

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: ADOPTION OF: : **ORPHAN'S COURT**
A.W., :
A MINOR CHILD : **NO. 6279**

OPINION AND ORDER

Before the Court is a Petition for Involuntary Termination of Parental Rights that was filed on July 22, 2011 by S.W. and his wife. Filed along with the Petition for Involuntary Termination was a Petition for Step-Parent Adoption.

S.W. is the natural father of A.W. born on December 21, 2003. The natural mother of the minor child is T.W. Petitioners allege that T.W.'s parental rights to the minor child should be terminated because, for a period in excess of six (6) months prior to the filing of the Petition, the natural mother has had no contact with the minor child, evidenced a settled purpose of relinquishing her parental claim, was disinterested in performing her parental duties, and has not given any care or subsistence necessary for the physical or wellbeing of the child.

The hearing in this matter was held on December 8, 2011. Petitioners both testified on their own behalf, the Court interviewed the minor child, and the natural mother and her boyfriend testified on her behalf in opposition to the Petition. Petitioners argue that the natural mother's parental rights should be terminated pursuant to 23 Pa. C.S. § 2511 (a) (1) and (2). Subsection (a) (1) permits the rights of the parent to be terminated if that parent, by conduct continuing for a period of at least six (6) months preceding the filing of the Petition, either has evidenced a settled purpose of relinquishing his or her parental claim to the child, or has refused or failed to perform parental duties. 23 Pa. C.S. § 2511 (a) (1).

Subsection (a) (2) permits the termination of parental rights if the repeated and continued incapacity, abuse, neglect or refusal to parent has caused the child to be without essential parental care, control or subsistence necessary for the child's physical or mental wellbeing, and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent. 23 Pa. C.S. § 2511 (a) (2).

In order to terminate parental rights, the parties seeking termination must prove by clear and convincing evidence that the statutory grounds for termination have been satisfied. In Re: L. M., 923 A.2d 505, 511 (Pa. Super. 2007). Assuming that the petitioning party has met that burden, the Court must then determine if termination of parental rights best serves the needs and welfare of the child pursuant to 23 Pa. C.S.A. § 2511 (b). In Re: L.M., 923 A.2d 505, 511 (Pa. Super. 2007).

The natural father testified that he was married to the natural mother for approximately five (5) years during which the minor child was born. Since approximately 2005, the minor child has lived with the father.

Following the death of their older child, the natural mother sought increased visitation with the minor child resulting in an Order of Court dated November 6, 2009 (Petitioners' Exhibit No. 1) granting the parents shared legal custody of the minor child, primary custody to the father and partial physical custody to the mother every other weekend, every Wednesday and on selected holidays and vacation.

Subsequent to the 2009 Custody Order and prior to early January of 2011, the mother exercised her partial custody rights with respect to the minor child "most of the time."

For years, however, the mother had difficulty complying with her child support obligation. There were numerous contempts and in late December of 2010, the mother was apparently ordered by the Court to undergo four (4) months in jail for being in contempt of the prior Order(s) requiring her to pay child support. The sentence, however, was suspended upon the condition that the mother make a substantial monetary payment by the end of January 2011. If the mother failed to make said payment, she was to report to the Lycoming County Prison to begin serving her sentence in early February of 2011.

The minor child visited with the mother either on New Year's Day of 2011 or a few days thereafter. Father did not hear from the mother again until April 30, 2011 when he received a call from the mother expressing that she did not want to go to jail and offering to the father full custody if he forgave her support obligation.

Father again heard from the mother on May 3, 2011. Mother left a message on father's phone again requesting that he help her and not allow her to be incarcerated. Soon thereafter father spoke with his attorney, who drafted a Consent to Adoption form and forwarded it to mother by enclosure letter dated May 11, 2011. Father then became aware that the mother was incarcerated in June on a previously issued Bench Warrant.

In June and early July, the father received two letters from the mother while the mother was incarcerated. (Court Exhibits 1, 2).

In the first letter, among other things, mother inquired as to how the child was doing, indicated that she missed her "so much," promised to make her future support payments, begged the father not to take her "baby" from her, noted that the child is

“the only thing” that keeps her “alive” in jail, expressed that the child should not lose her mother having already lost her sister, apologized for her past mistakes and requested that the father tell the minor child that she loved and missed her.

In the subsequent letter, again mother inquired as to how the minor child was doing. Among other things, mother again expressed her opinion that it would hurt the minor child to lose her mother after already having lost her sister, asked that the parties come to some sort of agreement with respect to “back child support,” asked that father assist her so that she could get out of jail and have the minor child see her mother again, promised to give her income tax return as payment for back due support, begged the father to look past what she did in the past and give her one last chance, noted that the minor child deserved to see her mom and did not deserve to be caught in the middle, represented that she would do “everything” in her “power” to get her life back on track and urged the father to “help [her] out.”

Approximately a day after the mother served a five-month prison sentence for contempt, she went to visit with the child at the paternal grandmother’s home where the father, his wife and the minor child were residing. Mother again attempted to visit with the child on November 15, 2011 and in late November 2011 (Thanksgiving) but on each occasion the father did not permit visitation.

According to the father, in the last six (6) months prior to the filing of the Petition, the mother did not visit with the child, made no phone calls to the child, sent no cards, sent no presents, did not file any Petitions for Child Custody, and did not request to exercise her custody rights. Father opined that terminating the mother’s rights would not have a negative affect on the minor child given the relationship that

the minor child had developed with father's wife.

Father's wife K.W. also testified on behalf of the Petition. Her testimony mirrored that of father.

Mother testified on her own behalf. Consistent with how father testified, mother confirmed that the parties separated in 2005 and eventually divorced in 2006. Contrary to how father testified, mother stated that she was abiding by the Custody Order since 2009. She noted that she and her daughter would do many things together including going out, seeing movies, shopping, working on scrapbooks and spending quality time together. She indicated that she and her daughter had an "awesome relationship."

She last saw her daughter the weekend after New Years Day in early January 2011. She readily admitted that prior to going to jail on June 7, 2011, she was "on the run" because she could not afford to make the conditional child support purge payment and did not want to be incarcerated.

Contrary to how father testified, mother indicated that on numerous occasions during this period, from January to June 2011, she attempted to speak with her daughter by phoning the father. She indicated that on numerous occasions the father failed to answer her calls or failed to return her phone messages. On the rare occasions when she spoke to the father, he refused to let her speak with her daughter.

Mother noted that the primary problem from the father's standpoint was that he wanted to make all of the decisions concerning their daughter's life. When she spoke to the father in April and May, she was willing to grant the father "full custody" which she understood as giving the father the authority to make all of the major decisions

regarding the child. At no time whatsoever, was she willing to give up her parental rights with respect to her daughter.

The mother's intentions were confirmed when the mother received the May 11, 2011 letter with the enclosed Consent to Adoption, from father's attorney. Once she received the "papers," she immediately called father's attorney and informed him that she was not signing the papers because she was not willing to give up her parental rights to her daughter. She even contacted father's attorney on a few other occasions afterwards requesting assistance with respect to visitation. He declined noting that he could not "help" her with "anything" because he "represented" the father.

Mother testified that on two occasions prior to the Petition being filed, she actually wrote letters from the prison to her daughter. She indicated that she sent the letters to her boyfriend in order that he could first copy and then mail them. In error, the boyfriend sent copies and kept the originals. One of the original letters was introduced in evidence and marked as Respondent Exhibit 2.

In the letter, the mother expressed her love and affection for the child as well as regret for the mistakes she made in not paying support and ending up in trouble. She attempted to engage her daughter in conversation asking her several questions regarding her activities and requesting that her daughter write her back and draw her a picture.

Following her release from jail, mother made substantial efforts to see her daughter all of which were rebuked by her father and/or the paternal grandmother. Mother's boyfriend testified on behalf of the mother confirming the mother's testimony regarding the letters as well as from his perspective, the great relationship

between the mother and child.

Upon consent of the parties, the Court extensively interviewed the child. She is clearly an engaging, bright and delightful young girl.

Unfortunately, her statements and demeanor were such that the Court concludes she was “coached” in anticipation of speaking to the Court and that her “testimony” was tainted and improperly influenced by father or other adults supporting father.

While carefully considering her answers with respect to many different lines of questioning, when it came to discussing her mother, the child expressed a hostility that was based on facts which could only have been related to her by those adults having contact with her. Moreover, in describing her “bad” mother, she utilized language that was uncommon for a young child of her age and education, and that could only have been related to her through adults.

For example, she related that her mother was bad and in jail because the mother failed to pay “child support.” The child related that the mother essentially abandoned her and ended up in jail because she didn’t pay her child support in the amount of thousands of dollars.

The child also testified rather incredibly that she never did anything with her mother, her mother did not feed her and just stuck her in a room where she essentially fended for herself. Curiously, despite this apparent hostility toward the mother because of the mother’s stated neglect, the child expressed that she somewhat loved both her mother as well as her mother’s boyfriend “Chuckie.”

In light of the clear taint of the child’s testimony, as well as other factors, the

Court does not find the testimony of the father or stepmother to be entirely credible. When father testified, his demeanor was such that the Court questioned whether he was being entirely candid. The Court had grave doubts that the father was voluntarily disclosing all of the relevant facts. Indeed, it was only through the Court's questioning and inquiry that the letters, which were written by the mother to the father, were even disclosed to the Court.

The father's summary of the letters was also misleading. The letters demonstrated far more concern over the child than admitted by the father. The father's testimony was also inconsistent with both the written documentation that was produced as well as the testimony of the mother. For example, with respect to the events surrounding mother's attempt to visit the child over Thanksgiving, the father testified that his role was secondary or minimal at best. The mother and child, however, both testified that the father took an active role in denying visitation on that date.

The mother's testimony, in the Court's opinion, was credible and weighty. She was clear and forthright in her answers, she was not evasive, and her answers were internally consistent as well as externally consistent with the written documentation. The father's attorney argued that the letter introduced as Respondent Exhibit 2 was fabricated in an attempt at supporting the mother's position in opposing termination of her parental rights. The Court finds such a claim incredible and concludes that the mother did, in fact, send two letters to her child while the mother was incarcerated and prior to the Termination Petition being filed.

The content of the letter does not suggest that it was fabricated. Moreover, if in

indeed the mother fabricated two letters, why would she not produce both letters for the Court, and why would the boyfriend have testified that he searched exhaustively for the other letter but could not find it.

Finally, the mother's testimony explaining her conduct was logical and made sense. For example, mother testified that while she was "on the run," she didn't want to exercise custody because she did not want to jeopardize the welfare of her child. Her testimony regarding her conversations with father's attorney was also logical. While she noted that she was willing to give to her husband full custody, as she understood it, once the paperwork was sent to her regarding termination of her parental rights, she refused to sign it. Her understanding of full custody was clearly different than abandoning her child and forfeiting her parental rights. While she was in the pre-release facility, her attempts at having her child visit with her would have been limited under the circumstances as explained by her.

Given the testimony, the Court concludes that the father has not met his burden of proving by clear and convincing evidence that the mother's parental rights should be terminated pursuant to 23 Pa. C.S. § 2511 (a) (1) or (a) (2). The Court does not find the evidence so clear, direct, weighty and convincing as to enable it to come to a clear conviction, without hesitation, that the elements of the statute justifying termination have been met. See, for example, In Re: J.D.W.M., 810 A.2d 688, 690 (Pa. Super. 2002).

The Court will first address the requirements of § 2511 (a) (2). In order to satisfy these requirements, the moving party must produce clear and convincing evidence regarding the following elements:

- (1) repeated and continued incapacity, abuse, neglect or refusal;
- (2) such incapacity, abuse, neglect or refusal caused the child to be without essential parental care, control or subsistence necessary to the child's physical or mental wellbeing; and
- (3) the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied. In Re: Adoption of M.E.P., 825 A.2d 1266, 1272 (Pa. Super. 2003).

While the mother failed to pay child support causing her to be incarcerated for five (5) months of the child's life, the Court cannot conclude that said conduct constituted repeated and continued incapacity, abuse, neglect or refusal. Moreover, the Court cannot conclude that the causes of any alleged incapacity, abuse, neglect or refusal cannot or will not be remedied.

Indeed, it is evident to the Court that the mother's conduct in causing her not to provide for her child has and will be remedied by her incarceration and the mother's clear and sincere intent to provide for her child in the future. Moreover, throughout her period "on the run", and during her incarceration, the mother made continued attempts to maintain a relationship with her child and to provide her child with a caring, interested and loving mother. Finally, immediately upon the end of her incarceration, the mother made numerous attempts to exercise her custody rights and to provide for her child.

The Court easily concludes that the mother made diligent efforts toward the prompt assumption of her full parental responsibilities and made clear efforts to provide for the child's need for parental control, care and subsistence.

Certainly while the mother "being on the run" and eventually becoming

incarcerated, created an incapacity that precluded her day to day interaction with the child, the mother utilized those resources available to her while “on the run” and incarcerated to maintain a relationship with her child.

The Court notes that there was absolutely no testimony whatsoever regarding any ability by the mother to make the required child support payments. Mother had no source of income and the only method by which she made prior purge payments was through borrowing from her boyfriend. The boyfriend credibly testified that he was not willing to again lend the mother monies.

The Court will next address the factors of § 2551 (a)(1). It cannot be concluded by any stretch of the imagination that the mother, by conduct continuing for a period of at least six (6) months immediately preceding the filing of the Petition, had evidenced a settled purpose of relinquishing her parental claim.

If anything, her conduct evidenced a settled purpose not to relinquish any parental claim. She had contact with the father by telephone and correspondence in which she requested that the father relay information to the child. Once she received papers from father’s attorney requesting that she relinquish her parental claim, she immediately contacted the attorney refusing to do so. Her conduct both prior to being on the run and after incarceration showed that she actively wanted to maintain her relationship with her child and provide as best as she could under the circumstances. Her explanation as to why she did not exercise custody for the approximate four (4) to five (5) months, although certainly an error in judgment makes sense under the circumstances. It falls far short of evidencing a settled purpose to relinquish her parental claims.

The final question is whether the mother's conduct for the six (6) months immediately preceding the filing of the Petition evidences the refusal or failure to perform parental duties. What the mother failed to do for the six (6) months preceding the filing of the Petition was to pay support and exercise her physical custody rights. A portion of that six (6) months, however, included at least one (1) month while she was incarcerated.

While she made attempts to see if her child could visit with her while incarcerated as evidenced by her testimony concerning her contacts with the counselor, there was no evidence to show she had any ability to pay support or that she could exercise her visitation rights.

Mother's incarceration alone is not a sufficient basis for termination of parental rights. In Re: McCray, 460 Pa. 210, 331 A.2d 652, 655 (1975). A parent's absence and failure to support a child due to incarceration is not conclusive on the issue of whether the parent has abandoned the child. In Re: I.G., 939 A.2d 950, 953 (Pa. Super. 2007).

A parent must use any resources available while in prison to maintain a relationship with the child. In Re: I.G., 939 A.2d 950, 954 (Pa. Super. 2007).

The Court finds that the mother did everything that she possibly could under the circumstances to maintain a relationship with her child. She essentially begged the father to forgive the child support obligation in order that she first, did not need to be on the run, next that she did not have to go to jail and third, that she could be released from incarceration prior to having to serve the five (5) months that was eventually imposed on her. She called the father on numerous occasions, wrote letters to the

father and indeed wrote letters to the child, which the father failed to provide to the child.

The affect of the mother's incarceration on the child was minimal at best, especially in light of the mother's contacts with the child, expressions of love, and regret for having caused the temporary lack of contact. Indeed, it appears that if there were any detrimental affects on the child, they were caused by the father's disparaging of the mother prior to and during her period of incarceration.

An incarcerated parent's efforts to maintain contact with the child has a central role in termination cases under 23 Pa. C.S.A. § 2511 (a) (1). In Re: Adoption of Dale A. II, 683 A.2d 297, 302 (Pa. Super. 1996). The mother's sincere efforts to perform her parental duties preserve her parental rights under subsection (a) (1). In Re: M.J.H., 501 A.2d 648 (Pa. Super. 1985). The mother's conduct was not only sufficient but substantial in order to create and forge a meaningful relationship with her child.

ORDER

AND NOW, this ___ day of December 2011, following a hearing and argument, the Court DENIES the Petition to Terminate the Parental Rights of T.W. The Court notes that the Custody Order of November 6, 2009 remains in full force and effect.

By The Court,

Marc F. Lovecchio, Judge