as follows:

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<sup>3</sup> This Court need only agree with any one subsection of Section 2511(a), in addition to Section 2511(b), in order to affirm the termination of parental rights. **See *In re B.L.W.***, 843 A.2d 380, 384 (Pa. Super. 2004).



Subsection 2511(b) focuses on whether termination of parental rights would best serve the developmental, physical, and emotional needs and welfare of the child. In ***In re C.M.S.***, 2005 PA Super 340, 884 A.2d 1284, 1287 (Pa. Super. 2005), this Court stated, "Intangibles such as love, comfort, security, and stability are involved in the inquiry into the needs and welfare of the child." In addition, we instructed that the trial court must also discern the nature and status of the parent-child bond, with utmost attention to the effect on the child of permanently severing that bond. ***Id.*** However, in cases where there is no evidence of a bond between a parent and child, it is reasonable to infer that no bond exists. ***In re K.Z.S.***, 2008 PA Super 62, 946 A.2d 753, 762-63 (Pa. Super. 2008). Accordingly, the extent of the bond-effect analysis necessarily depends on the circumstances of the particular case. ***Id.*** at 63.

***In re Adoption of J.M.***, 991 A.2d 321, 324 (Pa. Super. 2010).

Father's first three issues on appeal challenge the Child's adjudication of dependency. In his first issue, Father argues the adjudication of dependency regarding Child was inappropriate and not supported by the evidence. In his second issue, Father argues the trial court erred by directing that he undergo paternity testing when he had already executed an acknowledgement of paternity. Father argues that, by ordering the paternity test, the court "effectively avoided reaching a determination as to whether" he was ready, willing, and able to care for Child at the time of her adjudication. Father's Brief at 23. In his third issue, Father argues that the court did not have jurisdiction to enter a finding of dependency because Child was born in Cumberland County and he and Mother resided in Juniata County at the time of Child's birth. However, Father's appeal is to the order terminating his parental rights, not to Child's dependency adjudication. These issues are not proper challenges to the order terminating Father's parental rights to Child. Father's first three issues fail.

In his fourth issue, Father argues that prior counsel who represented him during the dependency proceedings, was ineffective by failing to preserve the aforementioned issues regarding paternity testing and jurisdiction and by withdrawing Father's appeal from the dependency adjudication without his knowledge or consent.<sup>4</sup> Father is not challenging the effectiveness of counsel's representation in the termination proceedings. Thus, this issue is also an improper challenge to the order terminating Father's parental rights to Child.

In Father's fifth and sixth issues, the crux of his argument is that, even if he is not in a position to provide parental care to Child, it is in Child's best interest that the parental grandparents provide care for Child. Specifically, in his fifth issue, Father argues the trial court erred by failing to stay the termination proceedings to allow Child's paternal grandparents to pursue kinship care.

On September 28, 2012, following the termination hearing, but before the court issued the subject order, Father filed a motion for stay, wherein he alleged that the paternal grandparents were approved as a kinship care resource on August 8, 2012. As a result, Father requested that the termination matter be stayed. Similarly, on October 1, 2012, Father filed a petition for special relief wherein he requested the court to change Child's goal from reunification with Father to placement with the paternal

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<sup>4</sup> Father filed a notice of appeal from the dependency adjudication on June 2, 2011; the appeal was withdrawn and discontinued on July 1, 2011.

grandparents. By order dated December 11, 2012, the trial court denied both the motion and the petition, stating, in part, “[t]o allow grandparents the opportunity to pursue kinship care now, or in the past, would not have alleviated Father’s duty to comply with family service plans. . . . There is no goal for the placement of [Child] with her grandparents. The goal was for reunification between [Child] and her father, and he failed to comply.” Order, 12/11/12. We discern no error by the trial court in this regard. The issue of paternal grandparents as a placement resource for Child was not a consideration in the court’s determination as to whether Father’s parental rights should be terminated pursuant to Section 2511(a) and (b). As such, Father’s fifth issue fails.

In his sixth issue, Father argues the court erred in denying the paternal grandparents’ request to intervene in the dependency proceedings. However, this is not a proper challenge to the termination order. Therefore, Father’s sixth issue fails.

In his seventh issue, Father argues the trial court’s decision to terminate his parental rights pursuant to Section 2511(a) is not supported by the record evidence. Father argues he participated in the majority of his visits with Child and “there were no significant concerns raised with respect to his care and interaction with the child during these periods.” Father’s Brief at 17. Father argues that after his March 2012, incarceration, he requested visits from the Agency, but was informed by the Agency caseworker that visits would not occur at the jail. In addition, Father argues “his period of incarceration is soon set to expire and he is presumed to be

innocent of any other charges pending against him.” *Id.* at 18. Father further argues that since his incarceration, he has participated in counseling to address his drug and alcohol and anger management issues and continued to see a psychiatrist.

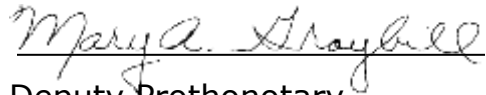
Father acknowledges in his brief on appeal that, even when not incarcerated, he did not fully comply with his FSP goals. Indeed, at the time of the termination hearing, Child had been in placement for more than fifteen months and Father testified he was not yet able to provide parental care to her. The testimonial evidence demonstrated that during the entirety of Child’s dependency, Father’s repeated and continued incapacity or refusal to cooperate with the Agency and reunification services provided by FICS has caused Child to be without essential parental care, control or subsistence necessary for her physical and mental well-being. Further, the testimonial evidence demonstrated that the conditions and causes of Father’s incapacity or refusal cannot or will not be remedied by him. Therefore, Father’s seventh issue fails.

In his final issue, Father argues the trial court abused its discretion in terminating his parental rights pursuant to Section 2511(b) by failing to adequately assess the impact of termination upon Child. Father asserts that Child, although “very young,” recognized him and bonded to him during their visitation periods and that severing the bond would be detrimental to Child. Father’s Brief at 20. Father further argues the Agency provided no evidence with respect to the “effects the severance of the parental relationship will have upon the child.” *Id.* We disagree. In this case, Child was placed in

foster care when she was five days old. With regard to Father's visits, the FICS caseworker testified that Child exhibited distress or "stranger anxiety" during visits with Father as she got older and Father was not visiting as frequently. N.T., 07/31/12, at 55. Father last visited Child on February 14, 2012. The Agency caseworker testified that since Father's March 2012, incarceration, he has not contacted the Agency to inquire about Child nor has he sent any letters or cards to the Agency to be provided to Child. There is no evidence of a parent-child bond between Father and Child. As such, it was reasonable for the trial court to infer that no bond exists. **See *In re Adoption of J.M.***, 991 A.2d at 324. Accordingly, we discern no abuse of discretion by the trial court in terminating Father's parental rights pursuant to 23 Pa.C.S.A. §§ 2511(a)(2) and (b).

Order affirmed.

Judgment Entered.

  
Deputy Prothonotary

Date: 6/4/2013