

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: : IN THE SUPERIOR COURT OF
J.K.Y., A MINOR : PENNSYLVANIA
:
:
:
APPEAL OF: :
J.M., BIRTH MOTHER : No. 1803 WDA 2012

Appeal from the Order Entered October 23, 2012,
In the Court of Common Pleas of Allegheny County,
Orphans' Court Division, at No. TPR 128 of 2012.

BEFORE: SHOGAN, OTT and STRASSBURGER*, JJ.

MEMORANDUM BY SHOGAN, J.: FILED: May 3, 2013

J.M. ("Mother") appeals from the order dated October 22, 2012, and entered October 23, 2012, granting Allegheny County Office of Children Youth and Families' ("CYF's" or "Agency's") petition to involuntarily terminate her parental rights to her male child, J.K.Y., pursuant to 23 Pa.C.S.A. § 2511(a)(2), (5), (8), and (b). We affirm.

The trial court set forth the factual background and procedural history of this appeal as follows:

J.K.Y. was born [in July] 2010. Mother and Father had an active Children Youth and Families (CYF) case when J.K.Y. was born, as CYF had concerns regarding Mother and Father and issues they had parenting an older sibling of J.K.Y.'s. At the time J.K.Y. was born, CYF had concerns about Mother's mental health, drug issues, and domestic violence between Father and Mother. J.K.Y. was removed from Mother[s] and Father's care on January 21, 2011, after an incident where the Crescent Township police responded to a 911 call placed from the home, and[,] after responding to the call and upon arriving at the home[,] felt that J.K.Y was unsafe in the home due to the

*Retired Senior Judge assigned to the Superior Court. Judge Strassburger did not participate in the consideration or decision of this case.

domestic dispute between Mother and Father. The child was adjudicated dependent on February 20, 2011[,] and the child has not been returned to the care of either of his parents since his initial removal in January 2011. J.K.Y. has been in the care of the maternal grandparents since January 20, 2011.¹

¹ The foster parents include Mother's biological [f]ather and her step-mother [sic] [(“Maternal Grandparents”).]

On September 18, 2012, CYF filed a petition for Involuntary Termination of Parental Rights (TPR) against Mother, Father, and the Unknown Father []. CYF filed these petitions for termination for Mother under 23 Pa.C.S.A. § 2511(a)(2), (5), and (8), and [§ 2511(a)](1), (2), (5), and (8) with regard to Father and the Unknown Father.²

² On October 22, 2012, the parental rights of Father and Unknown Father were terminated pursuant to 23 Pa.C.S.A. § 2511(a)(1), (2), (5), and (8). Father removed his contest to the TPR petition at the hearing and has not filed an appeal.

Trial Court Opinion, 12/20/12, at 1-2 (footnotes in original).

On October 22, 2012, the trial court held a hearing on the termination petition. At the hearing, CYF presented the testimony of its caseworker, Jamie Greenberg, and Neil Rosenblum, Ph.D., a licensed psychologist. Mother, who was incarcerated at the time of the hearing, testified on her own behalf.

The trial court made the following findings of fact based on the testimony of Caseworker Greenberg, who testified as to the timeline of the case and the continued placement of the child in the current foster home:

Caseworker Greenberg indicated that the primary concerns, which resulted in the removal of the child on January 20, 2011,

were the parents' ongoing drug issues, Mother's and Father's mental health, and concerns about domestic violence within the home. Mother's Family Service Plan (FSP) goals[] included the following items: (1) stabilizing her mental health[;] (2) recovery from substance abuse[;] (3) improving her parenting skills[;] (4) visitation[;] (5) eliminating verbal and physical abuse[;] and later, (6) refraining from criminal activity. Caseworker Greenberg explained that the refraining from criminal activity goal was not added to Mother's FSP until August 2012, when[,] at a review hearing[,] it was revealed that Father was incarcerated. Later that same month, Mother was also incarcerated after being arrested for trespassing. Mother remained incarcerated at the time of the October 22, 2012 TPR hearing.

Caseworker Greenberg testified that Mother was inconsistent with her FSP goals despite the services the agency provided Mother to help her meet her FSP goals. Mother, according to Caseworker Greenberg, did not meet her parenting goal because the litany of other issues present at the removal of J.K.Y. are still present, and therefore Mother is still incapable of properly parenting the child.

Mother continues to have substance abuse issues, and that FSP goal has not been satisfied. Caseworker Greenberg testified that Mother only attended nineteen of forty-four drug screens, and that Mother tested positive in five of those nineteen screens, including a positive screen as recently as July 26, 2012. Mother had completed some various in-patient drug rehabilitation programs since her open cases with CYF began in 2009, but clearly Mother has not been fully cooperative with the FSP goal of maintaining a drug-free lifestyle. Caseworker Greenberg further explained that the agency would require a full calendar year of negative screens before they would return J.K.Y. to Mother's care, and given Mother's most recent positive screen[,] that would be July 2013 at the earliest.

Regarding the other FSP goals, Caseworker Greenberg did praise Mother for making significant mental health progress and attending programs to aid her treatment, at least until her recent incarceration. However, according to CYF, Mother has not satisfactorily completed the goal of prevention of domestic violence. Caseworker Greenberg testified that[,] while Mother

has attended programs aimed at eliminating domestic violence, she has not separated herself from Father, even though Mother and Father both admitted that domestic violence has occurred between them. Mother has also been unable to attain stable housing since J.K.Y.'s removal in January 2011. Caseworker Greenberg concluded the testimony by stating that the agency believes that termination will serve J.K.Y.'s needs and welfare by providing him an opportunity for permanency in the care of his pre-adoptive foster family, the maternal grandparents.

Trial Court Opinion, 12/20/12, at 2-3.

The trial court made the following findings of fact based on the testimony of Dr. Rosenblum:

Dr. Rosenblum . . . testified to a series of evaluations with J.K.Y., his foster parents, and Mother. In May 2012, at the first evaluation between J.K.Y. and [his] foster parents and Mother, J.K.Y. was only twenty-one months old, and she [sic] had been living with the foster parents since he was six months old. Dr. Rosenblum testified that he was impressed with Mother at the May 2012 evaluation, and opined that he wanted Mother to have a chance [to] meet her goals before he would recommend adoption for J.K.Y. Dr. Rosenblum found Mother's parental interactions with J.K.Y. to be appropriate, and he also felt that Mother acknowledged her deficiencies. Dr. Rosenblum also stated that the interactions between J.K.Y. and the foster parents were positive as well, and that J.K.Y. had a strong attachment to maternal step-grandmother in particular. However, due to J.K.Y.'s young age, Dr. Rosenblum wanted to give Mother a chance to make more progress toward her FSP goals before he would recommend adoption.

Dr. Rosenblum next evaluated J.K.Y. and the foster parents in September 2012. Mother was not able to attend the evaluation due to her incarceration in August 2012. Dr. Rosenblum stated that[,] after being informed of Mother's incarceration, his opinion has changed and that now he recommends adoption. He stated that he does not believe it to be in J.K.Y.'s best interest to continue to wait indefinitely for Mother to rehabilitate herself to the degree necessary for J.K.Y. to be returned to her care. Mother had also indicated to Dr.

Rosenblum in May 2012 that her relationship with Father had ended, and clearly it has not ended (Mother and Father were arrested together). Dr. Rosenblum stated that because Mother has continued her pattern of making poor decisions, and because Mother will not be in a position for some time to care for J.K.Y., that termination meets J.K.Y.'s needs and welfare given his need for permanency and stability.

Trial Court Opinion, 12/20/12, at 3-4.

The trial court made the following findings of fact based on Mother's testimony:

Mother stated that she is making progress toward her FSP goals while in prison and that she expected to be released from prison in November. She said that she is attending NA ["Narcotics Anonymous"] meetings twice a week and that she would live with her [m]other (biological [m]other) once she is released from prison[,] and that J.K.Y. could live with her. She argued that she is not a bad [m]other, but [is] in a bad relationship.

Trial Court Opinion, 12/20/12, at 4.

On October 23, 2012, the trial court entered its order terminating Mother's parental rights. On November 16, 2012, Mother filed a notice of appeal, along with a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).

Mother raises the following issue:

1. Did the trial court err in finding that CYF presented clear and convincing evidence that involuntary termination of Mother's parental rights would best meet the developmental, physical and emotional needs and welfare of the child?

Mother's Brief, at 5.

We review an appeal from the termination of parental rights 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.*

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.*, [608 Pa. at 28-30], 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., ___ Pa. ___, ___, 47 A.3d 817, 826-827 (2012).

The burden is upon 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:

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.”

Id. (quoting *In re J.L.C.*, 837 A.2d 1247, 1251 (Pa. Super. 2003)).

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). *See 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). Here, we will focus on section 2511(a)(2) and (b).

Section 2511 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:

* * *

(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) and (b).

With regard to Mother's sole issue, we observe that the trial court granted the petition to terminate Mother's parental rights under section 2511(a) and (b), but Mother challenges only the termination under section 2511(b). Thus, she has waived any challenge to section 2511(a). ***See Krebs v. United Refining Co.***, 893 A.2d 776, 797 (Pa. Super. 2006) ("We will not ordinarily consider any issue if it has not been set forth in or suggested by an appellate brief's statement of questions involved, Pa.R.A.P. 2116(a). . . .").

We would, nevertheless, find that the trial court's decision to terminate Mother's parental rights under section 2511(a)(2) is supported by the competent evidence in the record. ***See In re C.L.G.***, 956 A.2d 999, 1009 (Pa. Super. 2008) (*en banc*) (stating that, on review of a termination of parental rights, only after we ascertain whether the termination was proper

under section 2511(a) should we review the termination pursuant to section 2511(b)).

Our Supreme Court has explained our inquiry under section 2511(a)(2) as follows:

As stated above, § 2511(a)(2) provides statutory grounds for termination of parental rights where it is demonstrated by clear and convincing evidence that “[t]he 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.” . . .

This Court has addressed incapacity sufficient for termination under § 2511(a)(2):

A decision to terminate parental rights, never to be made lightly or without a sense of compassion for the parent, can seldom be more difficult than when termination is based upon parental incapacity. The legislature, however, in enacting the 1970 Adoption Act, concluded that a parent who is incapable of performing parental duties is just as parentally unfit as one who refuses to perform the duties.

In re Adoption of J.J., 515 A.2d 883, 891 (Pa. 1986) (*quoting In re: William L.*, 383 A.2d 1228, 1239 (Pa. 1978)).

In re Adoption of S.P., ___ Pa. at ___, 47 A.3d at 827.

With regard to the sufficiency of the evidence to terminate Mother’s parental rights to J.K.Y. pursuant to section 2511(a)(2), the trial court made the following findings of fact:

Here, J.K.Y. was removed from Mother’s care for a variety of reasons including domestic violence between the parents, drug abuse in the home, a lack of parenting skills, Mother’s mental

health, etc. While Mother provided heartfelt testimony that she is trying to correct many of those issues, the fact remains that Mother has continually shown[,] since J.K.Y. was removed[,] that she cannot separate herself from Father, and thus the destructive cycle continues. Less than three months before the hearing, Mother was arrested with Father, and Mother, as a result, was incarcerated at the time of the TPR hearing. Caseworker Greenberg noted that[,] in a recent visit with Mother in jail, Mother asked whether Father's pod level could be changed so that he might be able to have more contact with Mother. Even after the arrest, after the domestic violence, Mother is unable to separate from Father, and thus the conditions which led to removal continue to exist and are not being remedied.

Trial Court Opinion, 12/20/12, at 5-6.

Had Mother not waived any challenge to section 2511(a)(2), we would conclude that the trial court's credibility and weight determinations with regard to section 2511(a)(2) are supported by competent evidence in the record. ***See In re Adoption of S.P.***, ___ Pa. at ___, 47 A.3d at 826-827.

Next, we address section 2511(b) of the Adoption Act. 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), *appeal denied*, 587 Pa. 705, 897 A.2d 1183 (2006).

Intangibles such as love, comfort, security, and stability are involved in the inquiry into the needs and welfare of the child. The 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. at 1287 (citations omitted).

Based upon the testimony and reports of Dr. Rosenblum, the trial court made the following findings of fact:

[The trial court is] convinced that the needs and welfare of J.K.Y. are best served by terminating the biological parents' parental rights, thus freeing the child for adoption by the foster parents. In Dr. Rosenblum's September 2012 evaluation of J.K.Y. and the foster parents, Dr. Rosenblum noted the attachment between J.K.Y. and his maternal grandparents. He stated that J.K.Y. is thriving in the only home he has really ever known. He reported that this appears to be an excellent placement for J.K.Y.

In order for J.K.Y. to fully realize the permanency and stability of [his] foster family, through adoption, termination of the biological parents' parental rights is necessary. Dr. Rosenblum was willing to give Mother a chance in this case before recommending adoption. He did not recommend adoption after the May evaluation, as Mother was clearly bonded to the child and had surprisingly strong parenting skills. However, by the time of the next evaluation, Mother continued to make poor choices including positive drug screens and an arrest, with Father, in August 2012. Dr. Rosenblum was therefore compelled to change his recommendation to adoption, as he stated that J.K.Y. can no longer afford to wait for Mother's recovery. Once Mother resumed contact with Father, the visits stopped, the drug screens became positive, and they were both incarcerated. Therefore, he opined that termination would best serve the needs and welfare of J.K.Y. due to the significant attachment he has with the foster parents and his need for a secure family now and in the years to come.

Trial Court Opinion, 12/20/12, at 7-8.

Mother underscores that both she and J.K.Y. are very young. Mother asserts that she loves J.K.Y. and contends that termination of her parental rights unnecessarily deprives Child of a lifetime of love and affection from his mother. Mother maintains that J.K.Y. enjoys his visits with her, and that the

visits are beneficial to him. She argues that the trial court should have ordered a permanency plan that would have been less permanent than the termination of her parental rights. Mother's Brief at 12-13.

Here, J.K.Y. has been in foster care with his maternal grandparents since he was approximately six months 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, 762, 764 (Pa. Super. 2008). This Court has stated that 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 1108, 1121 (Pa. Super. 2010).

Upon careful review of the evidentiary record, we conclude that the trial court's determinations are supported by competent evidence in the record. We will not disturb the trial court's credibility and weight assessments on appeal. *In re Adoption of S.P.*, ___ Pa. at ___, 47 A.3d at 826-827. Accordingly, we conclude that Mother's argument regarding section 2511(b) is without merit and affirm the trial court's order.

Order affirmed.

Judgment Entered



Deputy Prothonotary

J-S19015-13

Date: 5/3/2013