IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

In re:	:	
	:	
E.H. and J.H., minor children	:	NO. 5979
	:	
	:	ORPHAN'S COURT
	:	
	:	
	:	MOTION FOR RECONSIDERATION

DATE: February 20, 2007

OPINION IN SUPPORT OF ORDER

On January 3, 2007, following an on the record argument, this court issued an order from the bench denying Mother's Petition for Reconsideration of Pretrial Order filed December 28, 2006. This opinion is entered to further explain the court's reasoning in support of that order.

On June 15, 2006, the Lycoming County Children and Youth Agency (the "Agency") filed a Petition for Involuntary Termination of Parental Rights relating to Mother and Father's two children, E.H. and J.H. Following a pre-trial conference, on October 13, 2006, this court issued an order permitting the Agency to introduce at the up coming termination hearing prior court orders and records made in the dependency and termination proceedings relating to Mother and Father's other child, E.D., to establish factual allegations concerning Mother and Father's conduct. The October 13, 2006 order also required Mother and Father to give the Agency notice as to which factual findings made in prior court orders and records they were going to contest at the termination hearing.

On October 20, 2006, Father filed a Motion for Reconsideration at to the October 13, 2006 order. Father argued that he was entitled to contest and re-litigate the factual findings made in the prior court orders and records. In a December 12, 2006 order, this court denied Father's Motion for Reconsideration. The basis for the court's denial and order was the doctrine of collateral estoppel.

In relevant part, the December 12, 2006 order read as follows:

> It is hereby ORDERED and DIRECTED that all factual determinations made in the prior juvenile proceedings under case 00-30,416 as well as factual determinations made under the prior Orphan's Court, case #4966, relating to [E.D.'s] termination shall not be relitigated at the scheduled termination hearing in this case. The findings of fact entered by Judge Gray at the time of the termination of the parental rights of the parents to their child, [E.D.], may be admitted into evidence upon motion of the Agency on the request that the court take judicial notice of those findings. At the termination proceedings the court may take judicial notice of all factual findings made in the hearings held on January 12, 2005, July 14, 2005, November 3, 2005, March 10, 2006, April 24, 2006, and June 13, 2006.

The juvenile proceedings under case 00-30,416 referenced in the order related to the dependency proceedings concerning E.H. and J.H., who had been found to be dependent children in those proceedings.

On December 28, 2006, Mother filed a Motion for Reconsideration of Pretrial Order regarding the December 12, 2006 order. Argument on Mother's Motion was held on January 3, 2007. At the time of argument, Father joined in Mother's request for reconsideration. Also at argument, the children's guardian *ad litem*, Donald Martino, Esquire, stated his position, which ultimately supported Mother's reconsideration request, primarily out of concern that the

application of collateral estoppel raises an appeal issue which could unnecessarily delay finalizing a child's status.

Mother has asserted that in making our prior ruling, this court failed to apply the legal test for application of the doctrine of collateral estoppel as set forth in the ***Office of Disciplinary Counsel vs. Kiesewetter***, 889 A.2d 47 (Pa. 2005). Father and the Guardian ad Litem also argue that ***Kiesewetter*** controls. This court must acknowledge that it did not expressly consider all the ***Kiesewetter*** standards and thus must grant the request for reconsideration, however, the outcome of the ruling remains the same. Under ***Kiesewetter***, the doctrine of collateral estoppel precludes the parents from relitigating issues in the adoption proceedings that have already been determined against them in the juvenile proceedings.

In her Motion, Mother has asked this court to reconsider its decision to permit factual allegations to be established at the termination of parental rights hearing by the use of factual findings made in the dependency proceedings involving E.H. and J.H. However, Mother is not asking this court to reconsider its decision to permit the introduction of factual findings made in the termination proceedings relating to E.D. Mother argues that the admission of the factual finding made in the dependency proceeding and the foreclosure of her right to contest those findings should not be permitted under the doctrine of collateral estoppel. Specifically, Mother argues that the offensive use of collateral estoppel should not be permitted under the circumstances of this case and she should be allowed to contest and re-litigate the factual findings made in the dependency proceedings.

"The phrase "collateral estoppel," also known as "issue preclusion," means that when an issue of law, evidentiary fact, or ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in a future lawsuit." ***Commonwealth v. States***, 891 A.2d 737, 742 (Pa. Super. 2005), *app. granted*, 2006 Pa. LEXIS 2427 (12/12/06). The doctrine of collateral estoppel precludes relitigation of an issue determined in a previous action if:

> (1) the issue decided in the prior case is identical to the one presented in the later action;
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> (2) there was a final adjudication on the merits;
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> (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case;
>
> (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and
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> (5) the determination in the prior proceeding was essential to the judgment.

Office of Disciplinary Counsel v. Kiesewetter, 889 A.2d 47, 50-51 (Pa. 2005); ***Atl. States Ins. Co. v. Northeast Networking Sys., Inc.***, 893 A.2d 741, 745 (Pa. Super. 2006).

"The doctrine of collateral estoppel can be asserted either defensively as a shield to prosecution of an action or offensively as a sword to facilitate prosecution." ***Kiesewetter***, 889 A.2d at 51. "Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant." ***Ibid***. "Offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action

with another party." ***Ibid***. In this case we are concerned with the (plaintiff) agency's use of "offensive" collateral estoppel.

The offensive use of collateral estoppel raises concerns regarding fairness. In order to ameliorate those concerns, a court must preliminarily consider the following factors before determining whether to permit the use of offensive collateral estoppel:

> (1) whether the plaintiff could have joined the earlier action;
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> (2) whether the subsequent litigation was foreseeable and therefore the defendant had an incentive to defend the first action vigorously;
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> (3) whether the judgment relied upon as a basis for collateral estoppel is inconsistent with one or more previous judgments in favor of the defendant, and
>
> (4) whether the second action would afford the defendant procedural opportunities unavailable in the first action that could produce a different result.

Kiesewetter, 889 A.2d at 52; ***Toy v. Metro. Life Ins. Co.***, 863 A.2d 1, 15 (Pa. Super. 2004), *app. granted*, 882 A.2d 462 (Pa. 2005). "In considering whether the application of the doctrine of offensive collateral estoppel is warranted, 'the general rule should be that in cases where a plaintiff could easily have joined the earlier action or where, either for the [aforementioned] reasons ...or for other reasons, the application of offensive collateral estoppel would be unfair to a defendant, a trial judge should not allow the use of collateral estoppel.'" ***Toy***, 863 A.2d at 15 (quoting ***Parklane Hosiery Co., Inc. v. Shore***, 439 U.S. 322, 331 (1979)) (change in original).

Applying these four factors, it would be appropriate to permit the offensive use of collateral estoppel at the termination hearing. As would relate to the first factor, the Agency is the

petitioning party in both the dependency and the termination proceedings. With respect to the third factor, the factual determinations made in the dependency proceedings would not be inconsistent with any judgment in favor of Mother or Father. Those factual determinations were not in favor of Mother or Father in any way.

Concerning the second factor, Mother argues that the present termination proceedings were not foreseeable during the dependency proceedings, and because of the unforseeability, Mother and Father did not vigorously defend the dependency proceedings. Mother's argument is in opposition to common sense and what this court has observed as actual practice during dependency proceedings. Common sense would suggest that the permanent loss of parental rights is a real possibility once dependency proceedings have been initiated, and the parent involved in such proceedings must be aware of that possibility. In a dependency proceeding, the issue is whether the parent's conduct has deprived the child of the proper care and control. *See*, 42 Pa.C.S.A. § 6302; ***In re M.W.***, 842 A.2d 425, 428 (Pa. Super. 2004). In some situations, the parent's conduct, or lack thereof, may be so significant that removal of the child from the parent's custody is necessary. *See*, ***In re G.***, 845 A.2d 870, 872 (Pa. Super. 2004); ***In re A.L.***, 779 A.2d 1172, 1174 (Pa. Super. 2001). The institution of dependency proceedings puts a parent on notice that the care she has provided her child has been so deficient that government intervention has become necessary to prevent further harm to the child. Any realistic and reasonable parent in that situation must certainly realize that because of her demonstrated inability to provide the necessary care and control for her child there exists a real possibility that the government will not permit her

to continue to be responsible for that child. As such, the termination of parental rights is a possible and foreseeable ultimate result once dependency proceedings have been instituted.

The foreseeability of this prospect has been evident in most if not all of the dependency proceedings before this court. Parents appearing before this court in dependency proceedings are often upset that the children are being removed from their custody with the obvious source of that upset being the possibility that they might not get the children back. They often spontaneously raise this concern. It appears that the Agency regularly emphasizes this to the parents, and it is certainly something parent's counsel is aware of and of which counsel advises them.

As would relate to the present case, the court cannot recall of any hearing where Mother or Father would not have seen termination of their parental rights as being foreseeable, particularly in light of their experience with the dependency and termination proceedings concerning E.D. It is also evident from the matters held before this and other courts regarding the dependency proceedings that Mother and Father vigorously opposed the dependency petitions and stated their positions. Sometimes, Mother and Father's opposition was displayed in angry outbursts and/or in an intentional failure to appear for a hearing, even though they recognized that the failure to appear would result in adverse consequences.

In addition to the nature of a dependency matter, the Juvenile Act makes clear that the termination of parental rights is a possible outcome. The Juvenile Act states that where a child has been placed out of the home for a period of at least fifteen out of the last twenty-two months the Agency is required to pursue termination of parental rights unless there are compelling reasons

otherwise. 42 Pa.C.S.A. § 6351(f)(9). This provision of the Juvenile Act gives notice to parents involved in dependency proceedings that termination of their rights may result.

Concerning the fourth factor, Mother contends that the termination proceedings provide her with more procedural opportunities that were unavailable to her in the dependency proceedings to the extent that the procedural differences could produce a different result. Specifically, Mother contends that there are three procedural differences between a dependency proceeding and a termination proceeding that preclude the offensive use of collateral estoppel. The first procedural difference asserted is that the standard of proof in a dependency proceeding is less then the standard of proof in a termination proceeding. The second procedural difference asserted is that a dependency proceding is more informal then a termination proceeding, and consequently, rules of evidence at a dependency proceeding are much more relaxed. Specifically, Mother contends that hearsay evidence is more readily admitted at the informal dependency hearing, such that often times parents accept the admission of psychological reports foregoing cross examination of the psychologist who wrote the report. The third procedural difference asserted is that dependency proceedings are often heard in this county by a Master (Family Court Hearing Officer) rather than a judge of the Court of Common Pleas. The court will address Mother's three contentions in the order raised.

With regard to Mother's first contention, the standard of proof at a dependency hearing is the same as that at a termination hearing. Dependency matters are governed by the Juvenile Act, 42 Pa.C.S.A. § 6301, *et seq*. ***In re C.M.T.***, 861 A.2d 348, 352 (Pa. Super. 2004); ***In re A.L.***, 779 A.2d 1172, 1174 (Pa. Super. 2001). In a dependency proceeding under the Juvenile Act, the

petitioner bears the burden of establishing that the statutory requirements have been met. ***In re C.M.T.***, 861 A.2d at 352; ***In re S.B.***, 833 A.2d 1116, 1120 (Pa. Super. 2003), *app. denied*, 856 A.2d 835 (Pa. 2004). In order to meet its burden, the petitioner must prove by clear and convincing evidence that a child meets the statutory definition of dependency. 42 Pa.C.S.A. § 6341(c); ***In re G.***, 845 A.2d at 872; ***In re S.B.***, 833 A.2d at 1118 (The Juvenile Act empowers a court to make a finding that a child is dependent if the child meets the statutory definition by clear and convincing evidence.); ***In re A.L.*** 779 A.2d at 1174 ("… only where there is clear and convincing evidence may a child be adjudicated dependent.").

Involuntary termination of parental rights is governed by the Adoption Act, 23 Pa.C.S.A. § 2101, *et seq*. ***In re D.W.***, 856 A.2d 1231, 1233 (Pa. Super. 2004). In termination proceedings, the burden of proof is on the party seeking to terminate parental rights. ***In re N.W.***, 859 A.2d 501, 506 (Pa. Super. 2004); ***In re G.P.-R.***, 851 A.2d 967, 973 (Pa. Super. 2004). The grounds for termination of parental rights are set forth in Section 2511(a) of the Adoption Act. 42 Pa.C.S.A, § 2511(a). The party seeking termination must establish by clear and convincing evidence the existence of grounds to terminate parental rights. ***In re N.W.***, 859 A.2d at 506; ***In re G.P.-R.***, 851 A.2d at 973.

The standard of proof in a dependency hearing is identical to the standard of proof in a termination proceeding. In both a dependency hearing and a termination hearing, the burden of proof is upon the petitioning party. In both a dependency hearing and a termination proceeding, the petitioning party must establish the required elements by the same standard of proof – clear and convincing evidence. As such, Mother's first contention fails.

With regard to Mother's second contention, the use of the clear and convincing evidence standard of proof in dependency hearings mitigates any prejudice created by relaxed evidence rules and the admission of hearsay evidence. Clear and convincing evidence is " '… testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" ***In re G.P.-R.***, 851 A.2d at 973 (quoting ***In re A.L.D.***, 797 A.2d 326, 336 (Pa. Super. 2002)). This is a high standard of proof to meet. If there is a significant factor that affects whether or not dependency is to be adjudicated it is unlikely that such would be entered solely on the basis of hearsay evidence since such evidence alone would not meet this lofty standard.

Often, when hearsay evidence is introduced at a dependency proceeding by the Agency, parents object to its admission. In making a ruling on the objection, most courts determine the extent of the prejudice to the parents by the inability to cross examine the out of court declarant. In most instances where hearsay evidence is admitted, there is little prejudice to the parents. In this particular case, Mother and Father have not pointed to any particular admission of hearsay evidence, nor do the records available to this court reflect any such evidence being admitted, which operated to their prejudice, with the one possible exception being the admission of written psychological evaluations without testimony of the examiner.

Seldom, if ever, have parents pursued in dependency proceedings psychological evaluations seeking to establish contrary opinions to the psychological evidence offered by the Agency. Further, it is often the case that the psychologist is available in person to testify. It is also common that when the showing of availability is made the parents waive the psychologist's

testimony. That is, Mother and Father have not directed the court's attention to any hearsay evidence that could have changed the result of the dependency determination or out of home placement of E.H. and J.H. As such, Mother's second contention fails.

In this case the parents have not suggested that they disagree in any way with any prior psychological evidence nor that they objected to the entry into evidence of any such report.

With regard to Mother's third contention, while dependency matters in Lycoming County are often heard by a Family Court Hearing Officer, pursuant to 42 Pa.C.S.A. § 6305(b), the parties to the proceedings have the right to request that a judge of the Court of Common Pleas conduct the dependency hearing. This procedure is not often utilized in Lycoming County, likely because parents and their counsel recognize the extensive experience that both of the Lycoming County Family Court Hearing Officers have in dependency matters. Parties instead express an apparent acceptance of the fairness of their rulings, in as much as this court can only recall one instance in the last several years in either juvenile dependency or juvenile delinquency proceedings where a request for reconsideration or rehearing was made following a Family Court Hearing Officer's decision. There is nothing in the record to establish to having a judge rather than a Family Court Hearing Officer determine factual allegations in a dependency hearing would not produce a different result, neither generally nor in this case specifically. A Family Court Hearing Officer's findings are reviewed by a judge of the Court of Common Pleas to determine if the Family Court Hearing Officer's determination is supported by the record. This provides the parents in a dependency proceeding with an adequate procedural safeguard. In this case, the orders and factual findings this court has determined should be admitted under the doctrine of collateral estoppel

were made by Court of Common Pleas judges and clearly establish that the finding of dependency was warranted. As such, Mother's third contention fails.

After having preliminarily determined that the offensive use of collateral estoppel at the termination hearing would be appropriate, the court will now apply the ***Kiesewetter*** test to determine if the doctrine of collateral estoppel precludes the re-litigation of the factual findings made in the dependency proceedings regarding E.H. and J.H. The factual findings made in the dependency proceedings are identical to the specific facts intended to be litigated at the termination hearing, based upon the allegations in the Petition for Involuntary Termination of Parental Rights. The finding of dependency, reaffirmation of dependency, and placement of E.H. and J.H. have become final adjudications on the merits as would relate to those issues. Mother and Father were parties in the dependency proceedings regarding E.H. and J.H. Mother and Father had a full and fair opportunity to litigate the factual allegations raised in the dependency proceedings regarding E.H. and J.H. That factual findings made in the dependency proceedings were essential to the judgment in the dependency proceedings regarding E.H. and J.H. as the factual findings formed the factual basis for the dependency finding and the removal of E.H. and J.H from Mother and Father's custody. As such, the doctrine of collateral estoppel precludes the re-litigation of the factual findings made in the dependency proceedings regarding E.H. and J.H. at the termination hearing.

Accordingly, Mother's Motion for Reconsideration of Pretrial Order was denied by our prior Order of January 3, 2007.

BY THE COURT,

William S. Kieser, Judge

cc: Children and Youth (2)
Charles Greevy, Esquire
Donald Martino, Esquire
John Gummo, Esquire
Joel McDermott, Esquire
Judges
Gary L. Weber, Esquire (Lycoming Reporter)
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