

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

In the Interest of: K.M., A Minor

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appeal of: SE.M. and SH.M. PARENTS

No. 211 MDA 2014

Appeal from the Order Entered December 19, 2013
in the Court of Common Pleas of Mifflin County
Orphans' Court at No(s): 12 of 2013

BEFORE: DONOHUE, WECHT, and STRASSBURGER*, JJ.

MEMORANDUM BY STRASSBURGER, J.:

FILED MAY 30, 2014

Se.M. (Father) and Sh.M. (Mother) (collectively "Parents") appeal from the order entered December 19, 2013, which terminated involuntarily their parental rights to K.M. (Child). We affirm.

Child was born in February 2012, and is the natural son of Mother and Father. Children and Youth Social Services Agency (CYS) became involved with Child and Parents because Child was born prematurely and safety concerns were raised by those caring for Child at the hospital. Parents voluntarily placed Child with CYS on February 27, 2012. Child was placed with a pre-adoptive family. After a dependency hearing, the orphans' court found that Child was dependent, and continued Child's placement with the same family.

Caseworker Larry Druckenmiller (Druckenmiller) was assigned to the family and has been their caseworker since March 2012. Between March 2012 and July 2013, there were four Child Permanency Plans developed.

* Retired Senior Judge assigned to the Superior Court.

Objectives included utilizing the services of the Mifflin County Family Intervention Crisis Center (FICS), participating in an assessment for mental health services, managing mental health issues by attending counseling and taking medication, obtaining and maintaining suitable housing, obtaining and maintaining suitable income, and cooperating with CYS and other providers. At all four permanency review hearings, Parents achieved minimal progress in alleviating the circumstances that led to placement and had made moderate progress in completing permanency goals.

FICS assigned Parents to reunification family counselor Ashley Eters (Eters). Eters testified that upon investigating the issues with Parents, she determined that there were concerns regarding housing conditions, animals in the home, cleanliness of the home, financial management, and income to meet the needs of the family. Eters was further concerned about Parents' ability to manage Child's health conditions, lack of knowledge about infant care, as well as Parents' ability to manage their own mental health and medical diagnoses.

Parents were offered weekly sessions that included parenting education, visitation, and lifestyle checks. Of the 49 education sessions that were offered to Parents, Parents attended 32 of them. Of the 59 lifestyle checks where Eters actually went into Parents' home, she was only able to be in the home 29 times. N.T., 12/16/2013, at 75. Of specific concern in this regard was the "adolescent" lifestyle that Parents were living. **Id.** They

relied upon their aunt to help them financially and make decisions. Additionally, Parents were often sleeping when Etters arrived. Parents were offered 202 hours of supervised visitation, and participated in 196 of them. Parents always required an agency worker to prepare Child's meals during visits, intervene during bathtime, and to meet Child's needs. In fact, Parents never progressed beyond the stage where an agency worker had to care for the Child during the visits. FICS recommended that reunification services be closed in May 2013. Parents had not made any real progress in the year of receiving services.

On August 26, 2013, CYS filed a petition to terminate involuntarily Parents' rights to Child pursuant to 23 Pa.C.S. § 2511(a)(2), (5), (8), and (b). A hearing was held before the Honorable Timothy S. Searer on December 16, 2013. At the close of that hearing, and due to the fact that Judge Searer was leaving the bench at the end of the year, he ruled from the bench and ordered that Parents' rights be terminated. Parents timely filed a notice of appeal.¹

¹ The certified record does not contain a copy of the notice of appeal or a concise statement of errors complained of on appeal. However, there is a statement in lieu of opinion filed on January 22, 2014, authored by Judge David Barron, which reads:

[H]aving reviewed the docket entries and [Parents'] Concise Statement of Matters Complained of On Appeal Pursuant to Pa.R.A.P., 1925, and believing such issue now appealed to be fully supported in the 18 page Transcript of Proceedings of: Termination of Parents Rights *Partial Transcription filed December 19, 2013, this Court respectfully requests the

On appeal, Parents set forth three issues for our review.

[1.] Did the trial court err in failing to apply the correct “clear and convincing evidence” burden of proof in making its determination that the evidence was sufficient to support involuntary termination of parental rights?

[2.] Did the trial court err in ordering involuntary termination of parental rights in that there was not clear, convincing and sufficient evidence of incapacity to parent or of an inability to remedy the conditions that led to placement within a reasonable time?

[3.] Did the trial court err in finding that the severing of the parent/child bond would best serve the needs and welfare of the child, when the parents were never given the opportunity to develop a full, healthy parent/child bond?

Parents’ Brief at 3 (suggested answers omitted).

We consider these issues mindful of the following.

In cases involving the termination of a parent's rights, our standard of review is limited to determining whether the order of the trial court is supported by competent evidence, and whether the trial court gave adequate consideration to the effect of such a decree on the welfare of the child.

Absent an abuse of discretion, an error of law, or insufficient evidentiary support for the trial court's decision, the decree must stand We must employ a broad, comprehensive review of the record in order to determine whether the trial court's decision is supported by competent evidence.

In re C.W.U., Jr., 33 A.3d 1, 4 (Pa. Super. 2011) (quotation marks and citations omitted).

Superior Court of Pennsylvania refer to said Transcript for all issues claimed by Appellant.

Statement in Compliance with Pa.R.A.P. 1925, 1/22/2014.

Our courts apply a two-part analysis in reviewing an order terminating parental rights. As we explained in *In re L.M.*, 923 A.2d 505 (Pa. Super. 2007),

[i]nitially, the focus is on the conduct of the parent. The party seeking termination must prove by **clear and convincing evidence** that the parent's conduct satisfies the statutory grounds for termination delineated in Section 2511(a). Only if the court determines that the parent's conduct warrants termination of his or her parental rights does the court engage in the second part of the analysis pursuant to Section 2511(b): determination of the needs and welfare of the child under the standard of best interests of the child. One major aspect of the needs and welfare analysis concerns the nature and status of the emotional bond between parent and child, with close attention paid to the effect on the child of permanently severing any such bond.

Id. at 511 (emphasis added).

Parents first contend that the termination of their parental rights should be reversed because the orphans' court did not apply the proper standard when reviewing the evidence. Parents' Brief at 7-8. Parents direct us to the on-the-record opinion of the orphans' court delivered at the close of the hearing. The orphans' court stated, "[a]fter testimony, the [c]ourt is satisfied that the facts in this case by a preponderance of the evidence meet the statutory requirement." Orphans' Court Opinion, 12/16/2013, at 17. Parents argue that the proper standard for which to review the evidence was the "clear and convincing evidence" standard.

Parents are correct to the extent that they argue that the orphans' court was required to find clear and convincing evidence to support its

decision. However, upon review of the entire opinion, it is clear that the orphans' court utilized the proper evidentiary standard. For example, after thoroughly summarizing the factual circumstances and testimony in this matter (**see** Orphans' Court Opinion, 12/16/2013, at 2-10), the orphans' court then stated the applicable law.

We're also very much aware of our burden in this case and that's to hold the Agency's feet to the fire. Termination of Parental Rights is controlled by statute and it's a bifurcated process. Initially, we focus on the conduct of the parent, the -- the Agency must prove and their standard is by clear and convincing evidence that a parents' conduct satisfy the statutory grounds.

As we mentioned, the burden is on the Agency by clear and convincing evidence, clear and convincing testimony, that's clear, direct, weighty, and so convincing to enable this court to come to a clear conviction without hesitation as to the truth of the facts at issue.

Orphans' Court Opinion, 12/16/2013, at 10-11. Thus, even though the orphans' court did use the language "preponderance of the evidence" a few paragraphs later, it is clear, from a reading of the entire opinion, that the orphans' court was well aware that clear and convincing evidence was the correct standard to apply and utilized it in reaching its conclusion. Accordingly, Parents' first argument does not entitle them to relief.

We now turn to Parents' next two arguments which challenge the conclusion of the orphans' court that their parental rights should be terminated. Parents' Brief at 9-15. Here, the orphans' court terminated

Parents' rights pursuant to 23 Pa.C.S. § 2511(a)(2), (5), (8), and (b). "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 J.F.M.***, 71 A.3d 989, 992 (Pa. Super. 2013). For the purposes of our analysis, we focus on subsection (a)(8). The statute provides, in relevant part, as follows.

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

* * *

(8) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency, 12 months or more have elapsed from the date of removal or placement, the conditions which led to the removal or placement of the child continue to exist and termination of parental rights would best serve the needs and welfare of the child.

* * *

(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) ... (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. § 2511.

Section 2511(a)(8) represents the determination that “a parent’s basic constitutional right to the custody and rearing of [her] ... child is converted, upon the failure to fulfill ... 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 the Interest of K.Z.S.***, 946 A.2d 753, 759-760 (Pa. Super. 2008) (quoting ***In re B.N.M.***, 856 A.2d 847, 856 (Pa. Super. 2004)).

Instantly, there is no dispute that Child had been out of Parents’ care for over 12 months at the time of the hearing.

Once the 12-month period has been established, the court must next determine whether the conditions that led to the child’s removal continue to exist, despite the reasonable good faith efforts of [CYS] supplied over a realistic time period. Termination under Section 2511(a)(8) does not require the court to evaluate a parent’s current willingness or ability to remedy the conditions that initially caused placement or the availability or efficacy of [CYS] services.

K.Z.S., supra at 759 (quoting ***In re Adoption of K.J.***, 936 A.2d 1128, 1133 (Pa. Super. 2007)).

Parents argue that the record contradicts the testimony of Licensed Psychologist David Ray, M.Ed. (Ray), upon which the orphans’ court relied. Parents’ Brief at 10-12. Specifically, Parents contend that Ray did not take into consideration that, despite Father’s illness, he continued to be employed and do the best he could under the circumstances of working a night shift and then having daytime visits with Child. We disagree.

“When the trial court sits as fact finder, the weight to be assigned the testimony of the witnesses is within its exclusive province, as are credibility

determinations, [and] the court is free to choose to believe all, part, or none of the evidence presented.” **Mackay v. Mackay**, 984 A.2d 529, 533 (Pa. Super. 2009). The orphans’ court found Ray’s testimony convincing, and we conclude that this determination is supported by the record. The orphans’ court agreed with Ray that Parents’ dysfunction “impact[s] negatively on the ability of [Parents] to parent. Their parenting deficits are detrimental to the emotional development and the changing needs of a child, and [the orphans’ court shares] the conclusion that they lack capacity or ability to parent.” Orphans’ Court Opinion, 12/16/2013, at 9.

Mother admitted to Ray that she had a tumultuous childhood. In fact, she stated, “we are not bad people but given our childhood and upbringing we are seriously fucked up.” N.T., 12/16/2013, at 9. Ray concluded that Mother was “an individual who is in significant psychological distress.” **Id.** at 12. Ray concluded that Mother has “huge parenting deficits” due to her narcissistic traits, impulse control issues, and instability in relationships. **Id.** at 17. Ray testified that “when you put this all together it is very sad because no matter how hard she tries she will never keep up with [C]hild’s changing needs.” **Id.** at 19. In Ray’s opinion, when he considered “her overall functioning, both her intellectual functioning, her psychiatric difficulties, her personality disorders that she basically lacks the ability to parent [Child]. She’s unable to provide for his needs, his emotional needs, his needs for health and welfare, safety.” **Id.** at 19-20.

Ray also testified about Father's rare genetic disease called Maple Syrup Urine Disease. The disease requires that Father adhere to a very specific diet to control the symptoms. According to Ray, Father is very angry with his parents, CYS, and FICS. Father has a history of major recurrent depression, and Ray diagnosed him with Personality Disorder NOS with a Mixed Personality Disorder. He has characteristics of many personality disorders, including Dependent, Borderline, Narcissistic, Histrionic, and Passive Aggressive. **Id.** at 32.

Etters testified about specific safety concerns. She testified that there was an incident where Father placed his knee on Child during a diaper change. **Id.** at 71. She further testified that during Child's bath, Parents left the bathroom and an agency worker had to intervene and "catch" Child. **Id.** at 78. Etters also observed that Father was having difficulty caring for his medical condition. **Id.** at 80. Specifically, he was removed from the waiting list for a liver transplant for failing to meet the criteria to stay on the list.

Ray observed that although Father is able to maintain employment, because of his personality disorders and cognitive functioning, he would be unable to care adequately for Child. Thus, Ray concluded that Father "lacks capacity to parent [Child]." **Id.** at 36. Father "lacked the ability to provide for his physical needs, his emotional needs, as well as an appropriate environment for his health, welfare, and safety where [Child] could grow and mature both physically and psychologically." **Id.** As the record supports the

orphans' court's findings, we hold that the orphans' court properly terminated Parents' parental rights under section (a)(8) because "conditions which led to the removal or placement of [Child] continue to exist." 23 Pa.C.S. § 2511(a)(8).

We now turn to the other requirement under section 2511(a)(8), regarding the best interests of Child. Here, Ray testified that Child is doing well in his foster home and engages with his foster parents in a loving and age appropriate way. N.T., 12/16/2013, at 38. Thus, the record supports the orphans' court's finding that terminating Parents' rights is in the best interests of Child.

Accordingly, we conclude that the trial court did not err in finding that CYS met its burden under section 2511(a)(8). **See, e.g., In re C.L.G.**, 956 A.2d 999, 1008 (Pa. Super. 2008) (*en banc*) ("[I]f we were to permit Mother further opportunity to cultivate an environment where she can care for C.L.G., we would be subjecting a child, who has been waiting for more than two years for permanency, to a state of proverbial limbo in anticipation of a scenario that is speculative at best.").

We next consider whether the trial court gave adequate consideration to the welfare of Child under section 2511(b). "Intangibles such as love, comfort, security, and stability are involved when inquiring about the needs and welfare of the child." **K.Z.S., supra** at 760 (quoting **In re C.P.**, 901 A.2d 516, 520 (Pa. Super. 2006)).

The court should also consider the importance of continuity of relationships to the child.... The court must consider whether a natural parental bond exists between child and parent, and whether termination would destroy an existing, necessary and beneficial relationship. Most importantly, adequate consideration must be given to the needs and welfare of the child.

Id. (internal citations omitted).

Parents contend “that since they were never given the opportunity (time) to develop a full and healthy parent/child bond with [Child] the court should look at the realistic potential for the development of a healthy parent/child bond, before making the decision to sever all parent/child bonds forever.” Parents’ Brief at 13-14.

In a sense, Parents’ argument concedes that they have no bond with Child worth preserving, but they would like more time to develop one. However, based on the aforementioned principles of law, time has run out. The orphans’ court properly looked to the testimony of Ray in determining whether there was currently a bond worth preserving. With respect to Mother, Ray testified that Child’s bond is “an insecure, ambivalent attachment ... at best.” N.T., 12/16/2013, at 21. Ray concluded that Father “has at very best an insecure, ambivalent attachment” to Child. N.T., 12/16/2013, at 38. Child “does not have a really strong attachment to either parent. He doesn’t ... run and jump into their arms, hold them out. He doesn’t even light up ... when they see him[.]” ***Id.***

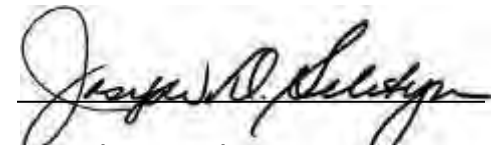
Furthermore, Ray also concluded that Child “had an excellent attachment to the foster parents. Very affectionate with them. Very close

with them.... And in [his] opinion he has a healthy, secure attachment with both" foster mother and father. ***Id.*** Thus, there was ample evidence that Child had no bond with Parents worth preserving and did have a strong bond with his foster family, who were willing to adopt him. ***See, e.g., L.M., supra*** at 512 ("There was absolutely no evidence that severing the ties between Mother and L.M. would have a negative effect on the child. Rather, unrefuted testimony indicated that L.M. was strongly bonded to her foster mother and was thriving in her foster home.").

Therefore, because the record supports the orphans' court's conclusions (1) that the conditions that led to Child's placement continue to exist, and (2) that termination of Parents' rights is in Child's best interests, we hold that the orphans' court committed no error or abuse of discretion in granting CYS's petition under section 2511(a)(8) and (b).

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/30/2014