

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE ADOPTION OF: C.M.M., A MINOR

IN THE SUPERIOR COURT OF
PENNSYLVANIA

APPEAL OF: J.M., FATHER

No. 277 MDA 2013

Appeal from the Decree entered January 10, 2013,
in the Court of Common Pleas of Cumberland County,
Orphans' Court, at No(s): 70 Adoptions 2012

BEFORE: BENDER, P.J., LAZARUS, and FITZGERALD*, JJ.

MEMORANDUM BY FITZGERALD, J.:

FILED NOVEMBER 27, 2013

J.M. ("Father") appeals from the Decree entered in the Cumberland County Court of Common Pleas granting the petition of Cumberland County Children and Youth Services ("CYS") to terminate his parental rights to C.M.M. ("Child"), born in November of 2009, pursuant to 23 Pa.C.S.A. § 2511(a)(5), (8), and (b).¹ We remand for further consideration of the bond between Father and Child, the effect termination would have on any bond, and Child's needs and welfare.

The trial court related the following factual history:

On June 7, 2011, [CYS] received a referral that "a burnt spoon and syringe" were found in the home of [Child's] parents. As part of its investigation CYS had the parents submit to drug testing. They both tested positive for cocaine and morphine.

* Former Justice specially assigned to the Superior Court.

¹ The trial court also terminated the parental rights of the child's mother, C.S.J. ("Mother"), the same day. Mother filed a notice of appeal, but on July 24, 2013, this Court dismissed her appeal for failure to file an appellate brief. **See *In re C.M.M.***, 276 WDA 2013 (Pa. Super. 2013).

A safety plan was put in place which allowed [Child] to remain in the home. . . .

Trial Ct. Op., 4/23/13, at 1. The family service plan required Father to: participate in random drug testing; comply with the recommendation from his drug and alcohol evaluation, which was to complete intensive outpatient treatment; comply with psychiatric treatment; sign release forms for case planning; participate in planning for Child's medical and dental care, education, and counseling; participate in assessment of his parenting skills and comply with any recommendations; discuss an alternate permanent plan for Child if reunification is not possible; apprise CYS of his current address and telephone number; cooperate with the Domestic Relations agency with respect to support for Child; maintain adequate housing which can accommodate Child; maintain a regular source of income; and meet with CYS caseworkers concerning his service plan objectives. CYS' Pet. for Involuntary Termination of Parental Rights, 10/15/12 ("CYS' Termination Pet."), at 3-6 (unpaginated).

On June 17, 2011, ten days after the referral to CYS, Father tested positive for opiates use, and on June 22nd tested positive for cocaine and opiates use. Trial Ct. Op. at 1-2.

[CYS] did not feel that [Child] could safely remain with his parents. Pursuant to an agreement, [Child] was placed with his adult half-sister who would supervise all contact between him and the parents.

Over the next three months both parents spiraled out of control. Each had numerous positive tests for “illicit drugs and unprescribed prescription drugs.” They both had contacts with police related to drug involvement and domestic violence.

Id. at 2.

On September 22, 2011, the master held a dependency hearing. CYS’ Termination Pet. at 3. Child’s half-sister advised that she could no longer care for Child, who was then twenty-two months old.² The master recommended that Child be declared dependent and placed in CYS’ care and foster care. The trial court adopted the master’s findings on October 3rd. Child continues to reside in the same foster home.

The court stated:

At the time [Child] was placed the Master noted[,] “Both parents acknowledge drug addiction and express a willingness to cooperate with treatment and other services.”

Mother and Father each had a drug and alcohol evaluation which recommended intensive outpatient counseling. [The permanency plan required both parents to complete intensive outpatient drug counseling and comply with CYS’ requests for random drug screens.³] Both [parents] were unsuccessfully discharged from that counseling in December of 2011. Father successfully completed outpatient (as opposed to intensive outpatient)

² In his report issued the same day, the master stated that testimony revealed that both parents had threatened to remove Child from his half-sister’s care and acted threatening towards the half-sister. Exh., Master’s Recommendation for Adjudication and Disposition-Child Dependent, 9/22/11 (“Master’s Report”), at 2.

³ ***Id.*** at 4.

counseling in August 2012. However, both parents consistently refused to submit to drug testing despite countless requests by [CYS]. Neither had agreed to submit to a drug test in more than a year prior to the termination hearing [on January 9, 2013.]

The other major reason for [C]hild's placement was the domestic violence in the home. As a result both parents were asked to undergo a mental health and parenting evaluation. Neither followed through.

Trial Ct. Op. at 2-3 (footnote citations to record omitted).

On October 15, 2012, CYS filed petitions for the involuntary termination of both parents' parental rights, citing subsections 23 Pa.C.S. § 2511(a)(2), (5), (8), and (b). The trial court held a hearing on both petitions on January 9, 2013. On the following day, the court entered the underlying decree terminating Father's parental rights to Child pursuant to subsections (a)(5), (8), and (b). Father then filed a timely notice of appeal and a Pa.R.A.P. 1925(a)(2)(i) statement of errors complained of on appeal.

On appeal, Father raises the following issues:

Did the Trial Court err in determining that [CYS] presented evidence so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction without hesitancy, of the truth of the precise facts in issue?

Did the Trial Court err in determining the best interest of [Child] would be served by terminating the parental rights of the biological parents?

Did the Trial Court err in refusing to grant Father's request for a continuance so that he could have adequate time to prepare with his new appointed counsel?

Father's Brief at 4.

We first note the relevant standard of review:

[O]ur standard of review is limited to determining whether the order of the trial court is supported by competent evidence, and whether the trial court gave adequate consideration to the effect of such a decree on the welfare of the child. We have always been deferential to the trial court as the fact finder, as the determiner of the credibility of witnesses, and as the sole and final arbiter of all conflicts in the evidence.

In re I.J., 972 A.2d 5, 8-9 (Pa. Super. 2009) (citations omitted).

In this case, the trial court granted termination under sub-sections 2511(a)(2), (5), (8), and (b). Those subsections provide:

(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:

* * *

(5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time **and termination of the parental rights would best serve the needs and welfare of the child.**

* * *

(8) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency, 12 months or more have elapsed from the date of removal or placement, the conditions which led to the removal or placement of the child continue to exist **and**

termination of parental rights would best serve the needs and welfare of the child.

* * *

(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.

23 Pa.C.S. § 2511(a)(5), (8), (b) (emphases added). Relevant to our disposition in the instant matter, we emphasize that both sub-sections (a)(5) and (8) require a petitioner to show “termination of the parental rights would best serve the needs and welfare of the child.” **See** 23 Pa.C.S. § 2511(a)(5), (8).

With respect to (a)(8), this Court has stated:

[T]ermination under subsection (a)(8) “does **not** require an evaluation of [the parents] willingness or ability to remedy the conditions that led to placement of the children.” Instead. . . subsection (a)(8) “requires only that the conditions continue to exist, not an evaluation of parental willingness or ability to remedy them.”

In re I.J., 972 A.2d at 11.

“[A] best interest of the child” analysis under both 2511(a)(8) and 2511(b) requires consideration of “[i]ntangibles such as love, comfort, security, and stability.” To this end, this Court has indicated that the trial court “must also discern the nature and status of the parent-child bond, paying close attention to the effect on the child of permanently severing the bond. Moreover, in performing a “best interests” analysis:

The court should also consider the importance of continuity of relationships to the child, because severing close parental ties is usually extremely painful. The court must consider whether a natural parental bond exists between child and parent, and whether termination would destroy an existing, necessary and beneficial relationship. Most importantly, adequate consideration must be given to the needs and welfare of the child.

Id. at 12 (citations omitted).

In his first issue, Father argues CYS presented insufficient evidence to sustain its burden and thus the trial court abused its discretion in terminating his parental rights to Child. Father avers that the “primar[y]” reason for Child’s placement,” his drug and alcohol use, “have been eliminated.” Father’s Brief at 6, 10. In support, he asserts that he: completed a drug and alcohol evaluation in February of 2012, completed outpatient treatment on August 13, 2012, “had not tested positive on any drug screens in over a year prior to the [termination] hearing,” and “gave uncontradicted testimony that he has been clean over that time.” **Id.** at 11. Father also avers the court improperly “relied heavily on the fact that [he] could not give urine samples for drug screens,” and maintains instead that he had “explained that . . . he had an enlarged prostate that prevents him from being able to urinate on demand” and had requested alternative means of testing. **Id.**

Father further contends the court erred in relying on his failure to undergo a mental health evaluation because “[t]here was no reason for

[him] to undergo a mental health evaluation.” **Id.** at 12. He reasons that “the caseworker testified [that he] has no mental health diagnosis[nor] history of mental health issues,” and that “all [CYS] and the Court could point to. . . was an alleged domestic violence issue from years prior, for which the Court had little, if any, evidence . . . submitted into the record.”

Id.

Finally, Father alleges he “made substantial progress on almost all of his goals,” including: signing release forms for case planning, participating in medical and dental care, “discuss[ing] alternative plans for his son,” apprising CYS of his current address and telephone number, cooperating with Domestic Relations, maintaining adequate and safe housing for Child, as well as a regular source of income—Social Security income, cooperating with caseworkers, and maintaining regular contact with Child. **Id.** at 10-11. We find no relief is due.

It is undisputed that as of October 15, 2012, the filing date of CYS’ termination petition, Child had not been in Father’s custody for approximately fifteen months. **See** 23 Pa.C.S. § 2511(a)(5), (8). Therefore, we review whether the court abused its discretion in finding that the conditions leading to Child’s removal continued to exist. **See In re I.J.**, 972 A.2d at 11.

The record establishes that Child was removed from Father’s care because of both parents’ drug use. Master’s Report at 1. At the termination

hearing, CYS caseworker Daniel Drachbar testified to the following. Father was discharged unsuccessfully from intensive outpatient drug and alcohol treatment at the Roxbury Treatment Center, but completed outpatient treatment at the Stevens Center. N.T. Termination H'rg, 1/9/13, at 24. The last drug screen from Father was dated December 21, 2011, and he refused to submit to drug screens thereafter, despite "multiple attempts" to test him during weekly visits with Child and at Father's home. **Id.** at 24-25, 26. Father stated that he did not trust the agency and had a problem urinating, but did not provide the requested proof from a doctor documenting this medical issue. **Id.** at 24-25, 26.

Although CYS requested Father to complete a mental health evaluation, it did not receive any documentation that he did so, and instead, "received the excuse that the insurance will not pay for it." **Id.** at 28. CYS informed Father that he could go to the mental health department in the same building as CYS' office for a list of providers who could complete an evaluation, including "the Stevens Center" where Father underwent drug treatment. **Id.** at 28-29. On cross-examination, Father's counsel asked Caseworker Drachbar why CYS requested a mental health evaluation "if he has no mental health issues." **Id.** at 35. The caseworker responded that CYS had concerns of domestic violence and anger. **Id.**

CYS wished to refer Father for a parenting evaluation, but the Alternative Behavior Consultants agency stated that Father would first have

to show sixty days of sobriety, and Father could not do so because he refused to cooperate with drug screening. **Id.** at 29. Father also did not undergo counseling for domestic violence issues as requested. **Id.** at 33.

Father consistently attended weekly visits with Child. **Id.** at 26, 34. Supervised visits were initially conducted "in the community," but after Father made a statement that caseworkers "go missing for taking their children," the visits were moved. **Id.** at 31-32. Father later denied "the intent of the statement to be threatening," but CYS "takes all threats seriously because of the nature of the job[.]" **Id.** at 32.

On cross-examination, Caseworker Drachbar agreed that Father had completed or substantially completed eight of his twelve family service goals. **Id.** at 35. With respect to Father's refusal or inability to submit to drug screening, the caseworker reiterated that Father "told [a] previous caseworker that he cannot urinate[,], does not trust [CYS and] want[ed] an outside agency" to conduct the testing. **Id.** at 36. Both parents informed Caseworker Drachbar that they would complete the testing at "Sadler." **Id.** at 36. Caseworker Drachbar contacted Sadler, was informed that it did not conduct drug testing, advised Father and Mother they would have to choose another facility, but did not receive any information. **Id.** at 37.

The court also heard the following testimony. A drug and alcohol therapist at the Stevens Center facility testified that Father successfully completed outpatient therapy. **Id.** at 6. However, that facility did not

conduct drug tests; instead, it relied on their patients' "word" and assumed Father was getting tested through CYS. *Id.* at 7. The director of outpatient therapy at Roxbury Treatment Center evaluated Father and recommended intensive outpatient therapy. *Id.* at 15. During his evaluation, Father "indicat[ed] that he was actively using opiates and did not intend to ever discontinue them;" it was "possibly" for this reason that Roxbury did not conduct a drug screen on him. *Id.* at 16. Father attended only one session and did not complete the program. *Id.* at 19-20.

Father also testified at the termination hearing. When asked why he did not submit to drug testing, he responded that he told CYS he has an enlarged prostate and sometimes has problems urinating on command. *Id.* at 46. The court then pointed out that he "gave successful drug tests up until December of 2011[but had not] given any since then, and there have been many requests." *Id.* at 47. The following exchange immediately followed:

[Father]: Since then, because—like they had us on a 30-day thing to where like they told us that they'd give us more time with our son if we did 30 days clean. I took that to heart, you know what I mean? I mean, you're going to give me more time with my son, okay, so I gave them 30 days clean. Then they go and changed the counselor on us, and they came up with 60 days clean. I mean—I mean, if you're going to give me more time, give me more time with my son. Don't tell me you're going to give me more time after 30 days.

THE COURT: You're changing the subject. Why is it that you didn't give any drug screens [since December of 2011]?

* * *

[Father]: I know I can't use that for an excuse, but that's my excuse, sir, that they changed that 30 days on me. It kind of upset me, and I didn't trust the system no more.

Id. at 47-48. Upon further questioning by the court, Father agreed that the master had advised him that "may very well lose [his] son unless we can establish that 60-day clean." **Id.** at 48. Father further testified that he has "been clean" since completing treatment at the Stevens Center in August of 2012, and that he had not used cocaine or prescription drugs. **Id.** at 48-49. Father stated that he could not produce a doctor's note for his prostate problem because he no longer had a doctor. **Id.** at 49. Father also denied telling CY5 that he would find another facility to conduct drug testing, and instead CY5 informed him that they could do swab tests, but it did not follow up on this. **Id.** at 52.

When asked why he did not complete a mental health evaluation, Father responded as follows: "I checked with my counselor when I left Helen Stevens, [sic] okay, and he gave me a bunch of places to call, so I called. They were talking it takes six months to get into, for one. For another, your insurance won't cover it." **Id.** at 51. However, Father further testified that he was willing to do the mental health evaluation and "anything" else necessary. **Id.** at 51.

In its opinion, the trial court reasoned:

[Child] had been placed out of the home for almost 19 months at the time of the termination hearing. The parents were repeatedly advised what they needed to do to be reunited with their son. They both refused to follow through with any of those requirements. . . .

* * *

For the entire time [Child] was in placement all visits between [Child] and his parents were supervised. It was determined early on that they could not safely care for him until they were able to overcome their drug addictions and adequately address their domestic violence issues. They made no progress in either area. As a result, we were convinced that the child could not be safely returned home.

Trial Ct. Op. at 4-5.

With respect to whether the conditions leading to Child's placement continued to exist, the court specifically found:

The child was placed because of his parents' drug abuse and domestic violence. Over the next 16 months the parents participated in numerous permanency review hearings and judicial conferences. At each proceeding they were told what they needed to do to be reunited with [Child]. They did nothing.

Both parents denied that they have a drug problem. Yet they refused to submit to drug tests. There were dozens of requests made by [CYS] and numerous excuses given by the parents. We did not find any of their excuses to be valid or believable. To the contrary we were convinced that they refused the tests because they continued to use drugs.

Id. at 5-6.

We hold Father has not established abuse of discretion on the part of the trial court in finding that the conditions which led to Child's placement

continue to exist. **See** 23 Pa.C.S. § 2511(a)(5), (8); **In re I.J.**, 972 A.2d at 11; **In re A.R.**, 837 A.2d at 564. Father's arguments on appeal would require this Court to reweigh the evidence and supplant the court's credibility findings with our own. This we cannot do. **See In re I.J.**, 972 A.2d at 8-9. For example, although Father continues to maintain that prostrate problems prevented him from urinating and thus submit to drug screens, he wholly ignores Caseworker Drachbar's testimony that when asked to provide documentation of his prostrate issue, Father failed to do so. **See** N.T. at 25. Although Father ultimately testified at the termination hearing that he could not provide medical documentation because he no longer had a doctor, he did not explain why he did not provide this explanation to CYS. **See id.** at 49. Furthermore, Father does not dispute Caseworker Drachbar's testimony that he had also cited distrust in CYS as a reason for not submitting to drug tests. Indeed, we note Father's corroborative statement at the hearing, that he did not "trust the system" because CYS first informed he had to establish thirty days of being drug free and then required him to show sixty days. **See id.** at 47. Father offers no explanation on appeal why a showing of sixty days' sobriety was detrimental to Child or his ability to care for Child.

Furthermore, Father's argument— that there was no diagnosis or other evidence evincing a need for such a mental health evaluation—goes to whether the objective should have been included in the service plan.

However, Father's explanation at the termination hearing for why he did not comply was that he was given a list "of places to call," he called, it would take six months "to get into," and his insurance did not cover it. **Id.** at 51. Indeed, Father asserted his willingness to submit to a mental health evaluation and any recommended treatment. **Id.**

In light of the foregoing, we hold the court's findings with respect to whether the conditions which led to Child's placement continue to exist, under both subsection (a)(5) and (a)(8), is supported by competent evidence. **See** 23 Pa.C.S. § 2511(a)(5), (8); **In re I.J.**, 972 A.2d at 8. We are bound by the court's determination that Father's excuses for not complying with the service plan were not credible. **See In re I.J.**, 972 A.2d at 8-9.

We next consider whether CY5 established, under both subsections 2511(a)(5) and (8), whether termination of Father's parental rights would best serve Child's needs and welfare. **See** 23 Pa.C.S. § 2511(a)(5), (8). At the termination hearing, the sole evidence presented by CY5 concerning any bond between Father and Child came through Caseworker Drachbar's testimony. The caseworker testified that Father had supervised visitation with Child every week for one hour, the "visits go extremely well[, t]he parents are appropriate[, Child] seems to enjoy them," and both "parents had consistent and regular visitation with" Child. N.T. at 26, 31-34, 39. However, Caseworker Drachbar stated, "After the visits, [the] foster parents

sometimes struggle with [Child's] behavior," and Child went "through a stage of lying." **Id.** at 40. Caseworker Drachbar opined that termination of parental rights "will provide [Child] with the permanency that he needs[,] structure and support," and there were no "negative effects . . . to [Child] if all contact with his parents cease[d]." **Id.** at 40.

The sole evidence testimony concerning the effect of termination on Child's needs and welfare was this testimony by Caseworker Drachbar: "[Termination] will provide [Child] with the permanency that he needs and structure and support," and the response "I do not, no," to the question of whether he "[saw] any negative effects to [Child] if all contact with his parents ceases." **Id.** At another point in CY5 Caseworker Drachbar's examination, he responded to the question of how Child was currently doing with: "He's doing excellent. He's thriving. He is a fun three-year old boy. He has fun with his other siblings in the foster home." N.T. at 31.

Finally, we note that Child's foster father testified that he and his wife were prepared to adopt Child, and that they and their four children love Child. **Id.** at 41-42. Father testified that he loves Child and that Child is "different" from his three adult children. **Id.** at 53 ("[I]t took me five years to decide to have a son, and [Child] is it. When I had [Child], I mean, it kind of changed things. I wanted to show him things that I didn't show my first kids.").

In its opinion, the trial court analyzed Child's needs and welfare as

follows:

[Child] is thriving in his new home. He is safe, secure, and loved. His foster parents and their children want very much to adopt him. While termination of his natural parents' rights will not adversely affect him, his adoption by and becoming a permanent member of his foster family will be of great benefit to him.

Trial Ct. Op. at 6.

Although CYS' evidence concerning the effect termination would have on Child's needs and welfare was not abundant, the trial court, after reviewing all the evidence in this matter, accepted it. Under the abuse-of-discretion standard of review, we decline to upset the court's findings that CYS established grounds for termination under sub-sections (a)(5) and (8). We do not, however, affirm termination under sub-section (b). **See In re I.J.**, 972 A.2d at 8-9.

With respect to the discrete issue of whether there was any bond between Father and Child, CYS' sole evidence was Caseworker Drachbar's testimony that Father regularly attended weekly, hour-long, supervised visits with Child, the "visits go extremely well[, t]he parents are appropriate," and Child "seems to enjoy them." N.T. at 39. Father testified that he loves Child. **Id.** at 53. In sum, this evidence is scant in establishing the nature of any bond between them. Significantly, the trial court's opinion provided **no** discussion of whether there was a bond between Father and Child, the nature of a bond if there was one, and the effect termination would have on the bond. **See In re I.J.**, 972 A.2d at 12. The termination

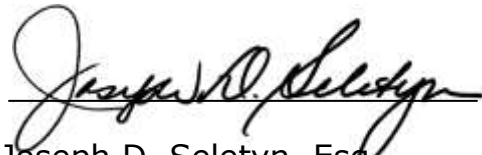
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transcript likewise provides no indication by the court as to its conclusions on this issue.

In light of the foregoing, we vacate the court's order terminating Father's parental rights and remand for the court to conduct an evaluation under sub-section 2511(b). The court may hold additional hearings, request briefs from the parties, or undertake any other action it deems necessary in its review.

Order vacated. Case remanded with instructions. 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: 11/27/2013