NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

IN RE: J.M.H., JR., A MINOR	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
APPEAL OF: M.C., MOTHER	:	No. 389 MDA 2014

Appeal from the Order dated January 30, 2014,
Court of Common Pleas, York County,
Orphans' Court at No. 2013-0109

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Appeal from the Order dated January 30, 2014,
Court of Common Pleas, York County,
Juvenile Division at No. CP-67-118-2011

BEFORE: DONOHUE, WECHT and STRASSBURGER*, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED JUNE 13, 2014**

Appellant, M.C. ("Mother"), appeals from the trial court's orders dated January 30, 2014 terminating her parental rights to J.M.H., Jr. ("Child") and approving a goal change from reunification to adoption. For the reasons that follow, we affirm the trial court's orders.

*Retired Senior Judge assigned to the Superior Court.

Child, born out of wedlock on June 19, 2008, is the son of Mother and J.M.H., Sr. ("Father"). Adjudication, 1/10/2014, at ¶ 4.[1] When Child was only a few months old, Mother sent him to reside with Father, and since that time Child has resided in the custody of paternal relatives. ***Id.*** at ¶ 33. On August 25, 2011, the York County Office of Children, Youth and Families ("CYS") filed an Alleged Dependent Child Petition, which the trial court granted on October 6, 2011. ***Id.*** at ¶¶ 10-11. The trial court awarded legal custody to CYS and physical custody to a paternal Aunt ("Paternal Aunt"), with whom Child had been residing (along with a paternal half-brother) since March 2011. ***Id.*** at ¶¶ 11, 42. The trial court established the initial goal for Child as reunification with his parents. ***Id.*** at ¶ 11.

Mother was incarcerated in the Dauphin County Prison in November 2009 and transferred to SCI-Muncy in November 2011. ***Id.*** at 25; Mother's Brief at 8. Mother received a five-year sentence for crimes committed in Dauphin and Cumberland Counties involving drug possession, possession with the intent to deliver, and criminal use of a communications facility. Adjudication, 1/10/2014, at ¶¶ 25-26. During her incarceration, Mother resided in a therapeutic community to address her drug addictions and attended two parenting classes and a violence prevention program. ***Id.*** at ¶

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[1] The trial court also terminated the parental rights of Father in this Adjudication. Like Mother, Father has been incarcerated for a substantial portion of Child's life. Father did not appeal the termination of his parental rights and is not a party to this appeal.

28. She was employed during her incarceration and used her wages to pay for hygiene products and to make donations to her church. ***Id.*** at ¶ 29. Mother was granted parole in December 2012 but received a misconduct prior to her release and it was revoked. ***Id.*** at ¶ 31. Mother was again granted parole in December 2013. ***Id.*** at ¶ 30.

As required by statute, the trial court conducted dependency review proceedings in March 2012, August 2012, February 2013, and August 2013. ***Id.*** at ¶¶ 16, 18, 21, 22. In August 2013, the trial court ordered CYS to file a petition to terminate the parental rights of Mother and Father and to change the court-ordered goal from reunification to adoption, which CYS did on October 8, 2013. ***Id.*** at 6; Mother's Brief at 7. On December 2, 2013, Mother filed a petition to change the goal to SPLC (subsidized permanent legal custodianship). The trial court conducted an evidentiary hearing on December 4, 2013, which concluded on December 24, 2013. By orders and an adjudication dated January 29, 2014 (entered on January 30, 2014), the trial court granted CYS's petition to terminate Mother's parental rights, granted the goal change to adoption, and denied Mother's petition for SPLC.

This timely appeal followed, in which Mother raises the following issues for our consideration and determination:

> 1. Whether the trial court erred in concluding that there is clear and convincing evidence that grounds for termination of Mother's parental rights are valid and sufficient per 23 Pa.C.S. 2511(a)(1)(2)(5) and (8).

2. Whether the lower court erred in not directing [CYS] to arrange for visits between Mother and Child during Mother's incarceration at SCI Muncy, and in specifically denying same.

3. Whether the lower court erred in concluding that SPLC is not an acceptable alternative to terminating Mother's parental rights.

4. Whether the lower court erred in concluding that it is in the Child's best interests to terminate Mother's parental rights.

Mother's Brief at 4.

Beginning with Mother's first and fourth issues on appeal, our standard of review for cases involving the termination of parental rights is as follows:

> [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)]. 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.*** 34 A.3d 1, 51 ([Pa.] 2011); ***Christianson v. Ely***, 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***, 650 A.2d 1064, 1066 (Pa. 1994).

In re I.E.P., 87 A.3d 340, 344 (Pa. Super. 2014).

Termination of parental rights requires a bifurcated analysis, as per section 2511 of the Adoption Act:

> 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). The petitioner has the burden to prove by clear and convincing evidence that the asserted statutory grounds for terminating parental rights are valid. ***In re R.N.J.***, 985 A.2d 273, 276 (Pa. Super. 2009).

This Court needs to agree with only one subsection of 23 Pa.C.S.A. § 2511(a), in addition to subsection 2511(b), to affirm a trial court's termination of parental rights. ***See In re B.L.W.***, 843 A.2d 380, 384 (Pa. Super. 2004) (*en banc*). Herein, we review the orders pursuant to section 2511(a)(2) and (b), which provide 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), (b).

Under subsection 2511(a)(2), the grounds for termination of parental rights are "not limited to affirmative misconduct." ***In re A.L.D.***, 797 A.2d 326, 337 (Pa. Super. 2002).

> Unlike subsection (a)(1), subsection (a)(2) does not emphasize a parent's refusal or failure to perform parental duties, but instead emphasizes the child's present and future need for essential parental care, control or subsistence necessary for his physical or mental well-being. Therefore, the language in subsection (a)(2) should not be read to compel courts to ignore a child's need for a stable home and strong, continuous parental ties, which the policy of restraint in state intervention is intended to protect.

In re E.A.P., 944 A.2d 79, 82 (Pa. Super. 2008) (internal citations and quotation marks omitted). Under subsection 2511(a)(2) even "sincere efforts to perform parental duties" may not be sufficient to remedy parental incapacity. ***In re Z.P.***, 994 A.2d 1108, 1117-18 (Pa. Super. 2010).

One recognized form of parental incapacity is incarceration. In ***In re Adoption of S.P.***, 47 A.3d 917 (Pa. 2012), our Supreme Court held that incarceration may be determinative under subsection 2511(a)(2) on the issue of parental incapacity:

> [W]e now definitively hold that incarceration, while not a litmus test for termination, can be determinative of the question of whether a parent is incapable of providing 'essential parental care, control or subsistence' and the length of the remaining confinement can be considered as highly relevant to whether 'the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent,' sufficient to provide grounds for termination pursuant to 23 Pa.C.S. § 2511(a)(2). ***See e.g. Adoption of J.J.***, 515 A.2d at 891 ('[A] parent who is incapable of performing parental duties is just as parentally unfit as one who refuses to perform the duties.'); ***E.A.P.***, 944 A.2d at 85 (holding termination under § 2511(a)(2) supported by mother's repeated incarcerations and failure to be present for child, which caused child to be without essential care and subsistence for most of her life and which cannot be remedied despite mother's compliance with various prison programs).

Id. at 830.

Mother argues that ***S.P.*** should not govern in this case because she has been granted parole and entered into a halfway house, and thus she is now in a position to "begin the bonding process" with Child. Mother's Brief at 20. In this regard, however, the trial court made the following observations:

> Mother's absence from Child's life has consistently left him without proper parental care and control. While her current incarceration has left her incapable of providing appropriate care and control for the Child, she simply did not provide Child with care for much of his life. She has not provided housing or transportation for Child since he was a few months old and for [] intermittent and inconsistent visits prior to his second birthday. Although able to provide Child with some financial support, albeit

> minimal, through her employment at the prison, Mother instead chose to donate tithes to the church. Due to her absence from Child's life, Mother knows very little about Child and has continuously failed to provide the necessary care, whether as a result of incarceration or her drug addiction. Child's daily needs were met by others even prior to his official placement with [Paternal Aunt] in 2011.
>
> Although Mother's parole was granted in December 2013, it is unknown to the [trial court] if or when Mother will actually be released from Muncy. Mother was granted parole once before, in December 2012, but had her parole revoked prior to her release. Even if she should actually be released on parole this time, [the trial court] does not know at what time such release shall occur. Additionally, Mother must reside at a halfway house where Child could not reside and could provide no insight into where or how long her placement there would last. She would need to obtain housing, employment, and transportation. Consistent with the Commonwealth's Supreme Court decision in *In re Adoption of S.P.*, there is too much uncertainty regarding Mother's ability to ***someday*** provide Child the necessary care for [the trial court] to say the repeated and continued incapacity of Mother will be remedied. Therefore, termination of Mother's parental rights is appropriate pursuant to Section 2511(a)(2).

Adjudication, 1/10/2014, at 35-36 (emphasis in original).

We agree with the trial court, as its findings of fact are supported by the certified record on appeal and its legal conclusion comports with the Supreme Court's decision in ***S.P.*** At the evidentiary hearing on December 4, 2013, Mother acknowledged that prior to the start of the proceedings that day, she had not visited with Child since March 28, 2010. N.T., 12/4/2013, at 32. She also testified that after the first six months of his life, she had

done "nothing" to be a parent to him, and that instead "all of the heavy lifting in regard to raising" him had been done by others. ***Id.*** at 42. She agreed that because she would be at the halfway house, it would probably take at least another six months to a year before there could be any consideration of Child coming to live with her, and she could not offer "an appropriate time frame or anything to tell you how long it's going to be." ***Id.*** at 91-93.

Mother does not challenge the trial court's finding that the Commonwealth presented sufficient evidence with respect to section 2511(b). Counsel for Mother stipulated that Mother and Child have no bond between them, and that Child has bonded with his current family (including Paternal Aunt). N.T., 12/24/2013, at 26-27. Mother testified that she is satisfied that Child is well-cared for at the present time. N.T., 12/4/2013, at 48.

For these reasons, we conclude that the trial court committed no error or abuse of discretion in terminating Mother's parental rights.

For her second issue on appeal, Mother contends that the trial court erred in not directing CYS to arrange for visits between Mother and Child during Mother's incarceration at SCI Muncy, and in denying her requests for visits. Mother testified that she wrote a letter every month to her CYS caseworker inquiring about Child's well-being, but repeatedly advised the caseworker that she did not want the caseworker to bring Child for visits,

both because of "that setting" (*i.e.*, prison) and because it was "not appropriate" because "he didn't know who I am." N.T., 12/4/2013, at 88-90. In August 2013, Mother reconsidered and requested prison visitations with Child. At that time,[2] the trial court denied the request, advising Mother than upon her release on parole, therapeutic visits could be arranged. ***Id.*** at 101.

The denial of a parent's request for visitation of a dependent child is governed on an abuse of discretion standard. ***In re J.S.C.***, 851 A.2d at 191. In her appellate brief, Mother offers no explanation why the trial court abused its discretion in August 2013 when it determined that a bond between Mother and Child could best be built after her release on parole

[2] In its written opinion pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure, the trial court suggests that Mother did not preserve this issue for appeal because she did not immediately appeal the August 2013 ruling. Trial Court Opinion, 3/6/2014, at 2. We disagree. An order denying visitation of a dependent child to a parent may qualify as a collateral order pursuant to Pa.R.A.P. 313. ***See In re J.S.C.***, 851 A.2d 189, 191-92 (Pa. Super. 2004) (citing ***In the Interests of Rhine***, 456 A.2d 608 (Pa. Super. 1983)). Accordingly, the trial court's August 2013 order in this case denying visitation was likely immediately appealable.

This result, however, does not foreclose our jurisdiction to consider the issue at this time, as the failure to appeal a collateral order within 30 days does not preclude an appeal of the order at a later date. ***See In re Estate of Petro***, 694 A.2d 627, 631 (Pa. Super. 1997) ("We can find no rule of law, either statutory or common law, which states that a collateral order ***must*** be appealed within 30 days of its entrance or an appeal based upon the substance of the collateral order is forever precluded.") (emphasis in original).

rather than in the prison setting – the same rationale Mother herself had given in rejecting visitations by Child until that time.

Instead, Mother now contends that CYS did not fulfill its obligations to provide services to her, noting that as a result of her incarceration, assisting with visitations was essentially the only service that CYS could have provided her.[3] Mother's Brief at 24. As indicated hereinabove, however, Mother testified that she did not want visitations with Child in the prison setting. N.T., 12/4/2013, at 88-90. Mother also admits that by the time she changed her mind about visitations in August 2013, it was "late in the proceedings" and thus highly unlikely that she could have developed a sufficient bond with Child to produce a different result in the termination context. Mother's Brief at 24.

For her third issue on appeal, Mother argues that the trial court erred in not granting her petition to change the Child's goal to SPLC (keeping Child in kinship care with Paternal Aunt and allowing Mother to develop a relationship with Child over time). On appeal, goal change decisions are subject to an abuse of discretion standard of review. ***In re N.C.***, 909 A.2d 818, 822 (Pa. Super. 2006).

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[3] In this case, the trial court reached no findings that CYS had failed to comply with its legal obligations or in any way failed to make reasonable efforts to reunify Mother and Child. Accordingly, this Court's decision in ***In the Interest of D.C.D.***, __ A.3d __, 2014 WL 1621789 (Pa. Super.), *appeal granted*, __ A.3d __, 2014 WL 2503618 (Pa. 2014), has no application here.

> In order to conclude that the trial court abused its discretion, we must determine that the court's judgment was "manifestly unreasonable," that the court did not apply the law, or that the court's action was "a result of partiality, prejudice, bias or ill will," as shown by the record. We are bound by the trial court's findings of fact that have support in the record. The trial court, not the appellate court, is charged with the responsibilities of evaluating credibility of the witness and resolving any conflicts in the testimony. In carrying out these responsibilities, the trial court is free to believe all, part, or none of the evidence. When the trial court's findings are supported by competent evidence of record, we will affirm, "even if the record could also support an opposite result."

In re R.M.G., 997 A.2d 339, 345 (Pa. Super. 2010).

With respect to decisions regarding SPLC, this Court has stated:

> SPLC transfers permanent legal custody to the dependent child's legal custodian without requiring the termination of natural parental rights. When deemed appropriate the [ ] court has the power to permit continued visitation by the dependent child's natural parents. To be eligible for SPLC, the legal custodian must meet all of the requirements for foster parenthood, submit to an annual eligibility evaluation, and have the ability to provide for the child without court supervision.

In re B.S., 861 A.2d 974, 977 (Pa. Super. 2004). The court may consider permanent legal custody upon the filing of a petition that alleges the dependent child's current placement is not safe, and the physical, mental, and moral welfare of the child would best be served if SPLC were granted. ***Id.***; ***In re S.B.***, 943 A.2d 973, 983 (Pa. Super. 2008). Upon receipt of this petition, the court must conduct a hearing and make specific findings

focusing on the best interests of the child. ***In re B.S***., 861 A.2d at 977. The "court must find that neither reunification nor adoption is best suited to the child's safety, protection and physical, mental and moral welfare of the child" for the court to name the custodian a "permanent legal custodian." ***Id.*** (holding 23 Pa.C.S.A. § 6351(f.1) governs appointment of permanent legal custodian).

In this case, the trial court changed the goal to adoption rather than to SPLC, finding as follows:

> [T]he current placement with the kinship provider, [Paternal Aunt], is still necessary and appropriate. Neither parent has been able to provide stable housing or proper and necessary care for Child in more than two years, due to incarceration or release to a halfway house. Furthermore, Father expressed at the termination hearing that he would not contest the termination, which indicates to this [c]ourt Father no longer desires to be a resource for Child. Child is safe in his kinship placement. Moreover, Child is thriving. Since he was adjudicated, Child has been reunited with his paternal half-brother []. Child receives from his kinship mother the care and control that his parents have not offered him.
>
> … [Mother] cannot provide Child with stable housing, nor can she assume custody and provide Child with the care and control he requires. Further, though Mother indicates to the [c]ourt that she is concerned about terminating a relationship between Child and his other biological siblings, there does not appear to be a bond with those siblings, nor has Mother's family, although aware of Child, stepped forward to involve themselves in these proceedings. Mother's family has not requested contact with Child, even though [Paternal Aunt] has arranged for visits.

* * *

> With such insignificant progress, it is clear to this [c]ourt that the current goal of reunification is no longer appropriate or feasible. Child has been in placement for more than two of his five years. His parents have been given the opportunity to make the changes necessary to provide Child with proper care, and yet nothing has really changed: Mother is still incarcerated and still does not have a relationship with Child; Father is right back where he started in 2011 [incarcerated]. Furthermore, as Father has decided not to contest the termination, he no longer wishes to be a resource for Child. The one parent with whom Child does have a relationship does not seek reunification, and the other parent has not complied with the goals established by the Agency and has selfishly requested that the [c]ourt continue to keep Child in limbo through a permanent legal custodianship. Child should not have to wait any longer for permanence and stability, and it is thus in his best interests that the goal be changed to adoption.

* * *

> This [c]ourt acknowledges Mother presented a Petition to Establish SPLC as a Goal for [Child]. This [c]ourt denies said petition. … After a thorough review of the evidence, it is clear to this [c]ourt that adoption is the appropriate goal for Child. Attempts at reunification are no longer appropriate. … [E]ven if Mother does remedy the circumstances eventually, there is no projected date for reunification. Child does not know Mother and no emotional bond between Mother and Child exists. Mother made no discernible effort to be an active part of Child's life prior to her incarceration and made only minimal effort to contact Child directly while incarcerated. Child has been living in a stable environment and his needs have been met by his [P]aternal Aunt since March 2011, and through [CYS] since October 2011. Although Mother appears to acknowledge that

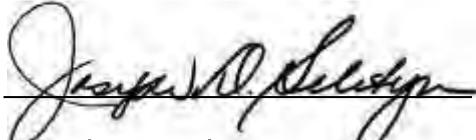
> reunification is not an appropriate goal, there is no reason to change the goal to SPLC. As previously explained, adoption is the goal that will permit Child to finally obtain stability.

Adjudication, 1/10/2014, at 12-16.

Given its standard of review, this Court may not substitute its judgment for that of the trial court, even assuming *arguendo* that we were inclined to do so. No basis exists on which we may conclude that the trial court's analysis is manifestly unreasonable or that its decision is the product of partiality, prejudice, bias or ill will. Accordingly, we will not disturb the trial court's change of the goal for Child to adoption rather than to SPLC.

Orders affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/13/2014