

IN THE INTEREST O F: V.B.-B.,	:	IN THE SUPERIOR COURT OF
A MINOR	:	PENNSYLVANIA
Appeal of: G.B., Mother	:	
	:	
Appellant	:	No. 1911 MDA 2012

Appeal from the Order entered October 3, 2012
in the Court of Common Pleas of York County,
Juvenile Division, at No. CP-67-DP-0000119-2012

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., and OLSON, J.

MEMORANDUM BY OLSON, J.:

FILED MAY 07, 2013

G.B., ("Mother"), appeals from the order dated and entered on October 3, 2012, which granted the petition filed by the York County Office of Children Youth and Families ("YCOCYF" or the "Agency") seeking to adjudicate as dependent her child, V.B.-B., ("Child"), pursuant to section 6302 of the Juvenile Act, 42 Pa.C.S.A. § 6302(1).¹ We affirm.

Child was born in January of 2012. The trial court found that Child sustained a fractured tibia while in the care of her father, R.B., ("Father") when she was one month old. Trial Court Opinion, 11/30/12, at 2 n.4. On June 3, 2012, YCOCYF filed the petition seeking to adjudicate Child dependent.

¹ We observe that Child's father, R.B., also filed a notice of appeal and Concise Statement of Errors Complained of On Appeal, pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b), on November 1, 2012 and November 2, 2012, respectively. On March 5, 2013, this Court, acting *sua sponte*, dismissed Father's appeal, docketed at No. 1944 MDA 2012, for failure to file a brief. **See** Pa.R.A.P. 2188.

The trial court set forth the following procedural history.

YCOCYF initially filed its Application for Protective Custody on June 18th, 2012. A Shelter Care hearing was scheduled before the Juvenile Court Hearing Officer on June 21st, 2012, which was continued upon [Father's] request that his Counsel appear at the Shelter Care hearing. The Shelter Care hearing was held on June 28th, 2012, and Child was placed in the legal custody of YCOCYF and in the physical custody of the emergency caregivers. YCOCYF filed a Dependency Petition on June 3rd, 2012. The Adjudication of Dependency and Disposition Hearing was initially scheduled on July 16th, 2012. However, [Mother] requested Counsel at the hearing, and the parties agreed to continue the hearing in order to allow Mother to seek Counsel in addition to YCOCYF's request to obtain medical records and testimony from Dr. Danielle Boal from Hershey Medical Center. The Dependency and Disposition hearing was continued again upon request of YCOCYF due to Dr. Boal's unavailability.

Trial Court Opinion, 11/30/12, at 2, n.2.

On September 28, 2012, the trial court held an evidentiary hearing, which it continued, and concluded on October 3, 2012. At the hearing, YCOCYF presented the testimony of Danielle Boal, M.D., an expert in pediatric radiology; S.W., a neighbor of Mother, Father, and Child; Pennsylvania State Trooper Thomas Grothey; Jennifer Smeltzer, a caseworker at YCOCYF; Nicole Fisher, a caseworker at YCOCYF; and Richard Morris, a patrolman with the Spring Garden Township Police Department. Mother testified on her own behalf, as did Father. On October 3, 2012, the trial court entertained argument from the parties' counsel.

Based on the testimony and the evidence, the trial court made the following findings:

The [trial court] made a finding of abuse pursuant to 23 Pa.C.S. § 6303 as to Father. . . . The [trial court] found that . . . Mother . . . was not a perpetrator of the abuse, and while she acted reasonably in obtaining proper care for Child upon learning of Child's injury, the [trial court] found that [Mother] had unresolved drug charges which raised concern in [the trial court] as to [Mother's] ability to provide for Child's health, safety and welfare. The [trial court] also found that [Mother] lacked stable housing and that she could not assure Child's safety because of her on-going relationship with Father. Therefore, the [trial court] found that Child is a dependent child without the proper parental care or control necessary for the child's physical, mental, or emotional health or morals. 42 Pa.C.S.A. § 6302(1).

Trial Court Opinion, 11/30/12, at 2 (footnote omitted)

The trial court entered its adjudication of dependency as to Child on October 3, 2012. On October 31, 2012, Mother filed a notice of appeal, along with a Concise Statement of Errors Complained of on Appeal, pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).

On appeal, Mother raises one issue for review:

Did the [trial c]ourt err and abuse its discretion by granting the request of [YOCYF] for a finding of dependency with respect to Mother [] on the basis of issues which include drug issues, housing issues and domestic violence issues when [YOCYF] failed to prove dependency by clear and convincing evidence?

Mother's Brief, at 4.

Our Supreme Court set forth our standard of review for dependency cases as follows:

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

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

To adjudicate a child dependent, a trial court must determine that the child:

is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals. A determination that there is a lack of proper parental care or control may be based upon evidence of conduct by the parent, guardian or other custodian that places the health, safety or welfare of the child at risk[.]

42 Pa.C.S.A. § 6302.

We have explained:

[T]he dependency of a child is not determined "as to" a particular person, but rather must be based upon two findings by the trial court: whether the child is currently lacking proper care and control, and whether such care and control is immediately available.

In re J.C., 5 A.3d 284, 289 (Pa. Super. 2010) (citations omitted).

"The burden of proof in a dependency proceeding is on the petitioner to demonstrate by clear and convincing evidence that a child meets that statutory definition of dependency." ***In re G., T.***, 845 A.2d 870, 872 (Pa. Super. 2004).

Our Supreme Court stated:

A court is empowered by 42 Pa.C.S. § 6341(a) and (c) to make a finding that a child is dependent if the child meets the statutory definition by clear and convincing evidence. If the court finds that the child is dependent, then the court may make an appropriate disposition of the child to protect the child's physical, mental and moral welfare, including allowing the child to remain with the parents subject to supervision, transferring temporary

legal custody to a relative or a private or public agency, or transferring custody to the juvenile court of another state. 42 Pa.C.S. § 6351(a).

In re M.L., 757 A.2d 849, 850-51 (Pa. 2000).

This Court has also stated:

Even after a child has been adjudicated dependent, however, a court may not separate that child from his or her parent unless it finds that the separation is clearly necessary. Such necessity is implicated where the welfare of the child demands that he [or she] be taken from his [or her] parents' custody.

In re G., T., 845 A.2d at 873 (citations omitted) (brackets in original).

Here, the trial court found the following facts from the testimony at the hearing on the dependency petition:

What was of greatest concern to this [c]ourt, and convinced it that Child was without proper parental control, was that this [c]hild, at less than one (1) month of age, suffered a fractured tibia, [sic] that Child could not have sustained or self-inflicted in any way. (N.T. p. 13, ln. 8-25.) The credible testimony presented indicated that this was an injury of an abusive nature causing Child pain. (N.T. p. 15, ln. 5-19.) This [c]ourt did not find that [Mother] was [the] perpetrator of the abuse, but[,] given the unstable relationship with [Father,] the [c]ourt has serious concerns about [Mother's] willingness to protect Child. The [c]ourt finds that [Mother] poses a further risk of harm to Child's health, safety and welfare because this [c]ourt does not believe that [Mother] will ensure Child's safety in the presence of [Father], whom this [c]ourt found a perpetrator of abuse against Child. A parent has a duty to protect [her] child from harms that others may inflict. Based on the evidence presented, the [c]ourt doubts [Mother's] ability to protect Child from [Father], and[,] although both parties state they are no longer involved romantically, [Mother] still frequently spends time at the home she shared with [Father,] where she provides child care for [Mother's] other child in exchange for her only source of income. (N.T. p. 101, ln. 15-24; N.T. p. 102, 14-25.) Furthermore, [Father's] admitted that she

and [Father] have a history of domestic violence[,] including a charge against [Father] for harassment as recent as August or September 2012. (N.T. p. 107, ln. 8-25, p. 108, [ln.] 1-25; N.T. p. 111, ln. 11-25, p. 112, ln. 1-12; N.T. p. 144, ln. 14-25; p. 145, ln. 1-18.) It is clear to the [c]ourt that [Mother] is still involved in a tumultuous relationship with the perpetrator of abuse of Child, and gives the [c]ourt serious doubts about her ability to provide for the safety and welfare of Child.

Furthermore, the [c]ourt considered [Mother's] drug use and criminal charges related thereto [sic] and its effect on [Mother's] ability to properly care for Child. [Mother] was charged with two counts of drug possession and one count of drug paraphernalia while Child was still in her custody.⁵ [Mother] did admit to smoking marijuana residue and ingesting prescription drugs (Ativan and Adderall) for which she did not have a prescription. (N.T. p. 87[,] ln. 18-25, and p. 88, ln. 22.) [Mother] is tested weekly for drugs, and she last tested positive for opiates on July 20th, 2012. (N.T. p. 73, ln. 25, p. 74, ln[.] 1-7.) Mother was subsequently accepted into the [Accelerated Rehabilitative Disposition (ARD)] program on September 21st, 2012[,] approximately one week prior to the Adjudication Hearing. (N.T. p. 96, ln. 6-8.) The [c]ourt considered testimony regarding Mother's drug use and in addition to finding her reasoning for her positive test totally lacking in credibility, the [c]ourt found that Mother's charges warranted consideration not only as to whether Child was dependent, but also as to disposition. [Mother] accepted zero responsibility for her drug use, and[,] in fact, gave an implausible explanation for her positive drug test. The laws of this Commonwealth require the court to consider the criminal charges and convictions of parties seeking relief under the Custody Act, 23 Pa.C.S. § 5329 and § 5330. In custody matters, before a [c]ourt can grant any award of custody to a party who has [the] said enumerated charges or convictions, the [c]ourt must determine that the party does not pose a threat of harm to a child and/or that further counseling is needed because of said charge.⁶ While the present matter is not a custody matter as within the realm of the Custody Act, and this [c]ourt is constrained to follow the Juvenile Act as it governs dependency matters, this [c]ourt did consider that Child was placed in the legal and physical custody of YCOCYF while [Mother] had pending drug charges and later incurred a positive test, when determining [Mother's] ability to ensure Child's safety should Child be returned home. The [c]ourt, in rendering

disposition, is required to determine legal and physical custody of a child to ensure that placement is suitable. Through the credible testimony presented, the [c]ourt determined that[,] at the time of the hearing, [Mother's] acceptance into the ARD program alone was not enough to clearly convince this [c]ourt that [Mother] would be able to provide for the health, safety and welfare of Child. Having found that placement with [Mother] may pose a threat of harm to Child, the [c]ourt, under both the Juvenile Act and the Custody Act, was precluded from placing Child in the custody of [Mother]. However, the [c]ourt determined that it would review the matter within thirty (30) days to determine whether [Mother] continued to pose a threat of harm.

The [c]ourt further questions [Mother's] ability to provide stable housing for Child. Additionally, [Mother] admitted that she has no means of supporting Child other than through [Child's] own father. (N.T. p. 106, ln. 14-25.) As stated above, [Mother's] only source of income is through the person whom this [c]ourt found to have abused Child. The fact that [Mother] relies upon [Father] for income greatly concerns this [c]ourt as to [Mother's] ability to provide for Child's health, safety and welfare without endangering the welfare of Child.

Finally, the [c]ourt was not placing any sort of burden on [Mother] to[,] in essence, prove she could provide proper parental care and control on behalf of Child. Instead, that burden was placed upon YCOCYF, [sic] to prove by clear and convincing evidence that Child was without proper parental care and control in accordance with 42 Pa.C.S. § 6302(1) and in this particular matter, this [c]ourt was clearly convinced by YCOCYF that Child is lacking proper parental care and control[,] and is a dependent child as that term is defined by the Juvenile Act.

⁵ Pursuant to a safety plan developed after [Father] was charged with Simple Assault and Endangering the Welfare of a Child, Child was in the custody of [Mother].

⁶ 23 Pa.C.S. [§] 5329.

Trial Court Opinion, 11/30/12, at 3-6 (footnotes in original).

Mother asserts that the trial court incorrectly found that Child was without proper parental care and control because Mother had a drug issue. Mother claims that the evidence showed that she had not tested positive for drugs since July 20, 2012, and that her other drug test results were negative. Mother also alleges that the trial court incorrectly questioned her housing, as the Agency did not present any evidence that her housing was inappropriate. Finally, Mother challenges the sufficiency of the evidence to support the trial court's questioning of her contact with Father, outside the presence of Child. Mother asserts that the trial court found that Mother did not violate the safety plan that was established, under which Mother was to have custody of Child, and Father was to have only limited contact with Child.

Mother would have this Court make different credibility and weight determinations from the testimony, and reach a conclusion different from the decision of the trial court. In ***In re R.J.T.***, our Supreme Court instructed:

... [A]ppellate courts must employ an abuse of discretion standard of review, as we are not in a position to make the close calls based on fact-specific determinations. Not only are our trial judges observing the parties during the hearing, but usually, as in this case, they have presided over several other hearings with the same parties and have a longitudinal understanding of the case and the best interests of the individual child involved. Thus, we must defer to the trial judges who see and hear the parties and can determine the credibility to be placed on each witness and, premised thereon, gauge the likelihood of the success of the current permanency plan. Even if an appellate court would have made a different conclusion based on the cold

record, we are not in a position to reweigh the evidence and the credibility determinations of the trial court.

In re R.J.T., 9 A.3d at 1190. ***See also In re Adoption of S.P.***, 47 A.3d 817, 826 (Pa. 2012). We find the trial court's reasons for determining that Child is dependent, because Child is lacking proper parental control and such care and control is not immediately available, are supported by competent evidence in the record. ***See In re J.C.***, 5 A.3d at 289. Accordingly, we affirm the trial court's order.

Order affirmed.

Judgment Entered.

Mary A. Shaybill
Deputy Prothonotary

Date: 5/7/2013