NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: ADOPTION OF L.R.R. D.O.B. 09/10/2009 APPEAL OF: D.N.R., NATURAL MOTHER, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1444 WDA 2012

Appeal from the Order, August 17, 2012,
in the Court of Common Pleas of Jefferson County
Orphans' Court Division at No. 6A-2012-O.C.

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND DONOHUE, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: February 22, 2013

D.N.R. ("Mother") appeals the trial court's order terminating her parental rights to L.R.R. ("Child"). On appeal, Mother argues that the trial court erred because the petitioner, K.E.S. ("Father") failed to show by competent, clear and convincing evidence that the statutory requirements of 23 Pa.C.S.A. Sections 2511(a)(1) and (2) were satisfied. After careful review, we affirm.

Mother, a 19-year-old, (dob 7/19/90) and Father, 39 years old, (dob 12/10/69) were dating for six months when Mother learned she was pregnant. (Notes of testimony, 8/2/12 at 20.) A female child was born in September of 2009. (***Id.*** at 4.) The parties never married, but lived together briefly. (***Id.*** at 9.) It is not clear from the record when Mother and Father parted ways; however, Child was in Mother's custody until she was

5½ months old. (***Id.*** at 25.) At that time, Mother agreed to voluntarily transfer physical custody of Child to the child's paternal grandmother, P.D.S., because Mother was unable to take care of her. (***Id.*** at 55-56.) Child has resided at the paternal grandmother's home since February of 2010. Father, along with two of his brothers, also resides there. (***Id.*** at 6.)

Between February and September of 2010, Mother called P.D.S.'s home to arrange visits. Because she was uncomfortable going to the home, Mother would arrange drop-offs at the state police barracks in Punxsutawney. (***Id.*** at 26.) On September 27, 2010, a stipulation and consent order was entered that granted primary physical custody of Child to P.D.S. with Mother awarded shared legal custody and supervised periods of visitation that included three hours on Mondays, Wednesdays, and Fridays; nine hours every other Saturday; and other times as agreed by the parties.

A second stipulation and consent order was entered on November 19, 2010. P.D.S. retained primary physical custody of Child, and Mother retained the same visitation rights but without the supervision requirement. After the entry of this order, Mother saw Child on a few occasions when her father arranged to bring Child to his house for a few hours at a time. This arrangement continued until February 28, 2011 when Mother was incarcerated in the Jefferson County Jail for three months. (***Id.*** at 52.) During her time in the Jefferson County Jail, Mother had no contact with Child.

Following her release on May 28, 2011, Mother went to live with her father for the next two months. During that time, Mother saw Child, two or three times, when her father would pick up Child and bring her to his house. On July 28, 2011, Mother was re-committed to the Jefferson County Jail where she remained until December 2, 2011, when she was transferred to SCI Muncy. Mother's incarcerations were the result of writing bad checks. On June 16, 2012, Mother was transferred to SCI Cambridge Springs. Her earliest release date is July 25, 2013. (***Id.*** at 54-55.)

On April 5, 2012, Father filed a petition for the involuntary termination of Mother's parental rights to Child. Also on April 5, 2012, P.D.S. filed a report of intention to adopt Child to which Father consented. On August 2, 2012, a hearing was held on Father's petition to terminate parental rights. On August 17, 2012, the trial court entered an order terminating Mother's parental rights to Child. Mother then filed this timely appeal and presents one question in support thereof:

> I. WHETHER THE PETITIONER, BY CLEAR AND CONVINCING EVIDENCE ESTABLISHED GROUNDS FOR INVOLUNTARY TERMINATION OF THE PARENTAL RIGHTS OF THE BIOLOGICAL MOTHER, AS SET FORTH IN 23 PA.C.S.A. §2511(a)(1) AND (a)(2)?

Mother's brief at 4.

Our scope and standard of review in cases of a trial court's decision to terminate parental rights are as follows:

> When reviewing an appeal from a decree terminating parental rights, we are limited to determining whether the decision of the trial court is supported by competent evidence. Absent an abuse of discretion, an error of law, or insufficient evidentiary support for the trial court's decision, the decree must stand. Where a trial court has granted a petition to involuntarily terminate parental rights, this Court must accord the hearing judge's decision the same deference that we would give to a jury verdict.
>
> In a proceeding to involuntarily terminate parental rights, the burden of proof is upon the party seeking termination to establish by "clear and convincing" evidence the existence of grounds for doing so. The standard of clear and convincing evidence is defined as testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitance, of the truth of the precise facts in issue.
>
> Moreover, an abuse of discretion occurs when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

In re C.L.G., 956 A.2d 999, 1003-1004 (Pa.Super. 2008) (***en banc***) (citations and brackets omitted).

The trial court is free to believe all, part, or none of the evidence presented, and is likewise free to make all credibility determinations and resolve conflicts in the evidence. ***In re M.G.***, 855 A.2d 68, 73-74 (Pa.Super. 2004). "[I]f competent evidence supports the trial court's findings, we will affirm even if the record could also support the opposite result." ***In re Adoption of T.B.B.***, 835 A.2d 387, 394 (Pa.Super. 2003).

The statutory bases for termination pursuant to Section 2511(a)(1), (2), and (b) are 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.
>
> (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)(1), (2), and (b).

Our case law has made clear that under Section 2511, the court must engage in a bifurcated process prior to terminating parental rights. ***In re D.W.***, 856 A.2d 1231, 1234 (Pa.Super. 2004). 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). ***In re B.L.L.***, 787 A.2d 1007, 1013–1014 (Pa.Super. 2001). Only after determining that the parent's conduct warrants termination of his or her parental rights must the court engage in the second part of the analysis: determination of the needs and welfare of the child under the standard of best interests of the child. ***In re C.M.S.***, 884 A.2d 1284, 1286–1287 (Pa.Super. 2005), ***appeal denied***, 587 Pa. 705, 897 A.2d 1183 (2006). Although a needs and welfare analysis is mandated by the statute, it is distinct from and not relevant to a determination of whether the parent's conduct justifies termination of parental rights under the statute. One major aspect of the needs and welfare analysis concerns the nature and status of the emotional bond between parent and child.

With respect to Section 2511(a)(1), this court has held that

> the trial court must consider the whole history of a given case and not mechanically apply the six-month statutory provision. The court must examine the individual circumstances of each case and consider all explanations offered by the parent facing termination of his or her parental rights, to determine if the evidence, in light of the totality of the circumstances, clearly warrants the involuntary termination.

In re N.M.B., 856 A.2d 847, 855 (Pa.Super. 2004), ***appeal denied***, 582 Pa. 718, 872 A.2d 1200 (2005) (citations omitted.)

Furthermore, our supreme court has determined:

> 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 Adoption of Charles E.D.M., 550 Pa. 595, 602, 708 A.2d 88, 92 (1998). Regarding the effect of incarceration, this court has explained that a parent's responsibilities are not tolled during incarceration, and therefore we must inquire whether the parent utilized those resources available while he or she was in prison to continue a close relationship with the child. ***In re C.L.G.***, 956 A.2d at 1006.

Mother argues she has neither shown a settled purpose to relinquish her parental duties nor has she failed or refused to perform parental duties. (Mother's brief at 8.) Mother points to the fact that she sent nine letters to

Child in 2011[1] and there were a total of 22 mailings sent to Child in 2012, both before and after the date of the petition to terminate her parental rights being filed. (Notes of testimony, 8/2/12 at 67, 69.) These letters were produced at the hearing. Mother maintains that her ability to parent Child is limited while she is incarcerated. However, in addition to the letters, Mother made efforts to call and stay in communication with Child. Both Mother's father and her sister testified that Mother tried to communicate with Child over the telephone; we recognize this is extremely difficult given that Child was not yet three-years-old at the time of the termination hearing.

We note that during the six-month time period prior to the filing of the petition (October 5, 2011 to April 5, 2012), Mother was incarcerated. However, case law instructs us to consider the whole history of a given case and to examine the individual circumstances and explanations of the parent facing termination of her parental rights. ***In re N.M.B.***, ***supra***. The trial court determined Mother's effort to maintain a parent-child relationship was "minimal." (Trial court opinion, 8/17/12 at 7.) In its opinion, the trial court observes that between November 19, 2010 (the date of the signing of the second stipulation and order) and July 28, 2011, Child had been with Mother

---

[1] Mother was incarcerated eight months out of the entire year of 2011. During seven of those months, Mother was in the Jefferson County Jail where she testified she was unable to call P.D.S. because the cellphone P.D.S. used would not accept collect calls from the county jail phone. (***Id.*** at 61-62.)

only a handful of times and for a few hours at a time. (***Id.***) Mother testified, however, that she maintained the visitation schedule through February 28, 2011, except for two or three times when she encountered transportation problems. (Notes of testimony, 8/2/12 at 58.) Mother further testified on those few occasions when she was unable to visit with her daughter, P.D.S. was aware she was not coming. (***Id.***)

Upon Mother's release from the Jefferson County Jail on May 28, 2011, she testified that according to her release papers she was not to contact P.D.S. for thirty days. (***Id.*** at 59.) According to Mother, when she did contact P.D.S., Mother was told she could not see Child, at least half the time. (***Id.***) Mother testified during June and July of 2011, she saw Child only a couple times. (***Id.*** at 60.) Mother was re-committed to the Jefferson County Jail on July 28, 2011. (***Id.***) The record indicates that Mother was sent to SCI Muncy, a state correctional facility on December 2, 2011. (***Id.*** at 61.) On June 14, 2012, Mother was transferred to SCI Cambridge Springs where she currently resides. (***Id.*** at 51.)

The trial court states there was some sort of "fundamental problem Mother had with the paternal grandmother and was disinclined to send anything to her house [for Child]. (Trial court opinion, 8/17/12 at 8.) The trial court appears to hold this against Mother by opining that Mother put herself first and let those issues interfere with any relationship that Mother hoped to sustain with Child. (***Id.***) The trial court's reasoning overlooks the

fact that Mother sent letters and cards to her own grandmother's and father's house knowing that her father and sister would be sure to read these letters and cards to Child as Mother doubted P.D.S. would do the same. Mother testified she did not believe her letters would be read to Child by P.D.S. (Notes of testimony, 8/2/12 at 65, 70.)

Mother's father testified that he and his mother would receive letters from Mother; they would open them up and if the letter was for Child, he would put it in a pile and later read it to Child. (***Id.*** at 101.). Mother's father stated that his other daughter, April, would also read the letters to Child. (***Id.***) When asked how often Child was at his house, he answered every four to six weeks. (***Id.*** at 102.) He also testified regarding telephone calls from SCI Muncy to his house in which Mother spoke to Child. (***Id.*** at 103.) When asked how Child reacted, he answered:

> I'd say like any two-year-old. Primarily, you know, do like a lot of kids do and hold the phone up to her ear. There was one time, I couldn't tell you when, but she did ask Mama, you know, said something about Mama come get me, or mama come see me, or something like that. I can't remember exactly what it was. I could hear [Mother] asking her a lot of questions. I didn't ease drop,[sic] but I was right there when Child was talking to her.

Id.

Mother's father also testified that Child recognized Mother in a photo he had at his house. He testified that he would ask Child "who is that [in the picture]" and Child would say "Mom." (***Id.*** at 104.) The particular photo he

was referring to also had Child in it and he would ask the Child, "who the baby is" and she would answer by stating her name. (***Id.***) He was asked why he did not tell Father and P.D.S. about the telephone calls and letters from Mother, and he answered "to keep peace." (***Id.*** at 105.) He explained:

> I feel like I walk a fine line with this, you know. If I take [Mother's] side, I piss them off. You know, if I take their side, I piss [Mother] off. So sometimes not to say anything is a better thing to say. I knew that she was getting the letters for her. Was that something concerning or to jeopardize [Child]? No. There was no reason for me to bring it up to them. And I honestly feel I didn't bring it up to them, you know, . . . just trying to keep the peace.

Id.

Based on this record evidence, the grounds for termination of Mother's parental rights under Section 2511(a)(1) do not exist. Clearly, by sending the letters and pictures to Child throughout the course of her incarceration as well as trying to communicate with Child by telephone, Mother did not evince a settled purpose of relinquishing her parental rights. Since we need only agree with the trial court's decision on any one subsection of 23 Pa.C.S.A § 2511(a) to affirm the termination decree, we turn to the other subsection the trial court relied on. ***In re B.L.W.***, 843 A.2d 380, 384 (Pa.Super. 2004) (***en banc***), ***appeal denied***, 581 Pa. 668, 863 A.2d 1141 (2004).

With regard to our review of Section 2511(a)(2), this court has stated the following:

> The fundamental test in termination of parental rights under Section 2511(a)(2) was long ago stated in ***In re Geiger***, 459 Pa. 636, 331 A.2d 172 (1975), where the Pennsylvania Supreme Court announced that under what is now Section 2511(a)(2), the petitioner for involuntary termination must prove (1) repeated and continued incapacity, abuse, neglect or refusal; (2) that such incapacity, abuse, neglect or refusal caused the child to be without essential parental care, control or subsistence; and (3) that the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied.

In re K.Z.S., 946 A.2d 753, 758 (Pa.Super. 2008). Moreover, the grounds for termination of parental rights under Section 2511(a)(2), due to parental incapacity that cannot be remedied, are not limited to affirmative misconduct; those grounds may also include acts of refusal as well as incapacity to perform parental duties. (***Id.***) Additionally, in ***In re E.A.P.***, 944 A.2d 79 (Pa.Super. 2008), we stated as follows:

> Each case of an incarcerated parent facing termination must be analyzed on its own facts, keeping in mind, with respect to *subsection (a)(2)*, that the child's need for consistent parental care and stability cannot be put aside or put on hold simply because the parent is doing what she is supposed to do in prison.

Id. at 84 (emphasis in original.)

The trial court made the following findings regarding the termination of Mother's parental rights pursuant to Section 2511(a)(2).

> As a result of her poor choices, Mother has left [Child] without essential parental care, control and subsistence for most of her life. That has been especially true since November 2010. Until then, Mother had at least been arranging regular visits. After that, though, she nearly vanished from her daughter's life, leaving [P.D.S.] as her only source of maternal support.
>
> Here, Mother's incarceration has certainly been a factor that has contributed to her failure to care for her own daughter. As the record reflects, though, her neglect began long before her confinement did. That is to say that Mother would be wrong to conclude that the Court was further penalizing her for being in prison, because her conduct was every bit as dismissive of [Child] for the eight months leading up to July 28, 2011 as it has been since.
>
> As the Court intimated in its findings of fact, moreover, Mother has demonstrated little likelihood that she can or will remedy the conditions that led to her failure to neglect. Most telling in that regard are her refusal to acknowledge the attitudes that have gotten her to this point and her failure to recognize that other people are not responsible for whether she succeeds or fails in life. As any program for addicts recognizes, self-awareness and admission of one's problems are essential to overcoming the addiction. The same is true when it comes to overcoming destructive attitudes and habits. Mother, however, is not willing to recognize or admit where she has failed. She thus is not in a position to positively modify her conduct. With respect to [Child], therefore, she is not in a position to be a mother who meets even the minimal standards of parenthood. And considering her demeanor at the termination hearing, she is not likely to be in that position for a very long time, if ever.

Trial court opinion, 8/17/12, at 8.

Mother admits that her "failure" has caused Child to be "without essential parental care, control or subsistence necessary for her physical or mental well-being." (Mother's brief at 10.) However, Mother contends she is in the process of remedying those causes. (***Id***.) Mother points out that she was in parenting classes at SCI Muncy, and was on a waiting list for parenting classes at SCI Cambridge Springs. (***See*** notes of testimony, 8/2/12 at 56.) Mother also spoke of finishing classes in order to obtain her GED, and getting a job once she is released from prison in July of 2013. (***Id.*** at 73.)

We note that a parent cannot protect parental rights by merely stating that she does not wish to have her parental rights taken away. ***Commonwealth v. Arnold***, 665 A.2d 836, 840 (Pa.Super. 1995). The record indicates Mother has been incarcerated for most of Child's life. Mother has never really provided parental care for Child even when she was not incarcerated. Mother never financially supported Child. (Notes of testimony, 8/2/12 at 29, 63.) Essentially, Mother sat idle for most of Child's young life, allowing P.D.S. to perform all parental duties.

Mother claims she now has a future plan for her life that will keep her from continued incarceration. (Mother's brief at 10.) When asked about that plan, Mother responded by stating she has the support of her father and sister. (Notes of testimony, 8/2/12 at 73.) When asked what her plan was as far as being part of Child's life, Mother answered, "Going to see her if

they allow me. My father even brought up that he would get her, and I could see her through him." (***Id.***) When asked how she would support Child, Mother said she planned on getting a job, and noted she was taking GED classes." (***Id.***)

Based on Mother's testimony and the trial court's observation of her, the court clearly did not believe that Mother was ready or would be ready in the near future to parent her child. As we have recognized time and time again, the trial court is free to believe all, part, or none of the evidence presented, and is likewise free to make all credibility determinations and resolve conflicts in the evidence. ***In re M.G.***, ***supra***. This court has also made it clear that we cannot and will not subordinate indefinitely a child's need for permanence and stability to a parent's claims of progress and hope for the future. ***In re C.L.G.***, 956 A.2d at 1005.

Based on the foregoing testimonial evidence, Mother's conduct has met the statutory grounds of Section 2511(a)(2). There is no record evidence that Mother will remedy her parental deficiencies any time soon. As such, we will not disturb the decree terminating Mother's parental rights pursuant to Section 2511(a)(2).

Last, although Mother does not address this issue, we have held that, in a case involving the termination of parental rights, the trial court is required to consider whatever bonds may exist between the child and parent, as well as the emotional effect that termination will have upon the

child. ***In re Adoption of A.C.H.***, 803 A.2d 224, 229 (Pa.Super. 2002). In this case, we conclude the trial court correctly determined that Child's needs and welfare are best served by terminating Mother's parental rights. There is no record evidence of a parent-child bond between Mother and Child. Child has not lived with Mother since she was an infant at five and one-half months old, and Mother has not seen Child since her incarceration on July 28, 2011. According to the trial court, Child is bonded to P.D.S. and loves her. (Trial court opinion, 8/17/12 at 9.) The trial court noted "it would be fanciful to assume that [Child] feels any of the bond she may have experienced as an infant" in light of the Child's tender age and the amount of time that has elapsed. (***Id.***) Child is happy in the only home she has known. (***Id.***) As such, the record demonstrates that terminating Mother's parental rights will best serve Child's "developmental, physical, and emotional needs and welfare." 23 Pa.C.S.A. § 2511(b).

Accordingly, we affirm the order of the trial court terminating Mother's parental rights pursuant to 23 Pa.C.S.A. § 2511(a)(2) and (b).

Order affirmed.