

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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| IN THE INTEREST OF A.C.-S., A MINOR | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| APPEAL OF: J.C., BIOLOGICAL MOTHER | : | |
| | : | No. 910 WDA 2014 |

Appeal from the Order Entered May 21, 2014
In the Court of Common Pleas of McKean County
Civil Division at No(s): CP-42-DP-0000010-2014

BEFORE: BENDER, P.J.E., SHOGAN J., and STRASSBURGER, J.

MEMORANDUM BY BENDER, P.J.E.:

FILED DECEMBER 23, 2014

J.C. ("Mother") appeals from the order entered on May 21, 2014 that adjudicated A.C.-S. ("Child"), born in April of 2012, a dependent child. After review, we vacate and remand.

The May 21, 2014 order was issued by the court after having considered and adopted the recommendations provided by a master after a hearing was held on May 6, 2014, in response to the dependency petition filed by the McKean County Children & Youth Services Agency's ("CYS").¹ The following recitation appears in the "Master's Recommendation for Adjudication—Child Dependent" ("Master's Adjudication"), which was stipulated to by the parties:

Findings of fact are as follows: Counsel for the Mother, counsel for the Agency, and the Guardian Ad Litem stipulated to facts as follows: Mother was[] arrested in Cattaraugus County, New York and remains incarcerated. Prior to her arrest, she made private

¹ Prior to the filing of the dependency petition, CYS had filed an application for emergency protective custody on March 3, 2014, which was granted.

arrangements to place [] [C]hild in the home of [D.] and [D.] [M.] in McKean County, Pennsylvania. Paternity of [] [C]hild has yet to be established, although paternity tests are now in process. At the time she placed [] [C]hild with Mr. and Mrs. [M.], paternity was not established. No custody order or guardianship agreement existed at the time and [] [C]hild was placed by the Mother with the [M.s] and there still is no documentation providing the [M.s] with any legal right to custody or guardianship. ... [M]other[] was a foster child herself in [D.M.'s] home, and had a relationship with her. [M]other was being investigated in NY, and was told that she needed to live with someone else with [C]hild due to the allegations against her, so she moved in with the [M.s]. Mother moved out of the [M.s'] home and left [] [C]hild in Mrs. [M.'s] care due to the pending investigation. [M]other agreed with Mrs. [M.] verbally that Mrs. [M.] would care for [] [C]hild no matter what happened or how long it would take. [M]other gave Mrs. [M.] clothing, money, diapers, wipes, food and a car[]seat. [M]other made sure the [M.s] had a bed for [] [C]hild. Mother was subsequently incarcerated.

[D.M.] was an approved foster placement through McKean County foster care services and ha[s] been a foster parent for 11 years. She was [] Mother's foster parent for approximately four years and she and [] Mother maintained a friendly relationship following [] Mother[']s leaving their home. Mrs. [M.] had frequent contact with [] [C]hild after she was born and [] [C]hild considers her a grandparent. Mrs. [M.] signed a form at Dr. Pradhan's office as a secondary contact and could take [] [C]hild to the doctor's. Mrs. [M.] would testify it would allow her to make medical decisions; however, the Court does not accept this assertion as the form was not presented. In February 2014, Mrs. [M.] lea[r]ned [M]other was under investigation. [M]other and [] [C]hild came to live with Mrs. [M.] for a period. [M]other and Mrs. [M.] spoke and verbally agreed if anything were to happen to [] Mother such as incarceration, Mrs. [M.] would care for [] [C]hild as long as was required. The [M.'s] home had a bed for [] [C]hild and the Mother provided the items outlined above for her care. [M]other was[] subsequently incarcerated. Mrs. [M.] maintained [] [C]hild at her home thereafter, continued to care for her as she would for foster children or a biological child/grandchild. Mrs. [M.] continues to be a foster care parent up to [the] present date. [M]other remains incarcerated and no documentation as to guardianship or

custody of [] [C]hild has been formalized in writing between [] Mother and the [M.s] or anyone else. The Court also finds that if [] [C]hild had simply remained in the [M.'s] home without documentation, the Father, once paternity is established, would have been able to remove [] [C]hild from the [M.'s] home at will as there is not custody or guardianship established for [] [C]hild through the Court. Likewise, given [M]other's incarceration and the present situation with no paternity established, if [] [C]hild were to need immediate medical attention, it would be very difficult to obtain the proper consents for such treatment absent an actual custody or guardianship agreement being in place.

Master's Adjudication, 5/21/14, at 1-2. Based upon these facts, the Master recommended that the court adjudicate Child as a dependent child. Following the court's approval of the Master's Adjudication, Mother 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).

On appeal, Mother presents the following issue:

Whether the trial court erred in finding the subject child to be a dependent child pursuant to 42 Pa.C.S. § 6302 ("dependent child") (subsection 1)?

Mother's brief at 2.

Our standard of review for dependency cases is as follows:

[T]he standard of review in dependency cases requires an appellate court to accept the findings of fact and credibility determinations of the trial court if they are supported by the record, but does not require the appellate court to accept the lower court's inferences or conclusions of law. Accordingly, we review for an abuse of discretion.

In re R.J.T., 9 A.3d 1179, 1190 (Pa. 2010).

Section 6302 of the Juvenile Act defines a dependent child, in part, as a child who:

(1) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals. A determination that there is a lack of proper parental care or control may be based upon evidence of conduct by the parent, guardian or other custodian that places the health, safety or welfare of the child at risk, including evidence of the parent's, guardian's or other custodian's use of alcohol or a controlled substance that places the health, safety or welfare of the child at risk;

. . .

(4) is without a parent, guardian, or legal custodian:

42 Pa.C.S. § 6302(1) and (4).

In ***In re G., T.***, 845 A.2d 870 (Pa. Super. 2004), we stated:

The question of whether a child is lacking proper parental care or control so as to be a dependent child encompasses two discrete questions: whether the child presently is without proper parental care and control, and if so, whether such care and control are immediately available.

Id. at 872 (internal quotations and citations omitted). "The burden of proof in a dependency proceeding is on the petitioner to demonstrate by clear and convincing evidence that a child meets that statutory definition of dependency." ***Id.*** at 872. Moreover, "the dependency of a child is not determined 'as to' a particular person, but rather must be based upon two findings by the trial court: whether the child is currently lacking proper care and control, and whether such care and control is immediately available." ***In re J.C.***, 5 A.3d 284, 289 (Pa. Super. 2010).

In the ***In re J.C.*** case, the trial court found the child was currently without care and control, a conclusion that this Court determined was

supported by the record. **See id.** at 289. The evidence revealed that the child, who was eleven years old, suffered from Downs Syndrome and was found wandering in a high crime area in his underwear. **Id.** Testimony revealed that this had previously occurred on other occasions and because of the child's special needs, he was considered a high-risk child. **Id.** The trial court also found that there was no immediately available proper parental care and control because both the mother and the grandmother were incapable of providing it. **Id.** at 290. Specifically, the court determined that no evidence supported the grandmother's claim that she was the child's legal guardian, but also discussed the grandmother's inability to be a proper caretaker for the child.

Here, the factual basis for the dependency determination differs from that found in **In re J.C.** In the instant case, it is evident that Mother is unable to provide the proper care and control of Child, but that Mrs. M. can and does provide that proper care and control, albeit without the necessary documentation so that she can have the legal authority to act on behalf of Child. It is apparent that CYS has accepted Mrs. M. as a foster parent for eleven years, acknowledging that she has been and continues to be able and willing to provide various children with proper care and control. Accordingly, it is obvious that despite Mother's unavailability to provide Child with the proper parental care and control, Mrs. M. is immediately available and, in

fact, the court confirmed Child's placement with Mrs. M. for the foreseeable future.

The single missing element in this matter is documentation to provide Mrs. M. with the necessary legal authority so that she can make any legal or medical decisions regarding Child. Although we recognize and must accept that the court refused to rely on testimony that a form was signed (but not entered into evidence) to allow Mrs. M. to have Child treated by Dr. Pradhan, this fact at a minimum reveals Mother's and Mrs. M.'s intentions that Mrs. M. would have the authority to seek medical care for Child. If the court appointed Mrs. M. as Child's guardian, Mrs. M. would have the authority to seek medical care for Child and prohibit the father from removing Child from Mrs. M.'s custody, if and/or when paternity is established.²

Thus, the circumstances here do not coincide with those in ***In re J.C.*** Consequently, we determine that the court abused its discretion by concluding that Child was a dependent child under the statute. Rather, we conclude that providing Mrs. M. with the documentation appointing her

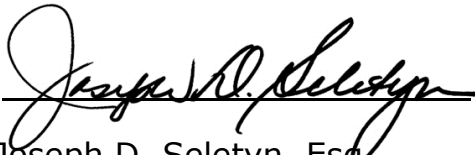
² We also note that the court found that "if Mother were to be released from incarceration and requested [] [C]hild from the [M.] family, the [M.] family would be without the ability to prevent Mother from taking [] [C]hild even if Mother did not have appropriate housing or other arrangements at the time...." Trial Court Opinion, 8/11/14, at 2. This statement is pure speculation and not based upon any facts contained in the record. Rather, Mother's actions prior to her incarceration regarding the placement of Child with the M.s, indicates that Mother would not take any action that might put Child in harms way.

Child's legal guardian would eliminate the need for declaring Child to be a dependent child and would allow for the continued, consistent care Child has been receiving. Nothing in the record suggests otherwise.

Accordingly, we vacate the dependency order and remand the matter for a hearing, if necessary, so that the court may determine whether there is any reason that Mrs. M. should not be appointed the legal guardian of Child.

Order vacated. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

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: 12/23/2014