

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: : IN THE SUPERIOR COURT OF
L.A.S. : PENNSYLVANIA
:
:
APPEAL OF: :
C.S., MOTHER : No. 1670 MDA 2012

Appeal from the Decree Entered August 16, 2012,
In the Court of Common Pleas of Berks County,
Orphans' Court Division, at No. 82539.

BEFORE: PANELLA, SHOGAN and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.:

Filed: March 8, 2013

C.S. ("Mother") appeals from the decree dated and entered August 16, 2012, granting the Berks County Children and Youth Services' ("CYS") petition to involuntarily terminate her parental rights to her child, L.A.S. ("Child"), pursuant to section 2511(a)(1), (2), (5), and (b) of the Adoption Act, 23 Pa.C.S.A. § 2511(a)(1), (2), (5), and (b).¹ We affirm.

On April 19, 2012, CYS filed a petition to involuntarily terminate Mother's parental rights to Child. On August 16, 2012, the trial court held a hearing on the petition. At the hearing, CYS did not present any witnesses, but successfully requested the admission of its exhibits 1-27. Mother presented the testimony of Kelli Mest, a CYS caseworker who works as a

*Retired Senior Judge assigned to the Superior Court.

¹ On August 16, 2012, the trial court also involuntarily terminated the parental rights of any unknown John Doe, as the father of Child. No party claiming to be Child's father has filed an appeal, nor is anyone claiming to be Child's father a party to this appeal.

resource family coordinator. Mother also testified on her own behalf. N.T., 8/16/12, at 5-6.

Based on the testimony and other evidence, the trial court set forth the factual background and procedural history of this appeal as follows:

Mother first came to the attention of CYS as a fourteen-year-old child upon receiving a report of her having mental health issues. Mother first became involved with CYS as a mother in October of 2004 after CYS received a report of her using inappropriate physical discipline on her daughter, A.C. CYS obtained emergency custody of A.C. due to observable physical bruising on the child. Mother was later founded [sic] as a perpetrator of physical abuse on the child. After being unable to remediate the issues causing A.C.'s placement, Mother's rights were involuntarily terminated on March 31, 2006. [In February of 2009], Mother gave birth to A.A.-S. The child entered resource care upon her discharge from the hospital, and by year's end was reunified with her father due to Mother's inability to remediate the issues necessitating placement. A.A.-S. does not have any contact with Mother. L.A.S., the child currently at issue, was born [in June of 2011] and has been placed in resource care since July 9, 2011 as a result of Mother's violating a safety plan.

After receiving a report that Mother gave birth to her third child, investigating the report, and locating Mother and child in Reading, Pennsylvania, CYS implemented a safety plan with Mother's relatives which stated that the caretakers would not allow Mother to be unsupervised with L.A.S. Two weeks later, CYS received a report that the safety plan was violated and that the safety of the child could not be assured. Upon investigating the report and interviewing Mother, CYS caught Mother in a lie and in violation of the plan. CYS petitioned for emergency custody and, after a detention hearing, L.A.S. was ordered to remain in shelter care. After a dependency hearing on August 10, 2011, L.A.S. was found to be dependent and taken under the care of the [trial court]. Temporary legal custody [was] transferred to CYS for placement purposes with a primary goal of adoption and a concurrent goal of return to Mother. Mother was ordered to cooperate with services, including

parenting education, mental health evaluation and treatment, establishing and maintaining stable and appropriate housing and income, casework services, visitation, anger management, and keeping CYS informed of changes in residence or income. The [trial court] also found that clear and convincing evidence of aggravated circumstances existed due to the termination of Mother's parental rights to her first child.

Trial Court Opinion, 10/16/12, at 3-4.

On August 16, 2012, the trial court entered its decree terminating Mother's parental rights with regard to Child under section 2511(a)(1), (2), (5), and (b) of the Adoption Act. On September 13, 2012, Mother timely filed her notice of appeal, along with a Concise Statements of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).

In her brief on appeal, Mother raises the following issues:

1. Did the Trial Court err in [the] termination of [Mother's] parental rights because [CYS] did not establish by clear and convincing evidence that [Mother's] parental rights should be terminated pursuant to [the] Pennsylvania Adoption Act, 23 Pa.C.S.A. § 2511(a)(1), (2), and (5)?
2. Did the Trial Court err in [the] termination of [Mother's] parental rights by disallowing [Mother] the right to present evidence of continued compliance with services post filing of the termination petition which violated [Mother's] Constitutional rights to due process and opportunity to be heard?

Mother's Brief at 3.²

² Mother's counsel contends that Mother's appeal is frivolous, but has set forth the evidence in the record and arguments that support Mother's issues on appeal. *See* Mother's Brief at 13, 18. Mother's counsel has not filed a motion to withdraw in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *Commonwealth v. Santiago*, 602 Pa. 159, 978 A.2d 349 (2009). The principles set forth in *Anders* apply to appeals involving

In reviewing an appeal from the termination of parental rights, we review the determination 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.*, [___ Pa. ___, ___, 36 A.3d 567, 572 (Pa. 2011) (plurality opinion)]. 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.*, [___ Pa. ___, ___], 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.*

In re Adoption of S.P., 47 A.3d 817, 826-827 (Pa. 2012). The burden is upon the petitioner to prove by clear and convincing evidence that the

termination of parental rights. *In re S.M.B.*, 856 A.2d 1235 (Pa. Super. 2004). *Anders* and *Santiago* require counsel to: 1) petition the Court for leave to withdraw, certifying that after a thorough review of the record, counsel has concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support the appeal; and 3) furnish a copy of the brief to the appellant and advise him of the right to obtain new counsel or file a *pro se* brief to raise any additional points the appellant deems worthy of review. *Santiago*, 602 Pa. at 173-179, 978 A.2d at 358-361; *In re Adoption of V.G.*, 751 A.2d 1174, 1176 (Pa. Super. 2000). As Mother's counsel has not filed a motion to withdraw or shown that she furnished a copy of the brief to Mother advising her of her rights, we will not address counsel's request to deem the appeal frivolous.

asserted grounds for seeking the termination of parental rights are valid. *In re R.N.J.*, 985 A.2d 273, 276 (Pa. Super. 2009). We have explained that:

[t]he 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.”

Id. (quoting *In re J.L.C.*, 837 A.2d 1247, 1251 (Pa. Super. 2003)). Finally, this Court may affirm the trial court’s decision regarding the termination of parental rights with regard to any one subsection of section 2511(a). *In re B.L.W.*, 843 A.2d 380, 384 (Pa. Super. 2004) (*en banc*).

Herein, we focus on section 2511(a)(1) and (b), which provides, 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.

23 Pa.C.S.A. § 2511(a)(1) and (b).

This Court has stated:

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). In addition,

Section 2511 does not require that the parent demonstrate both a settled purpose of relinquishing parental claim to a child and refusal or failure to perform parental duties. Accordingly, parental rights may be terminated pursuant to [s]ection 2511(a)(1) if the parent either demonstrates a settled purpose of relinquishing parental claim to a child or fails to perform parental duties.

In re Adoption of Charles E.D.M., 550 Pa. 595, 708 A.2d 88, 91 (1998).

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 [s]ection 2511(b).

Id. at 92 (citation omitted).

In re Z.S.W., 946 A.2d 726, 730 (Pa. Super. 2008).

Mother first argues that the trial court erred as insufficient evidence exists to support termination of her parental rights to Child. Mother contends that she has continued to utilize all available resources to preserve her parental relationship by attending visits and continuing affirmative performance in investing in her required services by keeping her appointments with Alternative Consulting Enterprise, Inc. ("ACE") mental health services and re-engaging in her domestic violence/anger management counseling. Mother's Brief at 10. Mother asserts that she was consistent with her visits, but acknowledges that the parenting counselor suggested that she had not made progress. Mother also complains that the trial court improperly sustained the objection by counsel for CYS to her testimony regarding her completion of a parenting course in the spring of 2012.

Regarding the definition of "parental duties," this Court has stated:

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 [C]ourt 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.

Parental duty requires that the parent act affirmatively with good faith interest and effort, and not yield to every problem, in order to maintain the parent-child relationship to the best of his or her ability, even in difficult circumstances. A parent must utilize all available resources to preserve the parental relationship, and must exercise reasonable firmness in resisting obstacles placed in the path of maintaining the parent-child relationship. Parental rights are not preserved by waiting for a more suitable or convenient time to perform one's parental responsibilities while others provide the child with his or her physical and emotional needs.

In re B., N.M., 856 A.2d 847, 855 (Pa. Super. 2004) (internal citations omitted).

The trial court found that Child was born in June of 2011 and has been placed in resource care since July 9, 2011, as a result of Mother's violation of a safety plan. As CYS filed the termination petition on April 19, 2012, the trial court properly found that Mother had failed to perform her parental duties for at least six months prior to the filing of the petition. Moreover, the trial court found that Mother's explanations for her failure to perform her parental duties and for her conduct lacked credibility, and it did not give them any weight. The trial court found that, between the time of July 9, 2011 and the date of the hearing, Mother had resided in at least five different residences, the last of which was unknown to CYS until she testified at the hearing. The court also found that although Mother was offered

casework and supportive services on a monthly basis, she participated in only two of five scheduled sessions and was resistant to domestic violence evaluation and treatment. The court also determined that while Mother appeared to have love and concern for Child, she was disconnected and content to allow Child to sleep for the large part of every visit. Throughout the relevant time period, Mother continued to need prompting and instruction in even the most basic areas of parenting. As the child matured, Mother appeared annoyed that he would not just want to sit with her, choosing instead to explore his surroundings, and Mother would engage the child only upon prompting from the supervisor. Trial Court Opinion, 10/16/12, at 4-5.

With regard to section 2511(a)(1), the trial court found that Mother: 1) has failed to perform even the most basic of her parental duties, 2) has not remediated any of the concerns that led to the placement of L.A.S., 3) is not capable of controlling her anger and mood swings, of avoiding men who would present a danger to her and her child, or of being able to provide necessary and appropriate care for her child even if she were able to provide stable and appropriate housing and secure a source of income to provide food and shelter. The court also found that Mother does not even appear to have a bond with Child. Trial Court Opinion, 10/16/12, at 6.

The trial court, thus, determined that Mother's efforts had come too late and were insufficient to demonstrate her willingness and capacity to assume parenting responsibilities for Child. Upon review, we conclude that competent evidence exists in the record which supports the trial court's determination as to section 2511(a)(1).

The record reflects testimony of Mother attempting to explain her failure to perform her parental duties as follows:

I was 16 [years old] when stuff happened. I was 16, dumb and stupid. I'm 26 years old. I got my own house. I got SSI. I'm going back to school, and I'm a mature parent now and I'd like my son with me.

N.T., 8/16/12, at 26. Mother also stated that she was challenging the termination: "[b]ecause I'm more mature. I deserve my son." *Id.*

Mother testified that she was subletting the home from a friend, and had moved into the house a month and a half before the hearing, but had not informed CYS because she was not sure that she would be staying there. N.T., 8/16/12, at 19-20. Mother also testified that she is on the list for Section 8 housing. *Id.* at 19. The trial court sustained the objection made by counsel for CYS to the admission of Mother's testimony regarding her seeking a residence and whether her house could accommodate a child. *Id.* at 20. The trial court ruled that this testimony concerned post-petition efforts to remedy the conditions alleged in the petition, namely, Mother's lack of housing for a child, and, thus, was inadmissible under

section 2511(b) of the Adoption Act. *Id.* Further, Mother testified that she had started a parenting program in April of 2012, and had completed the eight-week program. *Id.* at 21. Again, the trial court sustained the CYS objection based on post-petition efforts under section 2511(b). *Id.* at 21.

Moreover, Mother testified that she had been treated at Progressions for her mental health issues since she was five years old, and that she switched to ACE in 2011 or 2012. N.T., 8/16/12, at 22. Mother testified that she was noncompliant with her casework visits with CYS because she did not have stable housing, and she did not receive the letters scheduling the visits because she did not have an address to receive them. *Id.* at 24. Mother also testified that she was court-ordered to seek domestic violence counseling, but she stopped counseling because she had a part-time job and could not attend the appointments. *Id.* at 24-25. Additionally, she stated that she had explained her difficulty to CYS, and CYS had permitted her to return to counseling. *Id.* at 25. Mother also testified that she has individual counseling at Commonwealth Clinical and that she still treats at ACE. *Id.*

Mother testified that she had been attending her visits with Child every two weeks. N.T., 8/16/12, at 25-26. When Mother's counsel questioned her about the stability of her residence, counsel for CYS objected. *Id.* at 26. The trial court sustained the objection, stating that Mother had indicated

that she had housing for six weeks prior to the hearing. *Id.* Mother denied that she had been living on the streets or was homeless. *Id.*

On cross-examination by counsel for CYS, Mother admitted that the ACE treatment plan indicates her barriers to treatment are “anger issues, high anxiety causes[, and] client mood swings.” N.T., 8/16/12, at 28. Mother admitted that she is always depressed and sad. *Id.* In summary, the record reflects support for the determination of the trial court. As no abuse of discretion occurred, Mother’s first claim fails.

In her related second issue, Mother asserts that the trial court’s precluding her from presenting evidence of her attempts to comply with services denied her due process rights. Mother claims that she did not receive notice of the filing of the termination petition until June of 2012, and that she engaged in remedial conduct prior to CYS’ filing of the petition. Thus, she contends that the trial court should have considered her remedial conduct.

The decision of whether to admit or exclude evidence is committed to the sound discretion of the trial court. *Buchhalter v. Buchhalter*, 959 A.2d 1260, 1263 (Pa. Super. 2008). We may reverse the decision only upon finding that the trial court committed an abuse of discretion. *Id.* We reiterate that section 2511(b) provides that with “respect to any petition filed pursuant to subsection (a)(1) . . . 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.”

Moreover, in *In re Z.P.*, 994 A.2d 1108 (Pa. Super. 2010), this Court instructed:

[t]o be legally significant, the [post-abandonment] contact must be steady and consistent over a period of time, contribute to the psychological health of the child, and must demonstrate a serious intent on the part of the parent to recultivate a parent-child relationship and must also demonstrate a willingness and capacity to undertake the parental role. The parent wishing to reestablish his parental responsibilities bears the burden of proof on this question.

In *In re Z.P.*, 994 A.2d at 1119.

Here, the trial court adequately explained its reason for determining that Mother's proffer of remedial evidence related to her post-petition conduct. Trial Court Opinion, 10/16/12, at 6-7. The record demonstrates that Child was adjudicated dependent on August 10, 2011, and that custody was transferred to CYS for placement. Mother failed to cooperate with court ordered services, failed to maintain stable and appropriate housing, failed to consistently participate in required casework sessions, and failed to participate in domestic violence counseling. Mother only obtained a residence and began the parenting program subsequent to the filing of the petition. We, therefore, discern no abuse of discretion by the trial court in

excluding the evidence pursuant to section 2511(b). Mother's second claim fails.³

Finally, we review the third requirement stated in *In re Z.S.W.*, i.e., section 2511(b). In reviewing the evidence in support of termination under section 2511(b), we consider whether termination of parental rights would best serve the developmental, physical and emotional needs and welfare of the child. *See In Re C.M.S.*, 884 A.2d 1284, 1286-1287 (Pa. Super. 2005). "Intangibles such as love, comfort, security, and stability are involved in the inquiry into the needs and welfare of the child." *Id.* at 1287 (citation omitted). The court must also discern the nature and status of the parent-child bond, with utmost attention to the effect of permanently severing that bond on the child. *Id.*

With regard to section 2511(b), the trial court found as follows:

While Mother has demonstrated an incapacity to put the child's need before her own and has shown no improvement in her ability to care for a child despite almost eight years of services from CYS and related agencies, the child has had his needs met by foster parents to whom he has become quite attached. His foster parents are meeting all of his needs and L.A.S. is very happy and meeting all of his developmental milestones. The child has a strong bond with his foster mother and father and does not appear to have any bond whatsoever with Mother. When in distress, L.A.S. seeks out his foster parents for comfort and reassurance. There would be no

³ We also note that despite its evidentiary ruling, the trial court did consider Mother's proffer of testimony concerning her efforts to comply with services and to be in a position in which she could parent Child by obtaining housing and S.S.I. income. Trial Court Opinion, 10/16/12, at 6.

negative impact upon L.A.S. to have his mother's parental rights terminated and, in fact, the [trial court] found it to be in his best interests.

Trial Court Opinion, 10/16/12, at 7.

The trial court, thus, determined that Child lacks any bond with Mother that would be harmed by the termination, but has a bond with his foster parents. Trial Court Opinion, 10/16/12, at 6-7. Review of the record reflects competent evidence to support this determination. Additionally, the trial court could have appropriately made such a factual finding because Child has been placed in foster care since he was approximately three weeks old. This Court has observed that no bond worth preserving is formed between a child and a natural parent where the child has been in foster care for most of the child's life, and the resulting bond is attenuated. *In re K.Z.S.*, 946 A.2d 753, 764 (Pa. Super. 2008).

This Court has instructed:

It is incumbent upon a parent when separated from his child to maintain communication and association with the child. This requires an affirmative demonstration of parental devotion, imposing upon the parent the duty to exert himself, to take and maintain a place of importance in the child's life.

In re G.P.-R., 851 A.2d 967, 976 (Pa. Super. 2004).

In conclusion, there was sufficient and competent evidence of record to support the trial court's findings with regard to the three-pronged test set forth in *In re Z.S.W.*, 946 A.2d at 730. The trial court did not abuse its discretion in terminating Mother's parental rights to Child on the basis of

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section 2511(a)(1) and (b). Accordingly, we affirm the decree terminating Mother's parental rights to Child.

Decree affirmed.