

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA  
ORPHANS' COURT DIVISION**

**IN RE:** : **NO. 6318**  
 :  
**DJH,** :  
 :  
**a minor child,** :

**OPINION AND ORDER**

Before the Court is a Petition for Involuntary Termination of Parental Rights filed by Mother on May 29, 2012. Mother seeks to terminate the parental rights of the child's biological father, AH, as a prerequisite to having the child adopted by her husband, MR. A hearing on the Petition was held on October 1, 2012.

**Findings of Fact**

1. DJH was born September 30, 2001. He currently resides with his Mother, HR, and step-father, MR, at 1210 Towncrest Road, Williamsport, Lycoming County, Pennsylvania. The child's biological mother is HR, born November 14, 1980. She is currently married to MR who was born January 5, 1975. HR and MR were married on June 30, 2012.

2. The child's biological father is AH who was born on October 18, 1981. Father resides at 302 Glenwood Avenue, Williamsport, Lycoming County, Pennsylvania.

3. At the time of the child's birth, Mother and Father resided together.

4. When the child was approximately nine months old, Mother left Father and moved out of his residence because of the abusive relationship between Mother and Father.

5. Mother and Father reconciled approximately one year later.
6. On January 28, 2005, a Final Protection from Abuse Order was entered against Father which provided primary physical custody of the child to Mother with Father having partial custody/visitation rights Mondays and Tuesdays from Noon until 6:00 p.m.
7. On August 12, 2005, a Modified Final PFA Order was entered against Father which provided primary physical custody of the minor child to Mother with Father having partial custody rights as the parties were able to agree.
8. On November 16, 2005, an Order to Vacate the PFA was granted upon Mother's request to withdraw or discontinue the PFA action.
9. After the PFA was withdrawn by Mother, the parties reconciled for less than one year.
10. The parties' final separation occurred in 2006.
11. On February 7, 2007, Father filed a Petition for Custody.
12. Immediately prior to filing the Petition for Custody, Father had not seen the child in approximately nine months.
13. On March 13, 2007, a Custody Conference was held where the parties reached an agreement regarding custody. Pursuant to the parties' agreement, Mother had primary physical custody of the child. Father had partial physical custody on Thursdays from 11:15 a.m. until 7:00 p.m., and three out of four Saturdays from 11:00 a.m. until 4:00 p.m. The parties had shared legal custody.
14. In May, 2009, Father stopped exercising his periods of partial custody.

15. Father stated that the relationship between Father and Mother was toxic. They argued about a lot and there were several times the police were called.

16. After his last visit with his son, Father contacted Mother and advised her that he and his girlfriend had gotten into an argument and he now no longer had a place to stay, was having problems with his vehicle and that his work schedule was not conducive to exercising partial custody of his son. He advised Mother that he would contact her once he obtained his own residence and was able to resume visiting his son.

17. Around the child's birthday on September 30, 2009, Father left a card for the child at Mother's residence indicating to the child that he missed him and loved him.

18. Around Christmas, 2009, Father left gifts and a card for the child in a plastic bag on Mother's porch. In his card, Father stated that he missed his son and loved him.

19. Mother heard from Father was through a Facebook message in 2010 where Father indicated he wished to speak to Mother. Mother did not respond to this request.

20. At some point, Mother moved. She did not provide Father with her address. Father learned of Mother's new address from Domestic Relations.

21. In May, 2011, Father went to Mother's home and rang the buzzer in the intercom system. Mother answered the intercom. Father requested that Mother come down and speak with him and Mother refused to do so. Mother told Father, good luck getting to see DJH since it has been so long.

22. On April 10, 2012, Father filed a Petition for Modification of Partial Physical Custody. In his Petition, Father states that he wants to be a permanent and positive part of his son's life.

23. A Custody Conference was scheduled as a result of Father's Petition for Modification of Partial Physical Custody for May 29, 2012, at 9:00 a.m. in Family Court.

24. On the date of the Conference, May 29, 2012, Mother filed a Petition for Involuntary Termination of Father's Parental Rights at 8:52 a.m. immediately before the Custody Conference.

25. The minor child, DJH, is diagnosed as being intellectually disabled and autistic.

26. DJH attends school at Cochran Elementary School. His teacher is JP who is the autistic support teacher for grades 3-5.

27. JP described DJH as having difficulty with change, poor social skills, learning disabilities, and communication difficulty.

28. In regard to communication, JP indicated that DJH has difficulty with eye contact and also has difficulty speaking in full sentences. He described DJH as having meltdowns wherein the child may cry or make statements such as "I hate...", "that's stupid..." The child does not engage in cursing and his meltdowns do not become physical.

29. In regard to his learning difficulties, JP described DJH as having difficulty in functional academics. DJH can only do simple addition and subtraction. DJH is currently reading at a first grade level and his learning is at a very slow pace. DJH is a sight word reader and comprehension is difficult.

30. In regard to his social skills, DJH has difficulty with eye contact and with all forms of communication socially in general. DJH is more likely to engage in parallel play with other individuals where he will play next to them, not with them. JP described

DJH as having delayed echolalia. This is where he will repeat over and over talking to himself or repeat over and over again the same statement.

31. JP described DJH as never having a meltdown where he becomes physically aggressive. Instead, DJH will become verbally aggressive and may shut down and it will take a half hour to get him back.

32. JP indicated that DJH has difficulty with new individuals being introduced into his life.

33. JP described how when MR was going to marry DJH's Mother and move into his home, he wrote a social story about MR marrying DJH's Mother and moving into his home. JP explained that this is a way to introduce the change through a story to DJH. The story was read to DJH both at school and at home and was helpful with the transition for DJH.

34. JP stated that he believed that utilization of a social story helped with the transition for DJH, that it ultimately was a positive result for DJH.

35. JP indicated that DJH would need help adjusting to his Father coming back into his life and that he could utilize the same process of a social story for Father. JP did indicate that it can become a problem for DJH if a person leaves his life.

36. As an example, JP described how DJH's prior TSA (Therapeutic Support Assistant) Mr. Ben, worked very closely with DJH for several years. Recently, DJH's TSA was changed to Mr. Travis. It is taking DJH a long time to adjust to Mr. Travis, but JP indicated that eventually he will develop a relationship with Mr. Travis; however, it may not be the same as the relationship with Mr. Ben.

37. JP believes that male influence is positive for DJH.

38. Mother has been actively involved in DJH's academics and his IEP's since his commencement of school. Father has had little to no contact with the school and has had no involvement in DJH's education process to date.

39. DJH's step-father, MR, became a part of his life in October, 2011. In February, 2012, MR moved in with DJH and his Mother. Mother and MR decided to marry in March or April, 2012.

40. Mother and MR's decision to marry occurred after the filing of Father's Petition to Modify Custody.

41. DJH refers to MR as "dad". This occurred sometime after Mother and MR were married.

42. Father has paid child support on behalf of DJH since the entry of the initial Domestic Relations Order in approximately 2002. Father has no arrears and there have never been any enforcement issues with Father's payment of child support. Father has an excellent payment history.

43. Throughout DJH's life, Mother has been the parent responsible for all medical, dental and educational appointments for DJH. Father has attended very few appointments throughout DJH's life.

44. At times in public when DJH sees someone, he will ask if it is his father. In 2009, DJH saw an individual and asked his Mother if that was his father. Six or seven months later, this occurred again. It occurred most recently approximately one year ago.

45. Father indicated that he waited so long to come back to Court to obtain physical custody because he wanted to be ready for anything Mother could throw at him. Specifically, Father indicated that he wanted to be sure that he had appropriate housing and a set work schedule.

46. Father now resides in a two-bedroom apartment with ample room for DJH. Additionally, Father's job provides him with set hours for work. Father is employed at Haywood's as the head cook and has a routine work schedule.

47. Father testified that he did not believe that Mother wanted him to have anything to do with DJH and that Mother would fight him if he tried to see DJH.

48. Father believed that his decision to stop seeing the child for a period of time, that he was doing what was best for DJH. Father was worried that DJH was going to be affected by the fighting between Mother and Father and felt it was best if DJH no longer saw the fighting.

49. When Father filed the Petition to Modify Custody in April, 2012, he decided he could not wait any longer as he was ready to do whatever he needed to do to see his son and was no longer concerned about Mother being angry with him.

### **Discussion**

In order to terminate parental rights, the party 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 a 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).

Mother argues that the basis for termination in this case may be found in 23 Pa.C.S. §2511(a)(1) and §2511(a)(2), which provides as follows:

§2511. Grounds for Involuntary Termination

(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.

(2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused a child to be without essential parental care, control or subsistence necessary for his physical and mental well-being, and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

A court may terminate parental rights under Section 2511(a)(1) where a parent demonstrates a settled purpose to relinquish parental claim to a child or fails to perform parental duties for at least six months prior to the filing of the termination petition.

**In the Interest of C.S.**, 761 A.2d 1197, 1201 (Pa. Super. 2000). The Court should consider the entire background of the case and not simply:

mechanically apply the six month statutory provision. The court must examine the individual circumstances of each case and consider all explanations offered by the parent facing termination of his . . . parental rights, to determine if the evidence, in light of the totality of the circumstances, clearly warrants the involuntary termination.

**In re: B.N.M.**, 856 A.2d 847, 855 (Pa. Super. 2004), appeal denied, 582 Pa. 718, 872 A.2d 1200 (2005) citing **In re: D.J.S.**, 737 A.2d 283, 286 (Pa. Super. 1999).



In determining what constitutes parental duties, the Pennsylvania Supreme Court has said:

There is no simple or easy definition of parental duties. Parental duty is best understood in relation to the needs of a child. A child needs love, protection, guidance, and support. These needs, physical and emotional, cannot be met by a merely passive interest in the development of the child. Thus, this Court has held that the parental obligation is a positive duty which requires affirmative performance. This affirmative duty encompasses more than a financial obligation; it requires continuing interest in the child and a genuine effort to maintain communication and association with the child. Because a child needs more than a benefactor, parental duty requires that a parent "exert himself to take and maintain a place of importance in the child's life."

With these principles in mind, the question whether a parent has failed or refused to perform parental duties must be analyzed in relation to the particular circumstances of the case. A finding of abandonment, which has been characterized as "one of the most severe steps the court can take," will not be predicated upon parental conduct which is reasonably explained or which resulted from circumstances beyond the parent's control. It may only result when a parent has failed to utilize all available resources to preserve the parental relationship.

**In re: Burns**, 379 A.2d 535, 540 (Pa. 1977)(citations omitted).

The law recognizes, however, that there are situations in which a custodial parent has deliberately created obstacles and has by devious means erected barriers intended to impede free communication and regular association between a non-custodial parent and his or her child. Therefore, it is incumbent upon a court, before it terminates the rights of a non-custodial parent, to consider carefully the non-custodial parent's explanation, if any, for his or her apparent neglect. **In Re: Adoption of Shives**, 363 Pa. Super. 225, 230, 525 A.2d 801 (1987). Only where the totality of the circumstances demonstrates clearly and convincingly that a parent has refused or failed to perform parental duties for a minimum period of six months may an order be entered terminating parental rights. **In Re: Santelia**, 318 Pa. Super. 413, 417, 465 A.2d 21, 23 (1983). The Court does not find

that Mother has proven by clear and convincing evidence that Father has evidenced a settled purpose of relinquishing his parental claim to DJH or has refused or failed to perform his parental duties. Father has without fail, provided financially for DJH since 2002. Father has an excellent payment history and is current. Father filed a petition with the Court to establish his partial custody rights. This clearly demonstrates that Father's conduct evidenced a settled purpose not to relinquish his parental claim to DJH.

The Court understands the frustration Mother felt due to Father's almost complete absence from DJH's life from 2009 until he filed the petition in 2012. Father's explanation as to why, although certainly an error in judgment on Father's part, is credible. Father wanted to have a suitable place for DJH to stay and a consistent work schedule. Father knew Mother would fight him and he wanted to be able to address anything she may throw at him as a reason for him not to have time with his son. Father's attempts to see his son by sending a Facebook message and showing up at Mother's home on one occasion are half-hearted at best. However, Father's actions fall far short of evidencing a settled purpose to relinquish his parental claims to DJH. Father's payment of child support and filing of a petition in the Court to see his son demonstrates that Father did not refuse or fail to perform his parental duties. Mother did not meet her burden through clear and convincing evidence that Father's parental rights should be terminated pursuant to 23 Pa. C.S. § 2511 (a)(1).

In addition to 23 Pa. C.S. § 2511 (a)(1), Mother argued that Father's rights should be terminated pursuant to 23 Pa. C.S. § 2511 (a)(2). The fundamental test in termination of parental rights under Section 2511(a)(2) was long ago stated in *In re Geiger*, 459 Pa.

636, 331 A.2d 172 (1975), where the Pennsylvania Supreme Court announced that under what is now Section 2511(a)(2), “the petitioner for involuntary termination must prove (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 substance; and (3) that the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied.” *In Interest of Lilley*, 719 A.2d 327, 330 (Pa. Super. 2002).

Unlike subsection (a)(1), subsection (a)(2) does not emphasize a parent’s refusal or failure to perform parental duties, but instead emphasizes the child’s present and future need for essential parental, care, control or subsistence necessary for his physical or mental well-being. Therefore, the language in subsection (a)(2) should not be read to compel courts to ignore a child’s need for a stable home and strong, continuous parental ties, which the policy of restraint in state intervention is intended to protect. This is particularly so where disruption of the family has already occurred and there is no reasonable prospect for reuniting it.

*In re E.A.P.*, 944 A.2d 79, 82 (Pa. Super. 2008) (internal citations and quotations marks omitted). Thus, while “sincere efforts to perform parental duties,” can preserve parental rights under subsection (a)(1), those same efforts may be insufficient to remedy parental incapacity under subsection (a)(2). *In re Adoption of M.J.H.*, 501 A.2d 648 (Pa. Super. 1985). *See also Matter of Adoption of C.A.W.*, 683 A.2d 911, 916 (Pa. Super. 1996). “Parents are required to make diligent efforts toward the reasonably prompt assumption of full parental responsibilities.” *In re A.L.D.*, *supra* at 340. A “parent’s vow to cooperate, after a long period of uncooperativeness regarding the necessity or availability of services, may properly be rejected as untimely or disingenuous.” *Id.*

While Father was absent from DJH’s life from 2009 until 2012, the Court cannot conclude that said conduct constitutes repeated and continued incapacity, abuse, neglect

or refusal. Further, the Court cannot conclude that the causes of any alleged capacity, abuse, neglect or refusal cannot or will not be remedied. During this time, Father paid his child support obligation for DJH. Also, during this time, Father secured an appropriate home to have DJH visit with him at, a vehicle for transportation, and established a set work schedule conducive to partial custody. Father made two attempts to contact Mother to request to see DJH. Ultimately, Father came to the Court to seek a court order to establish partial custody rights.

**ORDER**

*AND NOW*, this 19<sup>th</sup> day of **October, 2012**, following a hearing and argument, the Court denies the Petition to Terminate the Parental Rights of Father. Under separate order to be issued this date, a custody conference will be scheduled regarding Father's Petition for Modification of Partial Custody filed on April 10, 2012.

By the Court,

Joy Reynolds McCoy, Judge