

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: ADOPTION OF L.H.S. : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
APPEAL OF: B.J.S., THE BIRTH :
MOTHER, :
: Appellant : No. 2646 EDA 2012

Appeal from the Decree of August 23, 2012,
in the Court of Common Pleas of Montgomery County,
Orphans' Court Division at No. 12-A0064.1

IN RE: ADOPTION OF K.N.S. : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
APPEAL OF: B.J.S., THE BIRTH :
MOTHER, :
: Appellant : No. 2647 EDA 2012

Appeal from the Decree of August 23, 2012,
in the Court of Common Pleas of Montgomery County,
Orphans' Court Division at No. 12-A0063.1

IN RE: ADOPTION OF K.M.S. : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
APPEAL OF: B.J.S., THE BIRTH :
MOTHER, :
: Appellant : No. 2648 EDA 2012

Appeal from the Decree of August 23, 2012,
in the Court of Common Pleas of Montgomery County,
Orphans' Court Division at No. 12-A0062.1

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IN RE: ADOPTION OF J.R.H. : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
APPEAL OF: B.J.S., THE BIRTH :
MOTHER, :
: Appellant : No. 2649 EDA 2012

Appeal from the Decree of August 23, 2012,
in the Court of Common Pleas of Montgomery County,
Orphans' Court Division at No. 11-A0217

BEFORE: OLSON, WECHT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

Filed: March 20, 2013

B.J.S. ("Mother") appeals from the decrees involuntarily terminating her parental rights to her four minor children, L.H.S., born in October 2000, K.M.S., born in March 2002, K.N.S., born in July 2003, and J.R.H., born in September 2008 ("the Children"). We affirm.

R.S. ("Father") is the biological father of L.H.S., K.M.S., and K.N.S. Father and Mother were married in 2001, separated in 2005, and are now divorced. Father has been the primary custodian of these children since mid-2005.¹ Father and his wife, T.S., have resided together with L.H.S.,

¹ Pursuant to court order, Mother had partial physical custody of the three older children from May 3, 2005, to May 13, 2005. After that date, the custody orders provided Mother with supervised custody of the children.

*Retired Senior Judge assigned to the Superior Court.

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K.M.S., and K.N.S. since approximately March 2007. On April 23, 2012, Father and T.S. filed petitions for the involuntary termination of Mother's rights to the three older children and for adoption of the children by T.S. J.G. is the biological father of J.R.H. J.R.H. was born while Mother was incarcerated. J.R.H. was voluntarily placed with S.M. and K.M. following her birth. J.R.H. was born with significant medical issues that continue to require ongoing medical care and therapy. On September 29, 2011, S.M. and K.M. filed a petition for the involuntary termination of Mother's and J.G.'s rights to J.R.H. and for adoption of J.R.H. The cases were consolidated and hearings on the petitions took place on August 15 and August 22, 2012.

The relevant facts are as follows. Mother has a history of criminal activity, primarily related to DUI and retail theft, beginning in 1989 that has led to multiple incarcerations. Mother had a period from 1999 until 2004 where she had no criminal involvement. In October 2004, Mother had an incident involving the police when she left the three older children in her vehicle while she was inside a bar drinking. A short time later, Mother was arrested after she was passed out in her vehicle on the side of the road while her three older children were in the vehicle. In October 2004, Mother went to drug and alcohol inpatient treatment. In February 2005, Mother was arrested for retail theft. Mother was incarcerated from July 2005 to May 2006. Mother was incarcerated again from July 2006 to July 2007. In July 2007, Mother was released to a rehabilitation facility where she resided until December 2007. In February 2008, Mother was arrested for retail theft and

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was incarcerated from February 2008 to July 2010. In July 2010, Mother was released to a halfway house where she remained until May 2011. In May 2011, Mother was again incarcerated after being arrested for retail theft. At the time of the hearing, Mother remained incarcerated.

At the hearing, Father testified as follows. The three older children did not visit Mother during any of her incarcerations. After October 2007, Mother had approximately five supervised overnight visits with the children. During Mother's incarceration from February 2008 to July 2010, the children received letters and phone calls from Mother. During the period of July 2010 to March 2011, when Mother was residing in the halfway house, Mother visited with the children approximately five times and communicated with them through e-mail. During this period, the oldest child, L.H.S., was excited to see Mother, but also cried on occasion; K.M.S. would cry and did not want to visit; and K.N.S., the youngest of the three children, did not have any reaction. Mother last saw the three older children in March 2011.

Father testified that since their last visit and Mother's May 2011 incarceration, the three older children have stated several times that they do not want to visit with Mother or have contact with her and that they are angry with Mother. Mother has written letters to the children since her May 2011 incarceration, but the children no longer want to read Mother's letters. Mother has sent forms to Father in order to arrange for visits with the children at the jail, but Father has not returned the forms. Father testified that there is no bond between Mother and the children because she has not been in their lives, that the children would be happy if they had no more

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contact with Mother, and that they would continue to do well. T.S. has been a caregiver for the children since 2007. The children love T.S., call T.S. "mom," and consistently state that they want her to be their mother and to adopt them.

K.M. testified that she took J.R.H. to visit Mother while she was incarcerated four or five times in the first year of J.R.H.'s life. In May 2010, a custody order was entered granting S.M. and K.M. sole legal and physical custody of J.R.H. until further order of court. In November 2010, Mother, S.M., and K.M. participated in custody conciliation. In December 2010, counsel for S.M. and K.M. sent Mother a proposed interim order addressing visitation between Mother and J.R.H., which Mother did not sign. From July 2010 to May 2011, Mother had approximately six visits with J.R.H. while Mother was residing in the halfway house. In addition, from February 2011 to May 2011, Mother attended approximately fifteen of J.R.H.'s occupational therapy sessions. Mother has not seen J.R.H. since Mother's incarceration in May 2011. K.M. was in communication with Mother regarding J.R.H. from J.R.H.'s birth until March 2011. Since May 2011, Mother has written to K.M. regarding J.R.H., but K.M. has not responded. Mother has sent forms to K.M. to arrange for visits with J.R.H. at the jail, but K.M. has not returned the forms. Additionally, K.M. testified that she and S.M. love J.R.H., J.R.H. is happy and affectionate with them, J.R.H. calls her "mommy," J.R.H. loves K.M.'s sons, and that it would not be a family without J.R.H.

The court also heard testimony from Ms. Adams, who conducted an adoptive home study of S.M. and K.M. Ms. Adams testified that S.M. and

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K.M., their two sons, and J.R.H. appear to be a family unit and that they are all bonded with each other. Ms. Adams testified that S.M. and K.M. meet all of J.R.H.'s needs, they are loving towards her, and that it is in J.R.H.'s best interest to be adopted by S.M. and K.M.

Mother testified that throughout her incarcerations she maintained contact with the three older children by sending them letters and, when permitted, talking to them on the phone. Mother requested visits with the three older children at the jail, but Father would not allow these visits to occur. Mother did not file anything with the court regarding having visitation with the children while she was incarcerated. Mother testified that she has a bond with the three older children and that that bond has continued "[a]s well as it could." N.T., 08/22/12, at 146. During the period of August 2010 to May 2011, Mother received e-mail from the three older children in which they stated that they loved Mother. Mother testified that her parental rights to these children should not be terminated because she was their sole caretaker for the first years of their lives, she loves the children, and the children love her. Mother further testified that severing the bond between Mother and the children would affect the children. Mother acknowledged that she was not in a position to be an excellent parent to the children for the last seven years because much of the time she was incarcerated or in a rehabilitation facility or halfway house. Mother acknowledged a letter from the children's therapist, which was admitted into evidence, in which the therapist stated that L.H.S.'s and K.M.S.'s emotional attachment to Mother is mostly expressed in negative terms, that L.H.S. and K.M.S. expressed that

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Mother has not been physically present in their lives, and that in their time with Mother they take on more of a parental role. The therapist further stated that any communication by L.H.S. and K.M.S. about T.S. has always been expressed in terms of safety, commitment, stability, and love and that they view T.S. as being the maternal figure in their lives.

Regarding J.R.H., Mother testified that she was always requesting visits with J.R.H. Mother testified that she developed a bond with J.R.H. when she was participating in J.R.H.'s therapy appointments. Mother testified that J.R.H. was happy to see her, would tell Mother that she loved her, called Mother "mommy," that both Mother and J.R.H. would cry at times when they had to separate, and that they love each other. Mother stated that she was not able to continue to build upon her bond with J.R.H. because she was not allowed any contact with J.R.H. after May 2011. Mother stated that after her incarceration in May 2011, she attempted to communicate with S.M. and K.M. by telephone, but S.M. and K.M. blocked their home phone and K.M. never answered her cell phone. From May 2011 to March 2012, Mother sent letters to J.R.H. and videos of Mother reading J.R.H. a book. Mother requested that K.M. allow her to have visits with J.R.H. and sent forms to S.M. and K.M. in order to allow for visits at the jail, but the forms were never returned.

Following the hearing, the trial court terminated Mother's rights to the Children pursuant to 23 Pa.C.S.A. §§ 2511(a)(2) and (b).² Mother's timely

² The court also terminated the rights of J.G. to J.R.H. J.G. is not a party to this appeal.

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appeal followed. On appeal, Mothers argues the evidence was insufficient to support termination of her parental rights under 23 Pa.C.S.A. §§ 2511(a)(2) and (b).³ Mother further argues the trial court failed to properly consider the actions of Father and S.M. and K.M. in thwarting Mother's attempts to maintain a bond with the Children and that Mother was prejudiced by the trial court's negative opinion of Mother.

Our standard of review is 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 we 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 S.H., 2005 PA Super 260, 879 A.2d 802, 805 (Pa. Super. 2005). In termination cases, the burden is upon the petitioner to prove by clear and convincing evidence that the asserted grounds for seeking the termination of parental rights are valid. *Id.* at 806. We have previously stated:

The standard of clear and convincing evidence is defined as 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."

³ Mother's first three issues addressing Section 2511(a)(2) and her next four issues addressing Section 2511(b) were each addressed as one issue in Mother's brief.

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In re J.L.C. & J.R.C., 2003 PA Super 466, 837 A.2d 1247, 1251 (Pa. Super. 2003).

The trial court is free to believe all, part, or none of the evidence presented and is likewise free to make all credibility determinations and resolve conflicts in the evidence. *In re M.G.*, 2004 PA Super 251, 855 A.2d 68, 73–74 (Pa. Super. 2004). If competent evidence supports the trial court's findings, we will affirm even if the record could also support the opposite result. *In re Adoption of T.B.B.*, 2003 PA Super 398, 835 A.2d 387, 394 (Pa. Super. 2003).

In the Interest of: A.S., 11 A.3d 473, 476-77 (Pa. Super. 2010).

Termination of parental rights is controlled by Section 2511 of the Adoption Act. This Court has established a two-part analysis in determining whether the termination of parental rights was proper:

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) (citations omitted).

This Court need only agree with any one subsection of Section 2511(a) in order to affirm the termination of parental rights. *See In re B.L.W.*, 843

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A.2d 380, 384 (Pa. Super. 2004). Instantly, we conclude the trial court properly terminated Mother's parental rights 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.A. §§ 2511(a)(2), (b).

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*

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the Interest of A.L.D. 797 A.2d 326, 337 (Pa. Super. 2002). Parents are required to make diligent efforts towards the reasonably prompt assumption of full parental responsibilities. *Id.* at 340. A parent's vow to cooperate, after a long period of uncooperativeness regarding the necessity or availability of services, may properly be rejected as untimely or disingenuous. *Id.*

Moreover, our Supreme Court recently held that:

[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.

In re Adoption of S.P., 47 A.3d 817, 828 (Pa. 2012). After re-visiting prior decisions regarding incapacity, our Supreme Court stated:

[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). n. If a court finds grounds for termination under

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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., 47 A.3d at 830-31.

Instantly, with respect to Section 2511(a)(2), Mother argues the petitioners failed to demonstrate that any incapacity or neglect by her could not be remedied. Mother argues that her participation in rehabilitation and self-improvement programs while incarcerated, efforts by her to ensure that she has housing and employment upon release from prison, and efforts by her to remain connected with the Children while incarcerated and stay apprised of J.R.H.'s medical condition, demonstrated that the conditions and causes of any incapacity and neglect by her could be remedied.

Contrary to Mother's claim, the certified record supports the trial court's determination that the petitioners presented clear and convincing evidence to involuntarily terminate Mother's parental rights pursuant to Section 2511(a)(2), due to a parental incapacity that cannot be remedied. In making its determination, the trial court pointed to Mother's criminal history dating back to 1989 which includes convictions for six DUIs, eight retail thefts, one endangering the welfare of children, one hit and run, and one false police report. The record reflects that except for short periods of time, Mother has been incarcerated or residing in a rehabilitation institution or halfway house from 2005 to the date of the hearings as a result of her

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convictions and has had limited contact with the Children during that time. Thus, Mother's incapacity has caused the Children to be without her parental care and control for substantial portions of their lives. The trial court was free to place little weight on Mother's participation in programs while incarcerated and efforts to prepare for her release from prison and stay connected to the Children in light of Mother's repeated incarcerations which have caused the Children to be without essential care and subsistence for most of their lives despite her participation in rehabilitation programs. The trial court found that Mother's testimony reflected her denial and defensiveness with respect to her actions and that she "has demonstrated no inclination to repent and turn away from the behavior that has rendered her incapable of parenting." Trial Court Opinion, 10/24/12, at 2. Thus, the record supports the trial court's conclusion that Mother's incapacity cannot be remedied.

In her second claim, Mother argues the petitioners have failed to satisfy the elements of Section 2511(b). Specifically, Mother argues her testimony establishes that a significant bond exists with the Children and that terminating Mother's rights will deny the Children the opportunity to pursue a relationship that they have enjoyed. Mother points to her testimony that she engaged in regular e-mail communication with the three older children from August 2010 until May 2011 and that each child sent an e-mail to Mother stating that they loved her. Mother testified that she continues to communicate with the three older children through letters and that she loves them and knows that they love her. Mother testified that

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when she attended J.R.H.'s therapy sessions, J.R.H. would called her "mommy," would tell Mother she loved her, was excited to see Mother, and cried at times when they had to separate. Mother further testified that she loves J.R.H. and J.R.H. loves her.

With respect to Section 2511(b), this Court has described 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.*, 2005 PA Super 340, 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.*, 2008 PA Super 62, 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). Further:

[I]n addition to a bond examination, the trial court can equally emphasize the safety needs of the child, and should also consider the intangibles, such as the love, comfort, security, and stability the child might have with the foster parent. Additionally, this Court stated that the trial court should consider the importance of continuity of relationships and whether any existing parent-child bond can be severed without detrimental effects on the child.

In the Interest of: A.S., 11 A.3d 473, 483 (Pa. Super. 2010).

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In terminating Mother's parental rights under Section 2511(b), the trial court determined that the needs and welfare of the Children would be advanced and benefited by the proposed adoptions, that no significant bond was being severed by the termination of Mother's parental rights, and that the proposed adoptions were in the best interest of the Children. **See** N.T., 08/22/12, at 311.

Competent record evidence supports the trial court's decision to terminate Mother's parental rights pursuant to Section 2511(b). The record established that the three older Children have not lived with Mother since they were very young and Mother's contact with them since 2005 has been sporadic. Evidence also indicated that Mother's contact has negatively affected the three older children who, since their last visit with Mother in March 2011, have stated that they do not want to visit with Mother or have contact with her, that they are angry with Mother, and no longer want to read Mother's letters. In contrast, the record established the three older Children have a loving relationship with their stepmother, T.S., who they want to be their mother and to adopt them. Additionally, the youngest child, J.R.H., has never lived with Mother and has had only limited contact with Mother. The evidence indicated that J.R.H. is bonded with S.M. and K.M. and their two sons, that S.M. and K.M. meet all of J.R.H.'s needs, they are loving towards her, and that it is in J.R.H.'s best interest to be adopted by S.M. and K.M. Thus, contrary to Mother's claims, the record supports the trial court's finding that no significant bond exists between Mother and the Children and that termination of Mother's parental rights would best serve

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the needs and welfare of the Children. Accordingly, we find no reason to disturb the trial court's order.

In her fourth claim, Mother argues the trial court erred by not properly considering the substantial barriers erected by the petitioners which thwarted Mother's efforts to maintain a bond with the Children. Specifically, Mother argues Father would not let her talk to the three older children when she would call for them and that she made repeated efforts to coordinate visits with the Children while she was incarcerated, but was thwarted by Father, S.M. and K.M. Mother argues she repeatedly sent forms to the petitioners to arrange visits with the Children at the jail, but the petitioners would not return the forms so that the visits could take place. Mother further argues that S.M. and K.M. blocked their home phone and K.M. never answered Mother's calls on her cell phone.

Although Mother claims she made repeated efforts to coordinate visitation and telephone contact with the Children while in prison, Mother did not take any steps other than requesting that Father, S.M. and K.M. allow the contact and forwarding forms to them so that visitation could be arranged. The record indicates that Mother had some phone contact with the three older children and had visitation with all four children during periods when she was not incarcerated. Despite Mother's claims that her attempts to maintain contact with the Children were being thwarted by Father, S.M. and K.M., Mother never sought court intervention even though there were custody orders in place regarding the Children. Thus, Mother fails to establish she exhibited reasonable firmness in attempting to

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overcome any alleged barriers to maintaining contact with the Children. *In re K.C.W.*, 689 A.2d 294, 299 (Pa. Super. 1997) (stating “[t]he parent must exhibit reasonable firmness in attempting to overcome the barriers or obstructive behavior of others.”). Moreover, to the extent Mother argues the lack of a significant bond with the Children is due to Father, S.M., and K.M. failing to arrange visitation and telephone contact with Mother while in prison, we disagree. It was Mother’s actions that resulted in her prison sentences and directly affected her relationship with her Children. Thus, we reject Mother’s argument insofar as she fails to take responsibility for maintaining a parent-child bond with the Children.

In her final claim, Mother asserts she was prejudiced by the trial court’s negative opinion of her as evidenced by the judge’s statement that if J.R.H. had been with Mother “a week she’d be dead.” N.T., 08/22/12, at 310. Mother argues the trial court developed a negative opinion of her based on her criminal record and failed to fully consider the factors that mitigated against terminating her parental rights. Mother does not cite to any legal authority that would establish her right to relief on this claim. As set forth above, the record supports the trial court’s termination of Mother’s parental rights in this case.

Accordingly, we affirm the decrees of the trial court terminating Mother’s parental rights pursuant to 23 Pa.C.S.A. §§ 2511(a)(2) and (b).

Decrees affirmed.

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