

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: J.M.B.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

APPEAL OF: S.B., FATHER

No. 38 MDA 2014

Appeal from the Decree dated December 2, 2013,
in the Court of Common Pleas of Berks County, Orphans'
Court, at No(s): 83261

BEFORE: BENDER, P.J.E, MUNDY, and JENKINS, JJ.

MEMORANDUM BY BENDER, P.J.E.:

FILED JULY 01, 2014

S.B. ("Father") appeals from the decree entered by the Court of Common Pleas of Berks County involuntarily terminating his parental rights to his daughter, J.M.B., born in May of 2012. We affirm.

In its opinion pursuant to Pa.R.A.P. 1925(a), the orphans' court aptly described the following facts and procedural history:

J.M.B.[] has been in the care of the Berks County Children and Youth Services (hereinafter "BCCYS") since October 17, 2012, for a period exceeding twelve (12) months.

Unfortunately, BCCYS has been involved with this family since June 2012, only one (1) month after the minor child's birth. From June until October 2012, BCCYS received three (3) reports concerning Father's repeated incarceration and pending criminal matters, an incident where Mother was shot in the head, the violent turbulent lifestyle of the family, and the minor child being in the care of multiple family members and friends. The minor child was declared dependent and custody was transferred to BCCYS for placement purposes on October 17, 2012. Father was not present at the initial dependency hearing due to his incarceration.

With the exception of twenty (20) days, Father has been incarcerated for the entirety of the minor child's placement.

. . .

Father has been incarcerated on, at least, seven (7) occasions. From 2006 until present, Father has been charged with numerous criminal offenses. However, even when he is not incarcerated, Father has demonstrated inadequate parenting in regards to his other children. Father's parental rights to his two older children, W.B. and N.B., were terminated in 2009. Father admitted that, during the almost two (2) years that these children were in placement, Father completed none of the court-ordered services.

Trial Court Opinion, 1/28/14, at 4-7 (citations to record and footnote omitted).

On August 5, 2013, BCCYS filed separate petitions for the involuntary termination of parental rights of Father and T.M.R. ("Mother") pursuant to 23 Pa.C.S. § 2511(a)(1), (2), (5), (8), and (b). The orphans' court held a hearing on November 25, 2013, during which Father, Mother, and Carol Rentschler, the BCCYS caseworker, testified. By decrees dated December 2, 2013, the orphans' court granted the involuntary termination petitions. Father timely filed a notice of appeal and a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b). Mother did not file a notice of appeal.

On appeal, Father presents the following issues:

1. Did the [orphans' c]ourt err by terminating [Father's] parental rights?
2. Was the evidence presented by . . . BCCYS[] insufficient to support the [orphans' c]ourt's decision to terminate [Father's] parental rights?

3. Did the [orphans' c]ourt err in and abuse its discretion by not properly considering that [Father] complied with services, other than those they had no control over, required by [BCCYS][?]
4. Did the [orphans' c]ourt abuse its discretion in terminating [Father's] parental rights when [Father] completed every program available to him during his incarceration, that he is likely to be released from prison shortly due to a development in his criminal case, and his stated desire to cooperate with any additional services recommended by [BCCYS]?

Father's brief at 8.

We review this appeal according to 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.***; ***In re R.I.S.***, 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.***, 613 Pa. 371, 34 A.3d 1, 51 (Pa. 2011); ***Christianson v. Ely***, 575 Pa. 647, 838 A.2d 630, 634 (Pa. 2003). Instead, a decision may be reversed for an abuse of discretion only upon demonstration of manifest unreasonableness, partiality, prejudice, bias, or ill-will. ***Id.***

As we discussed in ***R.J.T.***, there are clear reasons for applying an abuse of discretion standard of review in these cases. We observed that, unlike trial courts, appellate courts are not equipped to make the fact-specific determinations on a cold record, where the trial judges are observing the parties during the relevant hearing and often presiding over numerous other hearings regarding the child and parents. ***R.J.T.***, 9 A.3d at 1190. Therefore, even where the facts could support an opposite result, as is often the case in dependency and termination cases, an appellate court must resist the urge to

second guess the trial court and impose its own credibility determinations and judgment; instead we must defer to the trial judges so long as the factual findings are supported by the record and the court's legal conclusions are not the result of an error of law or an abuse of discretion. ***In re Adoption of Atencio***, 539 Pa. 161, 650 A.2d 1064, 1066 (Pa. 1994).

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

Termination of parental rights is governed by section 2511 of the Adoption Act, which requires a bifurcated analysis.

Our case law has made clear that under Section 2511, the court must engage in a bifurcated process prior to terminating parental rights. 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). 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.

In re L.M., 923 A.2d 505, 511 (Pa. Super. 2007) (citing 23 Pa.C.S. § 2511, other citations omitted). The burden is upon the petitioner to prove by clear and convincing evidence that the asserted statutory grounds for seeking the termination of parental rights are valid. ***In re R.N.J.***, 985 A.2d 273, 276 (Pa. Super. 2009).

This Court must agree with only one subsection of 2511(a), in addition to section 2511(b), in order to affirm the termination of parental rights. ***See In re B.L.W.***, 843 A.2d 380, 384 (Pa. Super. 2004) (*en banc*). Herein, we

review the decree pursuant to section 2511(a)(2) and (b), which provide 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:

. . . .

(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. § 2511(a)(2), (b).

To satisfy the requirements of section 2511(a)(2), the moving party must produce clear and convincing evidence regarding the following elements: (1) repeated and continued incapacity, abuse, neglect, or refusal; (2) such incapacity, abuse, neglect, or refusal caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being; and (3) the causes of the incapacity, abuse, neglect, or

refusal cannot or will not be remedied. **See *In re Adoption of M.E.P.***, 825 A.2d 1266, 1272 (Pa. Super. 2003). 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; to the contrary, those grounds may include acts of refusal as well as incapacity to perform parental duties. ***In re A.L.D.*** 797 A.2d 326, 337 (Pa. Super. 2002).

In ***In re Adoption of S.P.***, our Supreme Court addressed the relevance of incarceration in termination decisions under section 2511(a)(2). The ***S.P.*** Court held that “incarceration is a factor, and indeed can be a determinative factor, in a court’s conclusion that grounds for termination exist under § 2511(a)(2) where the repeated and continued incapacity of a parent due to incarceration has caused the child to be without essential parental care, control or subsistence and that the causes of the incapacity cannot or will not be remedied.” ***S.P.***, 47 A.3d at 828.

With respect to section 2511(b), this Court has explained the requisite analysis as follows:

Subsection 2511(b) focuses on whether termination of parental rights would best serve the developmental, physical, and emotional needs and welfare of the child. In ***In re C.M.S.***, 884 A.2d 1284, 1287 (Pa. Super. 2005), this Court stated, “Intangibles such as love, comfort, security, and stability are involved in the inquiry into the needs and welfare of the child.” In addition, we instructed that the trial 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.*** However, in cases where there is no evidence of a bond between a parent and child, it is reasonable to infer that no bond exists. ***In re K.Z.S.***, 946 A.2d 753, 762-63 (Pa. Super.

2008). Accordingly, the extent of the bond-effect analysis necessarily depends on the circumstances of the particular case. **Id.** at 63.

In re Adoption of J.M., 991 A.2d 321, 324 (Pa. Super. 2010).

Instantly, the crux of Father's issues on appeal is that the orphans' court abused its discretion in terminating his parental rights by discounting evidence he participated in the services available to him while in prison, he maintained contact with BCCYS, and he wrote four letters and/or drawings for J.M.B. We disagree.

The BCCYS caseworker, Carol Rentschler, testified Father has an extensive criminal history.¹ N.T., 11/25/13, at 17. Ms. Rentschler testified Father was incarcerated at the time of J.M.B.'s placement on October 17, 2012, at which time she was nearly five months old. **Id.** at 18. Father remained incarcerated for all but twenty days of J.M.B.'s placement. **Id.** Father was re-incarcerated on June 18, 2013, on charges related to illegal drugs and possession of a firearm, which was subsequent to J.M.B.'s birth. **Id.** at 17-18, 27-28. On the date of the termination hearing, Father remained incarcerated, and he was waiting for a hearing with respect to the

¹ With respect to his criminal history, Father testified it started in 1995, while living in the State of New York, for the crime of robbery. N.T., 11/25/13, at 40. Father testified he committed probation violations, and then he committed a crime involving illegal drugs in 2000, also while living in the State of New York. **Id.** at 33, 40-41. While residing in Pennsylvania, in January of 2012, Father pleaded guilty to charges related to illegal drugs. **Id.** at 35. Father was subsequently arrested for attempted homicide, which he testified was dropped to the lesser charge of simple assault. **Id.** at 35-36.

criminal charges. *Id.* at 20. Ms. Rentschler testified that, while in prison, Father completed eight programs, seven of which he completed within six months or less of his most recent arrest in June of 2013. *Id.* at 19. Ms. Rentschler testified on cross-examination that Father has kept in contact with her through letters, and he has provided her with letters and/or drawings for J.M.B. *Id.* at 22.

Father testified that the hearing on the criminal charges was scheduled for December 16, 2013. *Id.* at 31. Father also testified he anticipated the charges would be dismissed, but he would still have two years of probation to complete related to his prior crimes. *Id.* On cross-examination by counsel for BCCYS, Father acknowledged that his parental rights were terminated with respect to two children in 2009. *Id.* at 38.

We conclude the testimonial evidence supports termination of Father's parental rights pursuant to 23 Pa.C.S. § 2511(a)(2) in that Father's repeated and continued incapacity, abuse, neglect, or refusal due to his incarceration has caused J.M.B. to be without essential parental care, control, or subsistence necessary for her physical or mental well-being. In addition, the causes of Father's incapacity, neglect, or refusal cannot or will not be remedied in that there is no record evidence related to when Father will be released from prison, and when he will be able to provide essential parental care to J.M.B. With respect to Father's argument that his pending criminal charges are likely to be dismissed, and he will therefore be released from

prison shortly, we agree with the orphans' court that, "[o]ther than Father's own self-serving testimony," there is no record evidence to support Father's assertion. Trial Court Opinion, 1/28/14, at 6. Moreover, even if Father is released from prison in the near future, Father testified he has two years of probation left, during which time he would not be able to assume parental responsibility of J.M.B.

In light of the requisite bifurcated analysis in termination matters, we next review the decree pursuant to section 2511(b) regarding the developmental, physical and emotional needs and welfare of J.M.B. We discern no abuse of discretion.

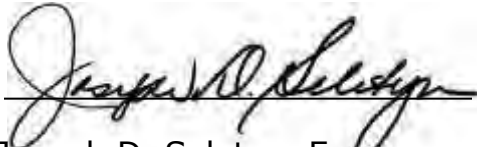
In this case, there is no evidence of a bond between J.M.B. and Father, as she was nearly five months old when placed in the custody of BCCYS in October of 2012, and Father was incarcerated at the time. Ms. Rentschler testified that J.M.B. has not seen Father the entire time of her placement. N.T., 11/25/13, at 19. Indeed, Ms. Rentschler testified it would not be detrimental to J.M.B. if the court terminates Father's parental rights "because she doesn't know him." *Id.* at 21. Further, Ms. Rentschler testified that J.M.B.'s foster parents, with whom she has resided for more than one year, are a long-term resource, and that J.M.B. looks to them "to have all her needs met." *Id.* at 20-21; *see In re T.S.M.*, 71 A.3d 251, 268 (Pa. 2013) (stating, "[c]ommon sense dictates that courts considering

termination must also consider whether the children are in a pre-adoptive home and whether they have a bond with their foster parents”).

Based on the foregoing testimonial evidence and the relevant case law, we discern no abuse of discretion by the court in concluding that terminating Father’s parental rights “would best serve the developmental, physical, and emotional needs and welfare” of J.M.B. We further observe that the Guardian *Ad Litem* filed a letter brief in support of the orphans’ court decision to terminate Father’s parental rights. Accordingly, we affirm the decree terminating Father’s parental rights pursuant to 23 Pa.C.S. § 2511(a)(2) and (b).

Decree affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/1/2014