[J-48A-B-C-D- 2011]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

IN RE: R.I.S. & A.I.S Appeal Of: C.S., Father	: Nos. 27 & 28 MAP 2011 :
IN THE INTEREST OF R.I.S. & A.I.S Appeal Of: C.S., Father	: Nos. 29 & 30 MAP 2011 :
	: Appeal from the Orders of the Superior Court at Nos. 791, 792, 828 & 829 MDA 2010 dated 12/22/10, reversing the orders of the York Co. CCP dated 4-19-10 & 4-22-10 at Nos. 2009-141, 2009-142, CP-67-DP-4-2009 & CP-67-DP-4-2009
	: ARGUED: May 10, 2011

OPINION

MR. JUSTICE McCAFFERY **DECIDED: November 23, 2011**

C.S. ("Father"), who is currently incarcerated in a State Correctional Institution in Erie County with a minimum release date in June 2012, and a maximum release date in June 2016, is the biological father of two minor children: A.I.S. (d.o.b. 7/5/07), and R.I.S. (d.o.b. 10/23/08) (collectively "the children"). He appeals the Superior Court's reversal of the York County trial court's orders denying petitions for the involuntary termination of his parental rights and for changes in the placement goals for the children from reunification to adoption. We reverse and take this opportunity to reiterate a principle that this Court has never abandoned: that a parent's incarceration, standing alone, cannot constitute proper grounds for the termination of his or her parental rights.

Father was sentenced to serve two to four years' incarceration in June 2008. In January 2009, York County Children and Youth Services ("CYS") filed an application for

protective custody of the children, based in part on a request for emergency placement made by the biological mother of the children, K.H. ("Mother"). The children were adjudicated dependent in February 2009, and were placed together in a temporary foster home. A pre-adoptive resource was identified by CYS, and in December 2009, CYS filed petitions for changes in the placement goals for the children from reunification to adoption, and for the involuntary termination of the parental rights of Father and Mother. On March 2, 2010, a hearing on the petitions was conducted.[1]

At the hearing, it was shown that a family service plan setting forth goals for Father with respect to reunification had been created in February 2009, and his progress toward attaining those goals was reviewed in July 2009 and again in December 2009. The goals set for Father included cooperating with service planning, signing necessary releases, remaining in contact with CYS through written correspondence, providing documentation upon completion of therapeutic prison programs, and maintaining a record of good prison conduct. Evidence was presented to show that Father had met each of these goals: he had cooperated with service planning, he had signed all necessary releases, he had remained in written and telephonic contact with CYS, he had provided CYS with documentation of his completion of therapeutic prison programs, and he had not had any incidents of misconduct while incarcerated.

Additionally, evidence was presented at the hearing that Father had maintained contact with the children by sending them cards on a monthly basis and by participating in

[1] By way of further background, the record reveals that Father and Mother were never married, but resided together as a family. At the time of Father's sentencing, Mother was pregnant with R.I.S., who was born after Father entered prison. At that time, Mother apparently relapsed into drug use, and CYS became involved. Mother also has a daughter, Z.B.S., whose biological father is unknown. Z.B.S. was taken into protective custody with R.I.S. and A.I.S., and all three are living together in the same foster home. There are no issues before us with respect to Z.B.S.

a “Reading to Your Children” program sponsored by the prison whereby the children received a video of Father reading a book to them. It was shown that Father had requested visitation with the children, but the request was denied due to the time and distance that would be involved (an eleven-hour round trip by personal vehicle between the cities of York and Erie, Pennsylvania). Father’s alternative request for “virtual visitation” was denied because CYS had no video-conferencing capability. It was further shown that Father purchased a pre-paid phone card and attempted several times to call the children, but the foster parents refused the calls.

The following testimony was elicited on cross-examination of Rachael Carey, a CYS family support caseworker, by Father’s counsel:

> Q. One of the other goals was for [Father] to refrain from negative behaviors while being incarcerated?
>
> A. Yes.
>
> Q. To your knowledge, [Father] has not had any incidents of misconduct while incarcerated?
>
> A. Not to my knowledge.
>
> Q. One of the goals also included remaining in contact with you via written correspondence?
>
> A. Yes,
>
> Q. And [Father] has remained in contact with you through letters?
>
> A. Yes.
>
> Q. And in those letters he has requested updates on the children?
>
> A. Yes.
>
> Q. He’s asked about the[ir] welfare and their medical conditions?
>
> A. Yes.

Q. He's also requested that you send pictures of the children?

A. Yes.

Q. And he's made a request on more than one occasion?

A. Yes.

Q. And did the agency forward photographs of the children to [Father]?

A. Yes.

Q. In addition to the written correspondence, you have also had several telephone conferences with [Father] at SCI Albion; correct?

A. Yes.

Q. Approximately how many phone calls have you had with [Father]?

A. Do you want me to count all of them or approximate?

Q. If you could approximate, that would be sufficient.

A. I would say five, maybe ten.

* * * *

Q. During the telephone conferences that you had with [Father], would he ask about the children?

A. Yes.

Q. And again, specifically, he would ask about their welfare and how they were doing in the foster home?

A. Yes.

Q. One of the goals listed is also that [Father] is to initiate supervised visitation with the children; correct?

A. Yes.

Q. And you've testified though, that was not able to happen because of the distance and the children's ages?

A. Yes.

Q. And again, that was not through any fault of [Father]?

A. It was not.

Q. Despite being incarcerated then, [Father] has still been consistent in his efforts to remain part of the children's lives; correct?

A. Yes.

Q. And he has not abandoned his concern for the welfare of the children?

A. No.

Q. He's remained interested in how they are doing?

A. Yes.

Q. Consistently asked for information about them and updates on their condition and progress?

A. Yes.

[Counsel]: One moment, your Honor. Nothing further.

[The Court]: To sum up your answer as to goals that were established, there was nothing that he didn't do or that there wasn't some satisfactory reason for his not being able to do it?

[The Witness]: You're correct.

(Notes of Testimony Hearing, 3/2/10, at 43 - 46).

Following the hearing, the trial court entered orders denying the goal change petitions and the involuntary termination petitions with respect to Father.[2] It concluded that CYS had not proven any of the statutory bases for the involuntary termination of Father's rights, and characterized the CYS position as seeking termination based solely on the existence and length of Father's sentence of incarceration. CYS filed a timely appeal to the Superior Court.

The Superior Court reversed, but did so in a very divided ruling by a three-judge panel. The ruling was expressed by a single panelist, Judge Cheryl Lynn Allen, with one other, Judge Sallie Updyke Mundy, concurring in the result, while the third, Judge Robert E. Colville, dissented. The single judge who authored the memorandum opinion in which neither of her colleagues joined stated that "incarceration alone cannot constitute grounds for termination[,]" but nonetheless concluded that "Father's incarceration is evidence of his parental incapacity." Memorandum Opinion, dated 12/22/10, at 16-17. On that basis, the Superior Court determined that the trial court's conclusions were not supported by the record and that the trial court had committed an abuse of discretion. Id. at 18.

In his dissent, Judge Colville wrote:

> The trial court found that Father has done everything possible for him to do regarding his responsibility as a father while incarcerated; the record included evidence that Father has maintained contact with and cooperated with CYS, has participated in hearings and meetings via telephone, has consistently requested information from CYS as to the welfare of the children, completed a program while incarcerated, sent cards to the children on a monthly basis sent a video of himself reading a book to the children, requested visits with the children which were denied by CYS, and attempted to call the children from prison. The trial court found Father's conduct while incarcerated to be exemplary and it is reasonable to assume that he will get out some time near his minimum sentence. The trial court found that Father was the one primarily responsible for caring for the children and providing for their welfare

[2] The court granted the petitions for the involuntary termination of Mother's parental rights, and there are no issues before us regarding that determination.

> before his incarceration and is therefore, likely to be able to care for the children after incarceration. The trial court further found that Father's prison sentence was not of such a length to establish that his inability to care for the children cannot be remedied. The record supports the trial court's findings.

Id. (unnumbered pages, at 2-3) (Colville, J., dissenting) (footnote omitted).

This Court granted allowance of appeal and we now address the following question as presented in the brief submitted by Father:

> Whether the Superior Court of Pennsylvania erred in reversing the Trial Court's placement goal determination and in relying solely on the fact of Appellant's incarceration to terminate his parental rights?

Appellant's Brief at 4.

We begin our analysis by noting that the right to conceive and raise one's children has long been recognized as one of our basic civil rights. Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923). In any context, the complete and irrevocable termination of parental rights is one of the most serious and severe steps a court can take. In re Adoption of Sarver, 281 A.2d 890, 891 (Pa. 1971). Realizing the significance of such a decision, this Court adheres to the view that the trial court is in the best position to determine credibility, evaluate the evidence, and make a proper ruling. In re Adoption of Atencio, 650 A.2d 1064, 1066 (Pa. 1994). The trial court's findings in a termination proceeding which are supported by evidence of record are entitled to the same weight given a jury verdict and must be sustained unless the court abused its discretion or committed an error of law. In re William L., 383 A.2d 1228, 1237 (Pa. 1978). It is well-established that a court must examine the individual circumstances of each and every case and consider all explanations offered by the parent to determine if the evidence, in light of the totality of the circumstances, clearly warrants the involuntary termination. In the Matter of the Adoption of Charles E.D.M., 708 A.2d 88, 91 (Pa. 1998).

The party seeking the termination of parental rights bears the burden of proving that grounds for termination exist by clear and convincing evidence. In re Adoption of Atencio, supra at 1066. 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. Id. Although this court has stated that the standard of review for an appellate court in these matters is limited to the determination of whether the trial court's decree is supported by competent evidence, see id., we have also explained that the factual findings of the trial court should not be sustained where the court has abused its discretion or committed an error of law. See In re William L. supra. Thus, absent an abuse of discretion or error of law, where the trial court's findings are supported by competent evidence, an appellate court must affirm the trial court even though the record could support the opposite result. In the Interest of R.J.T., 9 A.3d 1179, 1190 (Pa. 2010).

This Court has long held that a parent's absence or failure to support his or her child due to incarceration is not, in itself, conclusively determinative of the issue of parental abandonment. In re Adoption of McCray, 331 A.2d 652, 655 (Pa. 1975). Indeed, incarceration alone is not an explicit basis upon which an involuntary termination may be ordered pursuant to Section 2511 of the Pennsylvania Adoption Code.[3] In re C.S., 761

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[3] In this case, CYS sought termination pursuant to the grounds set forth 23 Pa.C.S. § 2511(a)(1), (2), (5), (8), 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:

(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.

(continued…)

A.2d 1197, 1201 (Pa.Super. 2000) (en banc). Rather, we must inquire whether the parent has utilized those resources at his or her command while in prison to continue and pursue a close relationship with the child or children. McCray, supra at 655. An incarcerated parent desiring to retain parental rights must exert him- or herself to take and maintain a place of importance in the child's life. Adoption of Baby Boy A., 517 A.2d 1244, 1246 (Pa. 1986).

(…continued)

(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.

(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. 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.

Appellate review of goal change determinations is equally deferential. See In the Interest of R.J.T., supra at 1190 (stating that appellate courts are not in a position to make close calls based on fact-specific determinations and must defer to the trial judges who are in the best position to gauge the likelihood of the success of a permanency plan). In a change of goal proceeding, the best interests of the child and not the interests of the parent must guide the trial court, and the burden is on the child welfare agency involved to prove that a change in goal would be in the child's best interest. In re D.P., 972 A.2d 1221, 1227 (Pa.Super. 2009). See In the Interest of R.J.T., supra at 1183-1184 (noting that the trial court correctly observed that it had a responsibility to look to the best interests of the child and not those of the child's parents in a change of goal proceeding); see also 42 Pa.C.S. § 6351(g) (setting forth matters to be determined in permanency planning).

In Adoption of Atencio, supra, this Court granted allowance of appeal to determine whether the Superior Court had applied an incorrect standard of review when it vacated the trial court's denial of a petition for the involuntary termination of parental rights. That matter did not involve an incarcerated parent, there was evidence presented that could have supported termination, and we acknowledged that disposition of the question whether involuntary termination was warranted represented a close case. Ultimately, however, we determined that because competent evidence existed to support the trial court's conclusions, it was improper for the Superior Court to rely upon the evidence to the contrary precisely because the trial court was in a better position to determine credibility, evaluate the evidence, and make a proper ruling. Id. at 1068.

In the instant matter, we similarly conclude that there was competent evidence to support the trial court's denial of the petition for involuntary termination. Accordingly, had this been merely a close case, a per curiam reversal with citation to Adoption of Atencio, supra, and In the interest of R.J.T., supra, might have been an appropriate disposition of the appeal to this Court. However, the Superior Court's derogation of the proper standard

of review here is particularly egregious. The Superior Court determined that the trial court's conclusions were not adequately supported by the record and that the court had abused its discretion, on the basis of Father's incarceration, and because the length of his incarceration is conclusive evidence of his parental incapacity. Importantly, the Superior Court improperly substituted its judgment for that of the trier of fact. The trial court determined that the length of Father's sentence was not so great as to foreclose the possibility of the successful maintenance of the parent-child relationship, and that termination of Father's parental rights would not serve the best interests of the children. The Superior Court viewed the same facts, and drew the opposite conclusion; to wit, "[t]he length of Father's prison sentence supports the conclusion that he cannot remedy the parental deficiencies that led to the Children's placement." Memorandum Opinion, dated 12/22/10, at 17. We state emphatically that this Court has never adopted or countenanced a view that incarceration alone is per se evidence of parental incapacity or that it represents appropriate and sufficient grounds for the involuntary termination of parental rights. Indeed, the law in Pennsylvania is quite the opposite, and we reiterate the definitive principle that when a parent uses the opportunities that are available in prison to make sincere efforts to maintain a place of importance in the lives of his or her children, incarceration alone will not serve as grounds for the involuntary termination of his or her parental rights.[4] Accordingly, we reverse the order of the Superior Court with respect to its determination regarding the involuntary termination of Father's parental rights.

With respect to the Superior Court's reversal of the trial court's order denying the petition of CYS for a goal change from reunification to adoption, we note that the trial court

[4] We make no ruling with respect to the involuntary termination of parental rights grounded on the prohibitive length of a parent's sentence of incarceration. We only note here, as the trial court properly did, that even if Father serves his maximum term of incarceration, R.I.S. and A.I.S. will still be only seven- and nine-years-old, respectively, upon his release.

concluded that reunification should remain the goal. In its Rule 1925(a) opinion, the trial court stated that the challenge on appeal to that ruling was "simply another way of making the same arguments addressed in the previous five contentions [relating to the involuntary termination of parental rights] and, therefore, needs no further response." Trial Court Opinion, dated 5/18/10, at 4-5 (unnumbered pages). Questions regarding the propriety of an order granting or denying a goal change petition are, of course, discrete inquiries requiring an analysis of interests exquisitely separable from those interests reviewed in questions relating to the involuntary termination of parental rights. In the Interest of R.J.T., supra. Thus, although we reverse the Superior Court's determination regarding the goal change petitions, we remand to the trial court for an examination of the merits of those petitions under the appropriate analytical model.

Reversed and remanded to the trial court for further proceedings not inconsistent with this Opinion.

Messrs. Justice Eakin and Baer join the opinion.

Mr. Justice Saylor files a concurring opinion, in which Mr. Chief Justice Castille joins.

Mr. Justice Baer files a concurring opinion.

Madame Justice Todd files a concurring opinion, in which Mr. Justice Baer joins.

Madame Justice Orie Melvin files a dissenting opinion.