NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: : IN THE SUPERIOR COURT OF

ADOPTION OF B.M.J., A MINOR : PENNSYLVANIA

:

APPEAL OF:

C.Y. : No. 1295 MDA 2013

Appeal from the Order Entered June 18, 2013, In the Court of Common Pleas of Northumberland County, Orphans' Court Division, at Adoptee No. 51 of 2012.

BEFORE: SHOGAN, ALLEN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.: FILED DECEMBER 03, 2013

C.Y. ("Mother"), appeals from the order dated May 31, 2013, and entered on June 18, 2013, which involuntarily terminated her parental rights to her son, B.M.J. ("Child"), born in June of 2010. The petition was filed by R.J. and C.J., husband and wife, who are Child's paternal aunt and uncle ("Aunt and Uncle"), pursuant to 23 Pa.C.S.A. § 2511(a)(1) and (b).¹ We affirm.

On October 12, 2012, Aunt and Uncle² filed a petition for the involuntary termination of Mother's parental rights to Child. On March 28,

¹ Aunt and Uncle filed a petition to confirm consent to adoption on January 2, 2013. At the hearing on the petition to terminate Mother's parental rights, Mother stipulated that Child's father, M.J. ("Father"), executed a consent to adoption. N.T., 4/3/13, at 47. Thus, Father is not a party to the instant appeal nor has he filed an appeal on his own behalf.

² On June 11, 2010, when Mother was in the hospital, Lancaster County Children and Youth Social Service Agency ("CYS") originally placed Child in the custody of a paternal great uncle for two weeks, and then the custody of

2013, the orphans' court appointed a guardian *ad litem* for Child. The orphans' court held evidentiary hearings on January 2, 2013, and April 3, 2013. At the hearing on January 2, 2013, Mother, *pro se*, stated she had attempted to obtain legal assistance, "but things are tight." N.T., 1/2/13, at 3. The orphans' court continued the case for the appointment of counsel for Mother. *Id.* at 20. Thereafter, the guardian *ad litem* filed a first report with the court on April 3, 2013, the date of the second hearing. At the second hearing, Aunt and Uncle called Mother as a witness on cross-examination, and Aunt testified as well. At the close of testimony, the orphans' court held the record open for a supplemental report from the guardian *ad litem*, who filed it on April 10, 2013. N.T., 4/3/13, at 51–56.

In an order dated May 31, 2013, and entered on June 18, 2013, the orphans' court terminated Mother's parental rights to Child pursuant to 23 Pa.C.S.A. § 2511(a)(1) and (b). The orphans' court further directed that

Aunt and Uncle; Child was six weeks old. Moreover, on November 29, 2011, the Lancaster County Court of Common Pleas entered an order awarding legal and physical custody of Child to Aunt and Uncle. Thus, pursuant to 23 Pa.C.S.A. 2512(3), which provides in pertinent part that "[a] petition to terminate parental rights with respect to a child under the age of 18 years may be filed by . . . [t]he individual having custody or standing *in loco parentis* to the child and who has filed a report of intention to adopt," Aunt and Uncle had standing to pursue the instant petition. **See**, **e.g.**, **In re Adoption of L.J.B.**, 18 A.3d 1098, 1108 n.10 (Pa. 2011) (plurality) ("While [23 Pa.C.S.A.] Section 2511 delineates the grounds for involuntary termination of parental rights, Section 2512 governs the requisites for a valid petition for termination, and accordingly is equally relevant and controlling regarding this appeal.").

the adoption of Child would "continue without further notice to or consent of [Mother]," and that custody of Child was "transferred to, or in the alternative, shall remain with, [Aunt and Uncle]." Orphans' Court Order, 6/18/13, at 1. On July 17, 2013, Mother timely filed a notice of appeal. Both the orphans' court and Mother complied with Pa.R.A.P. 1925.

At the hearing on April 3, 2013, Aunt and Uncle presented Mother as a hostile witness and also presented the testimony of Aunt. *Id.* at N.T., 1/2/13, at 4, 37. Additionally, Aunt and Uncle admitted two letters from Lancaster County CYS dated September 19, 2011, and August 5, 2010, and safety plans for Child established for Child's paternal great-uncle on July 9, 2010, in whose care Child initially was placed, and on July 23, 2010, for Aunt and Uncle, who received Child approximately two weeks later. N.T., 4/3/13, at 42, 50. Aunt and Uncle's Exhibit 1.

Mother testified that Father is Uncle's half-brother. N.T., 4/3/13, at 5. When she was in the hospital shortly after Child's birth, Child was placed in the care and custody of Child's paternal great-uncle for two weeks, followed by placement with Aunt and Uncle. He had been living with them since that time. *Id.* at 5–6, 42. Mother testified that between April 2012 and October 2012, the six-month period prior to the filing of the termination petition, she had not visited Child at all. *Id.* Mother acknowledged that between April 2012 and October 2012, she did not file a petition with the orphans' court

requesting enforcement of the then-existing custody order that permitted her to have supervised visitation with Child. *Id.* at 6–7. Moreover, Mother admitted that she did not send any cards, letters, or gifts to Child during the period between April 2012 and October 2012, but that Child received social security disability benefits through her. *Id.* at 7. Mother explained that she had been pursuing her custody rights to another son, Child's half-brother, with whom she has visitation, and to her daughter, Child's sister, for whom Mother's parents have temporary custody. *Id.* at 8.

Mother has mental health issues including attention deficit disorder and "schizoaffective disorder with bipolar." N.T., 4/3/13, at 8–9. Mother testified that she had attempted to contact her parents to see Child on their weekend custodial time, but her parents were afraid that Aunt and Uncle would not let them see Child if they permitted Mother to visit Child while he was in their care. *Id.* at 10–11.

Mother testified that in November 2011, she had not contacted the children and youth agency in Northumberland County, where Aunt and Uncle live, to arrange any visits with Child, explaining that she was homeless during that time. N.T., 4/3/13, at 17, 20. Mother also admitted that she did not file any petition seeking visitation. *Id.* at 19. Mother acknowledged that she had not seen Child since August 2011. *Id.* at 19–20. Mother further agreed that Child has bonded with Aunt and Uncle, and Child considers them

his parents. *Id.* at 21–22. Mother testified that Child is well cared for by Aunt and Uncle, and that Child is happy. *Id.* at 22–23.

On cross-examination by her counsel, Mother stated that Child spends time with her other two children every other weekend at the home of her parents. N.T., 4/3/13, at 24. Mother testified that Aunt and Uncle had moved several times and would not have had her address, but they would have had her parents' address. *Id.* at 25.

On cross-examination by the guardian *ad litem*, Mother testified that beginning in April 2012 until the present time, she was taking medication that successfully treated her mental health issues. N.T., 4/3/13, at 29. In December 2012, she moved to a three-bedroom apartment. *Id.* at 29–30. She claimed that she had visited Child with her parents between May 2011 and August 2011, when she stopped visiting. *Id.* at 30–31.

Aunt testified that Child had been in their sole custody since he was six weeks old. N.T., 4/3/13, at 38. She testified that Mother and Father went to Arkansas in 2010 after Child had been placed in their care and had represented that they would voluntarily terminate their parental rights to Child. *Id.* at 39. Aunt testified that Child refers to Aunt and Uncle as dad and mom. *Id.* She cares for Child when he is sick, and Child seeks out Uncle for playtime. *Id.* Aunt also stated that Child does not know any other mother and father, and is part of her family with Uncle. *Id.*

Aunt testified that Mother had filed a custody complaint in Lancaster County, and they had attempted to file a custody complaint in Lycoming County, where they had resided for a time, but Lancaster County assumed jurisdiction over the matter. N.T., 4/3/13, at 39. Aunt and Uncle appeared with their counsel at a November 8, 2011 custody hearing, but Mother did not appear. *Id.* at 40-41. At the time of the November 8, 2011 hearing, Aunt and Uncle had moved to Northumberland County, and as a result, supervision of any contact between Mother and Child was ordered to be conducted by Northumberland County CYS. *Id.* at 41-42.

Aunt testified that Child has no knowledge of Mother. N.T., 4/3/13, at 42-43. She and Uncle have not instructed Mother's parents to shield Child from visiting Mother. *Id.* at 43. Aunt is not aware of any effort by Mother to visit Child since August 2011. *Id.* She stated that Mother's parents know their address and have been in their home. *Id.* at 44. Aunt testified that neither she nor Uncle has done anything to prevent Mother from attempting to contact Child. *Id.* at 44-45.

Aunt testified that she and Uncle reside with Uncle's two sons, ages eleven and thirteen, and that Child plays well with them. N.T., 4/3/13, at 45. Aunt testified that although she is not Child's biological mother, she has raised him from an infant, she loves him very much, she feels very protective of him, and she ensures that he is safe. *Id.* at 45–46. She also

testified that she and Uncle tuck Child in every night, and that Child says, "Mommy, hug kisses, Daddy, hug kisses." *Id.* at 46. Aunt stated that she and Uncle desire to have Mother's parental rights terminated so that they can adopt Child. *Id.* at 46–47.

On cross-examination by Mother's counsel, Aunt testified that she and Uncle had moved to their current address in Northumberland County in September of 2011, and that they had not notified Mother of their move by certified mail at that time. N.T., 4/3/13, at 48. Aunt stated that she and Uncle are not employed, but Uncle receives workers' compensation for a work-related injury. *Id.* Aunt also testified that no bonding assessment had been performed. *Id.*

On cross-examination by the guardian *ad litem*, Aunt explained that Uncle was expecting to settle his workers' compensation litigation that arose from an automobile accident, and that because Father's related surgery was unsuccessful, he likely would be on disability for the remainder of his life. N.T., 4/3/13, at 49. Aunt also testified that she is a trained pharmacy technician. *Id.*

On appeal, Mother raises the following issues:

- 1. [Aunt and Uncle] failed to prove by clear and convincing evidence that involuntary termination of Mother's parental rights would serve the emotional needs and welfare of the child.
- 2. The [orphans'] court committed an error of law by involuntarily terminating Mother's parental rights without the

presentation of a bonding assessment or evidence of whether or not a bond existed between Mother and the minor child.

Mother's Brief at 7.

We review the appeal in accordance with the following standard:

[A]ppellate courts must apply an abuse of discretion standard when considering a trial court's determination of a petition for termination of parental rights. As in dependency cases, our standard of review requires an appellate court to accept the findings of fact and credibility determinations of the trial court if they are supported by the record. In re: R.J.T., 608 Pa. 9, 9 A.3d 1179, 1190 (Pa. 2010). If the factual findings are supported, appellate courts review to determine if the trial court made an error of law or abused its discretion. Id.; R.I.S., 36 A.3d [567,] 572 [(Pa. 2011) (plurality)]. 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, 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, 650 A.2d 1064, 1066 ([Pa.] 1994).

In re Adoption of S.P., 47 A.3d 817, 826–827 (Pa. 2012).

The burden is on the petitioner to prove by clear and convincing evidence that the asserted grounds for seeking the termination of parental rights are valid. *In re R.N.J.*, 985 A.2d 273, 276 (Pa. Super. 2009). Moreover, we have explained that the standard of clear and convincing evidence is defined as "testimony that is so clear, direct, weighty and convincing" as to enable the fact-finder to come to a clear conviction, "without hesitance, of the truth of the precise facts in issue." *Id.* (quoting *In re J.L.C.*, 837 A.2d 1247, 1251 (Pa. Super. 2003)). This Court may affirm the orphans' court's decision regarding the termination of parental rights with regard to any one subsection of section 2511(a). *See In re B.L.W.*, 843 A.2d 380, 384 (Pa. Super. 2004) (*en banc*).

We focus on 23 Pa.C.S.A. § 2511(a)(1) and (b), which provide, in relevant part, as follows:

§ 2511. Grounds for involuntary termination

- (a) General rule.—The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:
 - (1) The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.

* * *

(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.

In both her statement of questions involved in her brief and her concise statement of errors complained of on appeal, Mother did not challenge the orphans' court's order with respect to its determinations under section 2511(a)(1). Thus, she has waived any challenge to the termination of her parental rights pursuant to section 2511(a)(1). **See Krebs v. United Refining Company of Pennsylvania**, 893 A.2d 776, 797 (Pa. Super. 2006) (stating that we will not ordinarily consider any issue not preserved in the statement of questions involved in an appellant's brief, and any issue not raised in a concise statement of errors complained of on appeal is waived).

If Mother had not waived this issue, we would find sufficient evidence to support the termination of her parental rights to Child under section 2511(a)(1). We have explained this Court's review of such a challenge as follows:

To satisfy the requirements of section 2511(a)(1), the moving party must produce clear and convincing evidence of conduct, sustained for at least the six months prior to the filing of the termination petition, which reveals a settled intent to relinquish parental claim to a child or a refusal or failure to

perform parental duties. *In re Adoption of R.J.S.*, 901 A.2d 502, 510 (Pa. Super. 2006).

* * *

Once the evidence establishes a failure to perform parental duties or a settled purpose of relinquishing parental rights, the court must engage in three lines of inquiry: (1) the parent's explanation for his or her conduct; (2) the post-abandonment contact between parent and child; and (3) consideration of the effect of termination of parental rights on the child pursuant to Section 2511(b).

In re Z.S.W., 946 A.2d 726, 730 (Pa. Super. 2008) (citing In re Adoption of Charles E.D.M., 708 A.2d 88,91 (Pa. 1998)).

"Parental duties" have been defined as follows:

There is no simple or easy definition of parental duties. Parental duty is best understood in relation to the needs of a child. A child needs love, protection, guidance, and support. These needs, physical and emotional, cannot be met by a merely passive interest in the development of the child. Thus, this court has held that the parental obligation is a positive duty which requires affirmative performance.

This affirmative duty encompasses more than a financial obligation; it requires continuing interest in the child and a genuine effort to maintain communication and association with the child.

Because a child needs more than a benefactor, parental duty requires that a parent exert himself to take and maintain a place of importance in the child's life.

In re B., N.M., 856 A.2d 847, 855 (Pa. Super. 2004) (quoting In re C.M.S., 832 A.2d 457, 462 (Pa Super. 2003)). Parental duty requires that the parent "act affirmatively with good faith interest and effort, and not yield to every problem, . . . even in difficult circumstances." Id. A parent must

utilize all available resources and exercise reasonable firmness "in resisting obstacles placed in the path of maintaining the parent-child relationship." *Id.* To be legally sufficient, post abandonment contact "must demonstrate a serious intent on the part of the parent to re-cultivate a parent-child relationship and must also demonstrate a willingness and capacity to undertake the parental role." *In re Z.P.*, 994 A.2d 1108, 1119 (Pa. Super. 2010) (quoting *In re D.J.S.*, 737 A.2d 283, 286 (Pa. Super. 1999)).

Instantly, the orphans' court specifically found that Mother did not visit or contact Child from August 2011 onward; that she made no effort to contact Child or to exercise visits as permitted; that she had shown a settled purpose of relinquishing parental claim to Child; that she had refused or failed to perform parental duties; and that she did not suffer from a lack of mental capacity or from diminished capacity. Order, 6/18/13, at 1. In its Pa.R.A.P. 1925 opinion, the orphans' court provided the following analysis of the evidence under section 2511(a)(1):

Here, Natural Mother did not visit or contact [C]hild from August 2011 onward. She made no effort to contact [C]hild or to exercise visits, even though opportunities to do both were afforded to her. She has further failed during the relevant period of time to perform parental duties. In light of the totality of the circumstances, termination of parental rights was warranted.

Orphans' Court Opinion, 8/8/13, at unnumbered 1.

As we would find competent evidence in the record supporting the orphans' court's credibility and weight assessments, we would conclude that

the orphans' court did not abuse its discretion in terminating Mother's parental rights under section 2511(a)(1).

Following our determination that the requirements of section 2511(a) are satisfied, we proceed to review whether the requirements of subsection (b) have been met. **See In re Adoption of C.L.G.**, 956 A.2d 999, 1009 (Pa. Super. 2008) (*en banc*). The focus in terminating parental rights under section 2511(a) is on the parent, but under section 2511(b), the focus is on the child. **Id.** at 1008.

Mother argues that the orphans' court committed an error of law in terminating her parental rights without clear and convincing evidence that the termination would serve Child's best interests. Mother's Brief at 10. Mother asserts that there is nothing in the record to establish whether there is a bond between her and Child and whether severing that bond would be detrimental to Child. *Id.*

In reviewing the evidence in support of termination under section 2511(b), our Supreme Court recently stated as follows:

[I]f the grounds for termination under subsection (a) are met, a court "shall give primary consideration to the developmental, physical and emotional needs and welfare of the child." 23 Pa.C.S. § 2511(b). The emotional needs and welfare of the child have been properly interpreted to include "intangibles such as love, comfort, security, and stability." *In re K.M.*, 53 A.3d 781, 791 (Pa. Super. 2012). In *In re E.M.*, [620 A.2d 481, 485 (Pa. 1993)], this Court held that the determination of the child's "needs and welfare" requires consideration of the emotional bonds between the parent and child. The "utmost attention"

should be paid to discerning the effect on the child of permanently severing the parental bond. *In re K.M.*, 53 A.3d at 791.

In re: T.S.M., 71 A.3d 251, 267 (Pa. 2013).

The orphans' court stated the following with regard to 23 Pa.C.S.A. § 2511(b):

This court did consider the question of whether a bond existed between Natural Mother and the minor child and whether a termination would destroy a relationship between them that was existing, necessary, and beneficial. Contrary to the issue raised on appeal, the presentation of a formal bonding assessment or expert testimony is not required. **See In re Z.P.**, 994 A.2d 1108 (Pa. Super. 2010). This court, after considering all the evidence presented at hearing as well as the report submitted by the child's guardian *ad litem*, determined that there was not an existing relationship between Natural Mother and the minor child. Further, the Court found that no bond existed between the two, and that the needs and welfare of the minor child would be best served by the termination of Natural Mother's parental rights.

Orphans' Court Opinion, 8/8/13, at unnumbered 1–2.

Aunt testified that she and Uncle have been Child's caregivers since Child was six weeks old, and that they are the only parents he knows. Aunt also stated that Mother had not visited Child since August of 2011, and that Child never asks about Mother; indeed, he does not even know Mother. Further, Aunt testified that she and Uncle provide for all of Child's needs and keep him safe and protected. She explained that Child is part of their family with Uncle's other two sons, with whom Child is very close, that Child refers

to Uncle and Aunt as Daddy and Mommy, and he looks forward to hugs and kisses at bedtime.

In *In re K.Z.S.*, 946 A.2d 753 (Pa. Super. 2008), this Court explained that in cases where there is no evidence of any bond between the parent and child, it is reasonable to infer that no bond exists. *Id.* at 763. "The extent of any bond analysis, therefore, necessarily depends on the circumstances of the particular case." *Id.* We instructed that the court should also consider the intangibles, such as the love, comfort, security, and stability the child might have with the foster parent. Additionally, we stated that the court should consider the importance of continuity of relationships and whether any existing parent-child bond may be severed without detrimental effects on the child. *Id.*

We further observed in *K.Z.S.* that where the subject child had been constantly and consistently separated from his mother for four years, any relationship between the two had to be "fairly attenuated," such that even if a bond existed, it did not defeat the termination of the mother's parental rights. *Id.* at 764. Based on the strong relationship that the child had with his foster mother, the child's young age, and his very limited contact with his mother, this Court found competent evidence to support the orphans' court's termination of the mother's parental rights without a bonding evaluation. *Id.*

As the orphans' court observed herein, in conducting a bonding analysis, the court does not need a formal bonding evaluation, and it is not required to use expert testimony, but may rely on the testimony of social workers and caseworkers. *In re Z.P.*, 994 A.2d at 1121. Here, the guardian *ad litem* submitted a second report to address the bond between Child and his foster parents and Mother, which the orphans' court considered in rendering its decision.

We conclude that there was sufficient evidence from which the orphans' court properly determined that Mother failed to "exhibit [the] bilateral relationship which emanates from the parent['s] willingness to learn appropriate parenting" *In re K.K.R.S.*, 958 A.2d 529, 534 (Pa. Super. 2008). As she did not put herself in a position to assume daily parenting responsibilities, she could not develop a real bond with Child. *See In re J.L.C.*, 837 A.2d 1247, 1249 (Pa. Super. 2003). Additionally, as part of its bonding analysis, the orphans' court appropriately examined Child's relationship with her caregivers, Aunt and Uncle. *See In re: T.S.M.*, 71 A.3d at 267–268 (stating that the court must consider whether the child has a bond with the foster parents).

A parent's own feelings of love and affection for a child, alone, will not preclude termination of parental rights. *In re Z.P.*, 994 A.2d at 1121. We stated therein that a child's life "simply cannot be put on hold in the hope

that [a parent] will summon the ability to handle the responsibilities of parenting." *Id.* at 1125. Rather, "a parent's basic constitutional right to the custody and rearing of his child is converted, upon the failure to fulfill his or her parental duties, to the child's right to have proper parenting and fulfillment of his or her potential in a permanent, healthy, safe environment." *In re B.,N.M.*, 856 A.2d at 856. The record reflects that the orphans' court appropriately considered Child's best interests and conducted a bond-effect analysis in deciding whether to terminate Mother's parental rights.

Mother also contends that there is nothing in the record to establish whether a bond exists between Child and his siblings, who are Mother's other biological children, and whether severing those bonds and separating the siblings would be in the best interest of Child. Mother's Brief at 10. Mother failed to preserve this issue in her Pa.R.A.P. 1925(b) statement and the statement of questions involved in her brief. Thus, she waived that issue. **See Krebs**, 893 A.2d at 797.

Nevertheless, we observe that the orphans' court considered Mother's testimony that Child visits with Mother's other children at the home of her parents every other weekend. The orphans' court also considered Aunt's testimony that Child resides with her and Uncle's two sons, and that Child gets along well with Uncle's two sons as a family unit. We discern no merit

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to Mother's contentions that the orphans' court failed to consider the impact

on Child of separating the siblings and discontinuing the siblings' visits.

The orphans' court conducted a thorough analysis of Child's needs and

welfare. There is no evidence in the record, that based on the termination of

Mother's parental rights, Aunt and Uncle would not permit Child to spend

time with Mother's other two children. Accordingly, we find that the

competent evidence of record supports the orphans' court's credibility and

weight assessment. Thus, we conclude that the orphans' court did not

abuse its discretion in terminating Mother's parental rights under

23 Pa.C.S.A. § 2511(a)(1) and (b).

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Eso

Prothonotary

Date: 12/3/2013

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