

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

IN THE INTEREST OF	: ORPHANS' COURT DIVISION
	:
S.M.,	: No. Adoption 6218
A Minor Child	: No. DP-25-2009

OPINION AND ORDER

On July 20, 2010, the Lycoming County Children and Youth Services ("Agency") filed a Petition to Involuntarily Terminate the parental rights of T.M. and D.C., respectively the biological Mother and biological Father of S.M., a minor child born on March 21, 2007.

The Petition alleges that involuntary termination of the parental rights of the parents is appropriate based on §§ 2511 (a) (1), (a) (2), (a) (5), and (a) (8) of the Adoption Act of 1980, as amended. 23 Pa. C.S. § 2511.

Hearings were held on September 15, 2010 and November 2, 2010. Testimony was received from several witnesses on behalf of the Agency on September 15, 2010 and from each of the biological parents on November 2, 2010.

Following the hearings, the parties were given an opportunity to submit Proposed Findings of Fact and Conclusions of Law. Proposed Findings and Conclusions of Law were submitted on behalf of the Agency, the Guardian Ad Litem for the child and the Father. Mother did not submit any Proposed Findings or Conclusions although she did submit a hand printed letter in support of her desire not to have her rights terminated.

On or about May 20, 2009, the child, then two years of age, was taken to the Williamsport Hospital by his Mother. Hospital personnel noticed a suspicious bruise on the child's abdomen. Mother's explanation was not satisfactory. The child was further found to be dehydrated and accordingly admitted. Upon further examination he was found to have a lacerated liver.

As a result of the child's serious injuries, he was life flighted to Geisinger Medical Center. He was diagnosed with a damaged liver and pancreas. Mother initially reported that she had been with the child all day and that he had fallen down a flight of steps. The attending physician reported that falling down a flight of steps does not usually produce the type of injuries suffered by the child. This type of injury, according to the attending physician, usually occurred in a severe automobile accident or through the application of significant physical force to the abdomen. Mother later reported that she had left the child in the care of her then paramour, Ronald James, III.

An ensuing criminal investigation determined that the child had suffered significant physical abuse which had been inflicted by Mr. James. Mr. James was accordingly criminally charged, and subsequently convicted and incarcerated.

During the child's initial admission, Mother used profanity at the child, pulled his arm, pulled pillows out from under him and caused him to hit his head on the bed. Further, Mother threatened to remove the child from the hospital against medical advice.

By Order of Court dated May 20, 2009, the Court found that Mother's conduct presented a clear and present danger to the welfare of the child and that the child's best interest and welfare required that legal and physical custody of him be given to the Agency.

The child was placed with a resource family following his release from Geisinger Medical Center and was subsequently adjudicated dependent on or about May 29, 2009. The child has remained with his resource family through the present.

Another child of Mother and Mr. James born on November 17, 2009 was adjudicated dependent and also placed with the same resource family in January of 2010. That child continues to reside along with S.M. with the resource family.

The child has recovered well from his injuries, is in relatively good health and is developmentally on track. The child was evaluated by Bruce Anderson, a licensed clinical psychologist. According to Mr. Anderson, the child has developed a bond with his resource parents and their children. The child calls the resource parents mom and dad and refers to their children as his brothers. The child will suffer no traumatic effects of termination of parental rights of both parents and will greatly benefit from a stable and permanent family. The resource mother is the primary attachment figure for the child. The resource parents intend to adopt the child if the parental rights of the parents are terminated.

According to Mr. Anderson, the child has little if any bond whatsoever with his natural Mother and no bond with his natural Father.

Father was born on August 3, 1975 and grew up in New Jersey. After graduating high school, he soon committed criminal misconduct which landed him in jail. Father was incarcerated in the state of New Jersey at the time he was informed by Mother that he was the father of the minor child.

Father was released from prison in August of 2008 when the child was approximately 1 ½ years old. Between August of 2008 and April of 2009, Father traveled from New Jersey to Pennsylvania on weekends two or three times a month to visit with his child. Father, however, failed to request permission for these visits from his supervising parole agent and knew that he was violating his parole by traveling out of state without such permission. In April of 2009 as a result of these parole violations, Father was re-incarcerated. He remained incarcerated until he was released on November 1, 2010. At the initial hearing in this matter, Father testified via video conferencing. He participated in person at the subsequent hearing.

During Father's periods of visitation with the child, he attempted to establish a relationship with his child. They would go places, play together and became "tight." The child called Father "Daddy." On a few occasions, Mother allowed Father to return to New Jersey with the child for extended visits.

Father's criminal history is significant. In 1997, he was convicted of delivery of drugs to an undercover law enforcement officer and incarcerated

for four years. He was subsequently convicted of another drug offense which resulted in a five-year sentence of incarceration. Father was then reincarcerated on the parole violation. He decided to max out on his sentence, thus continuing to be incarcerated and continuing not to have personal contact with his child.

While Father was incarcerated, he learned of the physical abuse committed upon his son and his son's subsequent placement with the Agency. While Father testified that he did not learn of these facts until September, October or November of 2009, he sent a letter to the Agency in June of 2009 "agreeing" to placement with Mother's sister. Agency Exhibit 30.

Because of Father's incarceration, he has obviously not participated in any of the proceedings preceding the termination hearings in September and November of 2010.

In June of 2009, the Agency thanked Father for his cooperation during the Agency's assessment of the allegations of neglect and/or referral for services. Unfortunately for Father, between April of 2009 when he was first incarcerated on his parole violation and November 1, 2010 when he was released, he was transferred to at least six different facilities making contact between he, the Agency and his child very difficult.

Father did write to the Agency "quite a few times" inquiring as to his child's status and welfare. In October of 2009, he wrote to the Agency noting that once he gets out he plans on going back to school to get his Commercial

Driver's License to be able to give his child the "proper care he deserves."

Agency Exhibit 49.

In December of 2009, Father was encouraged by the Agency to write letters, send cards or gifts, to maintain communication and to participate in any parenting classes available within the prison system. Agency Exhibit 52.

Father testified, however, that he could only communicate through the mails if he could purchase enough stamps which wasn't always the case. He explained as well that he could not always call because of the prison rules. He did, however, speak with an Agency representative on one occasion over the telephone for a "long" time.

In February of 2010, the Agency advised Father that it was concerned over his lack of communication. Agency Exhibit 58. Reference was made to possibly needing to proceed with termination proceedings. Father responded by apologizing for his "not responding in a timely fashion" and noting that he had sent a Christmas gift and would be sending a birthday gift. He also noted that he was on the waiting list for the "Hope program." Agency Exhibit 60. In March of 2010, Father was encouraged by the Agency to "continue his communication" with the Agency. Agency Exhibit 63. Later that month, the Agency noted that the child received the Father's birthday gift and liked it, as well as the Father's birthday card expressing a desire to soon start their "Father and son journey." Agency Exhibits 64, 66.

Father testified that due to his often and sudden relocation within the New Jersey prison system, communication with persons outside the prison was difficult. Father further testified that when he did attempt telephone contact with the Agency on some occasions to inquire about the status of his child, his attempts were often futile as he would be told to call back or leave a message. Father testified as well that during his most recent period of incarceration, he completed a parenting class although he did not learn "a lot." He also testified that he completed vocational classes to be "put on for trades," attended NA/AA meetings, and mentored other inmates.

Father conceded that he should have done more with respect to maintaining contact with his child, but that he is willing to do whatever the Agency requires of him in order to someday regain reunification with his child. He plans on becoming a plumber or electrician, and acknowledges that his child needs a stable home. Father noted that he presently resides with a girlfriend in New Jersey, and he has no intention to relocate to Pennsylvania.

Unfortunately, Father has no identifiable skills which would enable him to obtain employment to provide for himself let alone his child. It is evident that Father never held any job or employment of any kind. Indeed, Father's past history of criminal misconduct points to an unfortunate future of similar criminal misconduct in order to financially survive.

With respect to the Mother, upon the child's placement, the Agency had contact with Mother setting forth specified recommendations and

goals for reunification. Unfortunately, Mother has significantly failed with respect to complying with these recommendations or reaching the goals. Moreover, Mother has demonstrated an inability to provide for her child's essential needs. While the Court is convinced that Mother sincerely loves her child, the Court is equally convinced that Mother is equally incapable of properly demonstrating such love or providing for her child's needs and welfare.

From June 11, 2009 through September 15, 2009, Mother either canceled or missed approximately 40% of her scheduled visits with the child. During the visits that Mother attended, she seldom interacted with the child, exhibited moodiness and anger, made baseless complaints about the child's condition, was very difficult to work with, and showed little or no progress in her parenting skills or her anger management.

Mother was discharged from at least two different counseling services due to lack of attendance and missed a majority of the child's medical appointments during 2010.

Mother has demonstrated a bad attitude, poor anger management skills, lack of patience, inability to recognize that the child's needs must come before her own wants, an inability to listen to and learn from others, an inability to accept and follow guidance from Agency visitation staff, an inability to learn how to communicate and play with her child, and poor understanding of her child's developmental and medical needs.

The Agency provided Mother with many resources to work with towards reunification and to prevent permanent placement including intensive casework services, an outreach worker, family group decision making, project breakthrough, counseling services with two different groups, pregnancy care, parenting classes, salvation army program, YWCA Liberty House for housing, early intervention for the child, Careerlink and transportation services.

Despite these resources being made available to the Mother, as well as Mother participating in classes and some counseling, she showed little progress.

The Court observed poor behavior from the Mother during the two hearings. Mother showed little ability to contain her emotions or anger. She was mildly disruptive often talking loudly, making noises, shuffling her body and showing little respect for the witnesses, lawyers, court personnel or the process. Her testimony was replete with an attitude of victimization and excuses for all criticisms leveled against her.

Mother demonstrated an obvious inability to control her anger or emotions, thus placing her needs over her child's. The Mother's own testimony was full of examples. Mother left a visit with her child early because the visitation staff was "being rude" to her. She missed visits because either the Agency clock was fast, they refused to wait for her, she had no choice but to work or she had "problems" with her pregnancy. Despite being advised to go down on the floor to play with her son and his toys, she was "too uncomfortable"

being eight months pregnant. Plus, “things were okay” with the child playing with her while she was sitting down. She was irritable with staff because they disrespected her in front of her child. She lost or was fired from most if not all of her jobs, but conceded that she needed a permanent fulltime job. She was evicted from Liberty House (a residential facility) because she failed to comply with their rules such as curfew. She failed to have a current residence despite acknowledging that her child required a “stable place.” She first testified on cross-examination that she did not know her present address but then stubbornly insisted that there was no reason to give her address to the Agency. She admitted to being quick to anger as well as discontinuing her counseling but explained that she “hated it” when the Agency interfered with her and “her kids.”

Based upon the credible testimony of numerous witnesses, Mother was not capable of keeping jobs, and not capable of following through on suggestions or recommendations with respect to educational courses, housing or anger management. Mother would not stay current with her child’s medical or other types of appointments.

“In a proceeding to involuntarily terminate parental rights, the burden of proof is on the party seeking termination to establish by clear and convincing evidence the existence of grounds for doing so.” In Re: Julissa O., 746 A.2d 1137, 1139 (Pa. Super. 2000). “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.” Id., quoting Adoption of Atencio, 539 Pa. 161, 650 A.2d 1064, 1066 (1994).

The Court’s first inquiry is focused on the conduct of the parents. More specifically, in order to terminate the parent’s rights, the Court must be satisfied by clear and convincing evidence that their conduct meets the grounds for termination as delineated by the statute. In Re: Z.P., 994 A.2d 1108 (Pa. Super. 2010).

With respect to Father, the Agency concedes that because the child was not taken from his custody in a physical sense, subsections (a) (5) or (a) (8) would not apply.

Further, the Court finds that the Agency has not presented clear and convincing evidence to meet the statutory requirements of § 2511 (a) (1). Parental rights may be terminated under § 2511 (a) (1) where the parent demonstrates a settled purpose to relinquish a parental claim or fails to perform parental duties for at least the six months prior to filing the Termination Petition. In Re: C.S., 761 A.2d 1197 (Pa. Super. 2000) (en banc).

As our courts have noted, there is no simple definition of parental duties. It is best understood in relation to the needs of a child which include love, protection, guidance and support. Our courts have held that this “parental obligation is a positive duty which requires affirmative performance.” In Re: Z.P., supra. at 1119, quoting In Re: B., N. M., 856 A.2d 847, 855 (Pa. Super.

2004), appeal denied, 582 Pa. 718, 872 A.2d 1200 (2005).

Further, while the fact of incarceration does not in and of itself provide grounds for termination of parental rights, a parent's obligation to perform his parental duties does not cease because of incarceration. In Re: Z.P., supra. at 1120, quoting In Re: B., N. M., supra. at 85-56. The incarcerated parent must utilize all available resources to foster a continuing close relationship with the child and must act affirmatively to maintain the relationship even in difficult circumstances. Id.

The Court finds that Father has put forth a substantial effort into establishing a relationship with his son and perform his parental duties. Father has done everything that he could have done from prison. The evidence does not establish that the Father has either demonstrated a settled purpose to relinquish his parental claim or failed to perform parental duties and responsibilities to the extent possible while in prison.

Father has maintained contact with his child as acknowledged by the Agency, provided gifts, provided cards, provided words of encouragement and hope, completed a parenting class, completed vocational classes, attended NA and AA meetings and mentored other prisoners. The circumstances of his finances, moving from one facility to another, the limited number of programming slots available, the presence of waiting lists and the inability to have personal visits and phone calls all prevented Father from doing more. As the CASA report noted, Father expressed an interest in helping to raise the

child and even suggested different family members who could all help and be possible resource homes. Agency Exhibit 74. As well, Father cooperated with both to Agency and other agencies including Family United Network, Inc. Agency Exhibit 74.

With respect to § 2511 (a) (2), the Agency must prove three elements: (1) repeated and continued incapacity, abuse, neglect or refusal; (2) that such incapacity, abuse, neglect or refusal caused the child to be without essential parental care, control or subsistence; and (3) that the causes of the incapacity, abuse, neglect or refusal cannot and will not be remedied.” In Re: Z.P., supra. at 1117, citing in Interest of Lilley, 719 A.2d 327, 330 (Pa. Super. 1998).

The evidence of record in this case clearly and convincingly demonstrates that Father has not and is not capable of meeting the essential needs of the child, and will not be able to do so within a reasonable time. As the Agency argues, the facts show a pattern of incapacity to parent, particularly while Father was incarcerated. A common sense review of Father’s history and present status makes it clear that he is unavailable to provide the child with the protection, guidance, support and immediate permanency that the child needs and requires. The inherent limitations on Father’s ability to parent cannot be remedied.

Father is unwilling to relocate to Pennsylvania and his ability to support the child is nonexistent. There is no evidence as to Father’s work

experience or skill set and given his substantial felony criminal record, there is no guarantee whatsoever that he would obtain part-time or temporary, let alone fulltime employment.

The Court is significantly concerned about Father's extensive criminal history and whether Father is even capable of living a law-abiding life in the future. Even if Father were to take custody of the child, the Court is of the opinion that the risks are great that Father will become incarcerated in the future which would significantly impact on the welfare of the child. Obviously, he cannot provide for the child from prison. The Court notes that Father's repeated criminal activity in the past occurred despite the existence of another child of his and that the decisions of Father show a pattern of incapacity to parent. The Court has great concern that Father will not be able to maintain a crime free life or properly care for the child upon obtaining custody of him.

Father loves his child but even by his own admissions, he cannot provide a stable home. He is unemployed, has a substantial criminal record, lives with his girlfriend and has little to offer his child other than expressions of caring and future expressions of togetherness. Unfortunately, this is not enough.

Accordingly, the Court concludes that the elements of § 2511 (a) (2) have been proven by the Agency by clear and convincing evidence.

With respect to Mother, "[t]he statute permitting the termination of parental rights outlines certain irreducible minimum requirements of care that

parents must provide for their children and a parent who cannot or will not meet the requirements within a reasonable time following intervention by the state may properly be considered unfit and have his or her parental rights terminated.” In Re: B.L.L., 787 A.2d 1007, 1013 (Pa. Super. 2001).

Termination of parental rights under § 2511 (a) (5) requires that:

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

23 Pa. C.S.A. § 2511 (a) (5).

To terminate parental rights pursuant to § 2511 (a) (8), the following factors must be proven:

the child has been removed from parental care by the court or under a voluntary agreement with an agency, twelve 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.

23 Pa. C.S.A. § 2511 (a) (8); see also In Re: Z.P., supra at 1118; In Re: Adoption of M. E. P., 825 A.2d 1266, 1275-76 (Pa. Super. 2003).

Clearly, the child has been removed from parental care for twelve months or more, thus satisfying the first requirements of (a) (5) and (a) (8). The

Court must then determine whether the conditions that led to the child's removal continue to exist, despite the reasonable good faith efforts of the Agency supplied over a realistic time period. In Re: A.R., 837 A.2d 560, 564 (Pa. Super. 2003); In Re: Z.P., supra. Significantly, termination under these sections does not require the Court to evaluate a parent's current willingness or ability to remedy the conditions that initially caused placement or the availability or efficacy of Agency services. In Re: Z.P., supra., citing In Re: Adoption of T. B. B., 835 A.2d 387, 396 (Pa. Super. 2003).

By Order of Court dated May 22, 2009, the child was placed in the custody, care and control of the Agency. The child was subsequently found by clear and convincing evidence to be dependent by Order of Court dated May 29, 2009 based upon the allegations of neglect and abuse. The neglect and abuse concerned the child's medical injuries as well as Mother's conduct toward the child including screaming obscenities, shaking the child, ripping pillows from under the child, threatening to take the child out of the hospital against medical advice and picking up the child by his arm.

While Mother clearly wants to remedy the conditions that caused placement and while availing herself somewhat of the Agency's services, Mother has not and in all likelihood will not remedy such conditions within a reasonable time. Given the testimony, it is also clear that termination of parental rights would best serve the needs and welfare of the child.

Moreover, the Court finds that termination under subsections (a) (1) and (a) (2) is also clearly warranted. Mother is unfortunately unable to properly provide for the child and continues to leave the child lacking with respect to essential parental care, control or subsistence. There also appears to be no light at the end of the tunnel demonstrating that Mother can remedy these deficiencies. Mother is unable to keep employment, has no residence and clearly cannot provide for her child. Moreover, Mother has shown an inability to visit with her child on a continuous basis, let alone significantly bond with her child.

Mother's post-hearing letter to the Court expresses her sincere desire to be with her son and to correct her past mistakes. Mother clearly wants to provide for her child. Unfortunately, Mother is incapable of doing so.

Once the statutory requirements for involuntary termination of parental rights have been established under subsection (a), the Court must consider whether the child's needs and welfare will be met by termination pursuant to subsection (b). In Re: D.W., 856 A.2d 1231, 1234 (Pa. Super. 2004). "Although both subsections of the statute reference the 'needs and welfare of the child,' subsections (a) and (b) require separate analyses." In the Interest of: A.S. 2010 PA Super 164, 2010 Pa Super LEXIS 3222, at 25 (September 9, 2010), citing In Re: I.G., 939 A.2d 950, 951 (Pa. Super. 2007).

The Court must take into account what is best known as a bonding analysis. More specifically, the Court must consider whether a bond exists between the child and the parents and whether termination of the parent's rights would destroy an existing, necessary and beneficial relationship. In Re: Z.B., supra at 1121, citing In re: C.S., 761 A.2d 1197, 1202 (Pa. Super. 2000)(en banc).

The Court is convinced the evidence of record clearly supports the conclusion that termination of the parental rights of both Father and Mother best serves the child's needs and welfare. The child has lived with his resource parents for almost 20 months. Clearly, a very strong bond exists between the child and his resource parents as well as the resource siblings. The resource parents are providing love, comfort, security and stability to the child who is developing as hoped. While the efforts of Mother and Father evidence an interest in the child, clearly no bond has been established and the termination of the parent's interest would not destroy any existing, necessary or beneficial relationship. The conduct of the parents, in fact, demonstrates that to continue a relationship with them would be detrimental to the child.

The Court will not allow the child to languish in foster care hoping for a relationship with the natural parents that may or may not develop. "Above all else...adequate consideration must be given to the needs and welfare of the child." In Re: J.D.W.M., 810 A.2d 688, 690 (Pa. Super. 2002). The child needs a family that can now and in the future provide stability, comfort, shelter, food,

clothing and love.

The Agency has shown by clear and convincing evidence that the parental rights of D.C. and T.M. to their son, S.M., should be involuntarily terminated. The requirements of the statute have been met and it is in the best interest and welfare of the child that the parental rights be terminated.

ORDER

AND NOW, this ____ day of January 2011 for the reasons set forth in the foregoing Opinion, the parental rights of D.C. and T.M. to their, son, S.M., are hereby involuntarily terminated.

By The Court,

Marc F. Lovecchio, Judge

cc: Charles F. Greevy, III, Esquire
Ryan Gardner, Esquire
Don Martino, Esquire
James Protasio, Esquire
Charles F. Greevy, III
John P. Pietrovito, Esquire
Register & Recorder (Adoption No.: 6218)
CASA
Gary Weber, Esquire (Lycoming Reporter)
Work File