

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: K.J.S.B., A MINOR : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
APPEAL OF: J.A.S.Z., FATHER, :
: Appellant : No. 2313 EDA 2012

Appeal from the Decree, July 26, 2012,
in the Court of Common Pleas of Lehigh County
Orphans' Court Division at No. A2012-0025

IN RE: J.W.S., A MINOR : IN THE SUPERIOR COURT OF
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: Appellant : No. 2314 EDA 2012

Appeal from the Decree, July 26, 2012,
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Orphans' Court Division at No. A2012-0026

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND MUSMANNO, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: March 5, 2013

J.A.S.Z. ("Father") appeals from the trial court's decrees involuntarily terminating his parental rights to his two minor children, K.J.S.B., born in June of 2007, and J.W.S., born in August of 2009 ("the Children").¹ On appeal, Father contends that the trial court erred in finding that the Lehigh County Office of Children and Youth Services ("the Agency") met its burden

¹ Mother's parental rights to the Children were also terminated. She has not appealed.

of proving by clear and convincing evidence that his parental rights should be terminated pursuant to 23 Pa.C.S.A. § 2511(a)(1), (2) and (b). We affirm.

The relevant facts and procedural history of this case are as follows. On May 28, 2010, the Agency obtained emergency custody of the Children when Mother was being evicted from the home where they were residing. At that time, Father was incarcerated in state prison as a result of his arrest for possession with intent to deliver cocaine and receiving stolen property. Father was sentenced to three to six years' incarceration. (Notes of testimony, 7/20/12 at 227.) Father and Mother had lived together with J.A.S.Z. until Father was arrested on March 4, 2009. Mother was pregnant with J.W.S. when Father was arrested.

After the Agency obtained emergency custody of the Children, they were adjudicated dependent on June 22, 2010. Father participated by telephone in the adjudication hearing from the boot camp where he was incarcerated. Father was ordered to resolve all of his criminal issues, maintain contact with the Children, and cooperate with the Agency. The Children were allowed to return to Mother; however, the Agency accepted physical and legal custody of the Children once again on July 29, 2010. The Children were placed in foster care at that time, and have remained together in the same pre-adoptive home to date. Pursuant to the change of placement, a change of disposition hearing was held on August 17, 2010;

Father received notice but did not participate by telephone. Father's court-ordered services remained the same. In late August of 2010, Father was transferred from boot camp to S.C.I. Houtzdale because of a detainer lodged against him for criminal charges in Puerto Rico. (*Id.* at 236-237, 241.) Father has remained incarcerated throughout the course of this matter.

Permanency review hearings took place on October 5, 2010 and December 7, 2010. Father did not participate by telephone at either hearing. The next permanency review hearing occurred on March 22, 2011. Father had no contact with the Agency or Children during this review period and did not participate by telephone in the hearing. The trial court found that Father had made "no progress" at the March 22nd hearing.

In May of 2011, Richard Romig, the Agency caseworker, sent Father a letter along with pictures of the Children, his address and telephone number in case Father wanted to contact him, and the contact information for Father's assigned counsel. Father did not respond. The next permanency review hearing occurred on October 25, 2011. Father did not participate in the hearing. At another hearing on December 20, 2011, the trial court found that Father had made "no progress" towards alleviating the circumstances that resulted in the Children having been placed in care.

The next permanency review hearing occurred on March 20, 2012 at which Father did not participate by telephone. At that time, the Agency filed petitions for the involuntary termination of parental rights against both

Father and Mother. The last permanency review hearing took place on June 19, 2012. The day before the hearing, Mr. Romig called Father's prison counselor and asked that Father be made available by telephone. Mr. Romig spoke to Father and asked if he had received the letter that was sent to him in May of 2011. According to Mr. Romig, Father replied that he had received it. (*Id.* at 62.) From the time of that letter to their conversation in June of 2012, approximately one year, Father did not provide Mr. Romig with any certificates or documentation regarding successful completion of any courses or programs regarding parenting education while incarcerated. Mr. Romig did testify that Father asked how the Children were doing, but had no questions or concerns about their placement. (*Id.*)

At the June 19, 2012 permanency review hearing, the trial court found that Father was incarcerated in state prison and that he may be eligible for parole in July of 2012. The trial court also found that Father's maximum sentence was due to expire in March of 2015, but that Father will be unable to be a resource because of the detainer from Puerto Rico for charges of robbery. (*See* trial court opinion, 10/25/12 at 5.).

The involuntary termination hearing took place on July 20, 2012. Father remained incarcerated but participated by telephone. Mother failed to show up for the hearing. On July 26, 2012, the trial court entered decrees terminating both parents' parental rights pursuant to 23 Pa.C.S.A.

§ 2511(a)(1), (2) and (b). Father appeals and raises the following issues for our review:

- A. DID THE TRIAL COURT ERR AS A MATTER OF LAW AND/OR ABUSE ITS DISCRETION IN FINDING THAT [THE AGENCY] MET THE REQUIREMENTS OF 23 PA.S.C.A. § 2511(A)(1) AND (2) BY CLEAR AND CONVINCING EVIDENCE?

- B. DID THE TRIAL COURT ERR AS A MATTER OF LAW AND/OR ABUSE ITS DISCRETION IN FINDING THAT [THE AGENCY] SUSTAINED THEIR BURDEN OF PROOF BY CLEAR AND CONVINCING EVIDENCE THAT THE TERMINATION OF BIOLOGICAL [FATHER'S] PARENTAL RIGHTS TO [J.W.S.] AND [K.J.S.B.] BEST MEET THE NEEDS AND WELFARE OF THE CHILDREN AS REQUIRED BY 23 PA.C.S.A. § 2511(b)?

Father's brief at 5.

The standard and scope of review applicable in termination of parental rights cases are as follows:

When reviewing an appeal from a decree terminating parental rights, we are limited to determining whether the decision of the trial court is supported by competent evidence. Absent an abuse of discretion, an error of law, or insufficient evidentiary support for the trial court's decision, the decree must stand. Where a trial court has granted a petition to involuntarily terminate parental rights, this Court must accord the hearing judge's decision the same deference that it would give to a jury verdict. 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 B.L.W., 843 A.2d 380, 383 (Pa.Super. 2004) (*en banc*), *appeal denied*, 581 Pa. 668, 863 A.2d 1141 (2004) (internal citations omitted).

Furthermore, we note that the trial court, as the finder of fact, is the sole determiner of the credibility of witnesses and all conflicts in testimony are to be resolved by [the] finder of fact. The burden of proof is on the party seeking termination to establish by clear and convincing evidence the existence of grounds for doing so.

In re Adoption of A.C.H., 803 A.2d 224, 228 (Pa.Super. 2002) (internal citations omitted). The standard of clear and convincing evidence means testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitation, of the truth of the precise facts in issue. *In re J.D.W.M.*, 810 A.2d 688, 690 (Pa.Super. 2002). We may uphold a termination decision if any proper basis exists for the result reached. *In re C.S.*, 761 A.2d 1197, 1201 (Pa.Super. 2000) (*en banc*). If the trial court's findings are supported by competent evidence, we must affirm the court's decision, even though the record could support an opposite result. *In re R.L.T.M.*, 860 A.2d 190, 191-192 (Pa.Super. 2004). The termination of parental rights is controlled by statute. *In re Adoption of R.J.S.*, 901 A.2d 502, 507 (Pa.Super. 2006).

In terminating Father's parental rights, the trial court relied upon Section 2511(a)(1), (2) and (b) of the Adoption Act, which provides:

§ 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:

- (1) The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.
- (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)(1), (2), and (b). “[W]e need only agree with [the trial court’s] decision as to any one subsection in order to affirm the termination of parental rights.” *In re B.L.W.*, 843 A.2d at 384.

On appeal, Father claims there was insufficient evidence to support termination pursuant to Section 2511(a)(1) and (2). As this court is permitted to agree with the trial court relative to only one subsection of Section 2511(a) in order to terminate parental rights, we will focus on Section 2511(a)(2). With regard to our review of Section 2511(a)(2), this court has stated the following:

The fundamental test in termination of parental rights under Section 2511(a)(2) was long ago stated in *In re Geiger*, 459 Pa. 636, 331 A.2d 172 (1975), where the Pennsylvania Supreme Court announced that under what is now Section 2511(a)(2), the petitioner for involuntary termination must prove (1) repeated and continued incapacity, abuse, neglect or refusal; (2) that such incapacity, abuse, neglect or refusal caused the child to be without essential parental care, control or subsistence; and (3) that the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied.

In re K.Z.S., 946 A.2d 753, 758 (Pa.Super. 2008). Moreover, 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; those grounds may also include acts of refusal as well as incapacity to perform parental duties. (*Id.*) Additionally, in *In re E.A.P.*, 944 A.2d 79 (Pa.Super. 2008), we stated as follows:

Each case of an incarcerated parent facing termination must be analyzed on its own facts, keeping in mind, with respect to *subsection (a)(2)*, that the child's need for consistent parental care and stability cannot be put aside or put on hold simply because the parent is doing what she is supposed to do in prison.

Id. at 84 (emphasis in original.)

Instantly, Father acknowledges that his contact with the Children was limited, but believes that this should be evaluated under the totality of the circumstances that existed for him. (Father's brief at 13.) Father points out that he did make use of his time in prison by participating in vocational and other programs. (*Id.*) Additionally, Father notes that at the time of the initial court involvement, he sought visitation of his Children but his request was denied due to the age of the Children. (*Id.* at 12.)

Recently, in *In re Adoption of S.P.*, ___ Pa. ___, 47 A.3d 817 (2012), our supreme court discussed incarceration as it relates to Subsection 2511(a)(2). The court stated:

[I]ncarceration 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.

Id. at ___, 47 A.3d at 828. After re-visiting a plurality decision in *In re: R.I.S.*, ___ Pa. ___, 36 A.3d 567 (2011), the court held:

[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.**, [511 Pa. 590, 605,] 515 A.2d [883] 891 (“[A] parent who is incapable of performing parental duties is just as parentally unfit as one who refuses to perform the duties.”); **[In re] E.A.P.**, 944 A.2d [79] 85 [(Pa.Super. 2008)](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).’ If a court finds grounds for termination under subsection (a)(2), a court must determine whether termination is in the best interests of the child, considering the developmental, physical, and emotional needs and welfare of the child pursuant to § 2511(b). In this regard, trial courts must carefully review the individual circumstances for every child to determine, *inter alia*, how a parent's incarceration will factor into an assessment of the child's best interest.

In re Adoption of S.P., supra at ____, 47 A.3d at 830-831.

After careful review of the record in this matter, we conclude the trial court's credibility and weight determinations are supported by competent evidence. Father has not had any contact with the Children since March of 2009. Father has never met his youngest child, J.W.S., and K.J.S.B. was 22 months old the last time Father saw him. While initially Father asked to see

the Children, that request was denied due to distance.² However, according to the Agency caseworker, Richard Romig, Father has not requested visits or telephone contact since the Agency has been involved. Father has not written to the Children nor has he sent cards or gifts. Father was aware of the Agency's involvement since at least June of 2010 yet he never contacted the Agency concerning his Children or the requirements that were initially imposed on him, *i.e.*, take care of his criminal matters, maintain contact with the Children and cooperate with the Agency.

While Father testified he did not receive the May 2011 letter which contained the contact information for Mr. Romig and Father's lawyer, Mr. Romig testified Father told him that he had received the letter. (Notes of testimony, 7/20/12 at 62, 245.) The trier of fact was free to accept Mr. Romig's testimony as credible and not Father's. *In re Diaz*, 669 A.2d 372, 375 (Pa.Super. 1995). We will not disturb that credibility determination on appeal. *In re Adoption of M.E.P.*, 825 A.2d 1266, 1273 (Pa.Super. 2003). Furthermore, Father's criminal issues were unresolved at the time of the termination hearing, and the Agency's position was that Father failed to cooperate with it.

Father testified he had completed vocational courses in electrical occupations. (Notes of testimony, 7/20/12 at 238-239.) While Father can be commended for doing so, it remains that during his imprisonment, he did

² Father claims he was denied visitation due to the age of the Children.

nothing to keep in contact or even inquire as to his Children's well-being. Moreover, Father never informed the Agency that he had taken or completed any courses.

We note that due to the detainer lodged against him from Puerto Rico, it was unclear at what future date Father would be released from incarceration. Father testified he did not know what crime he committed in Puerto Rico. (*Id.* at 237.)

Father utterly failed to attempt to maintain any kind of relationship with his Children during his incarceration. We note that a parent cannot protect parental rights by merely stating that she does not wish to have her parental rights taken away. ***Commonwealth v. Arnold***, 665 A.2d 836, 840 (Pa.Super. 1995). The record indicates Father has been incarcerated for essentially the Children's entire lives. Father never financially supported the Children, and these Children do not know him. By his criminal conduct, Father has been absent from their lives while foster parents have provided for all the Children's needs. ***See In re B.,N.M.***, 856 A.2d 847, 855 (Pa.Super. 2004) (Parental rights are not preserved by waiting for a more suitable or convenient time to perform one's parental responsibilities while others provide the child with his or her physical and emotional needs), ***appeal denied***, 582 Pa. 718, 872 A.2d 1200 (2005). Father's incapacity to provide essential care, control and subsistence for the Children continues to

exist. The trial court properly considered all factors in sustaining its burden under Section 2511(a)(2).

Next, regarding Section 2511(b), we inquire whether the termination of Father's parental rights would best serve the developmental, physical and emotional needs and welfare of the Children. **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 children." ***Id.*** at 1287 (citation omitted). We must also discern the nature and status of the parent-child bond, with utmost attention to the effect on the children of permanently severing that bond. ***Id.*** The focus in terminating parental rights under Section 2511(a) is on the parent, but it is on the child under Section 2511(b). ***In re Adoption of C.L.G.***, 956 A.2d 999, 1008 (Pa.Super. 2008) (***en banc***).

Basically, Father argues he did have a relationship with K.J.S.B. who was born in June of 2007. Father was arrested in March of 2009 when K.J.S.B. was 22 months old. Father also maintains he has an older child who lives with Father's mother in Puerto Rico. Father claims he has a relationship with this child. (Father's brief at 16.)

Initially, we note the fact that Father claims to have a relationship with his oldest child, who lives in Puerto Rico, is of no moment to the matter before us. Whatever bond Father may have with K.J.S.B. is minimal if one

exists at all. As of the date of the termination hearing, the child had not had contact with Father for three years. J.W.S. has never had any contact with Father; thus, there can be no bond to speak of. Simply put, Father is a stranger to these Children. The Children are in a loving home with foster parents who desire to adopt them. The foster parents have provided for all the Children's needs and offer them security. Clearly, the effect of terminating Father's parental rights would be to ensure the Children a permanent, stable and loving environment.

The state should not seek to preserve in law a relationship which no longer exists in fact, with the result that the child is consigned indefinitely to the limbo of foster care or the impersonal care of institutions. ***In Re Adoption of V.G.***, 751 A.2d 1174, 1178 (Pa.Super. 2000). Based on our thorough review of the record, we conclude that the trial court's decrees are supported by clear and convincing evidence that termination of Father's parental rights best serves the needs and welfare of the Children.

Decrees affirmed.