

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

<b>IN RE:</b>	:	<b>NO. 6396</b>
	:	
	:	
<b>ADOPTION OF</b>	:	
<b>CAG,</b>	:	
<b>Minor child</b>	:	

**OPINION AND ORDER**

**AND NOW**, this **21<sup>st</sup>** day of **March, 2014**, before the Court is a Petition for Involuntary Termination of Parental Rights filed by Mother, EAS in regard to the rights of her child, CAG on September 20, 2013. Mother seeks to terminate the parental rights of the child's biological father, SG, as a prerequisite to having the child adopted by her husband, ES. A hearing on the Petition was held on March 21, 2014. At the time of the hearing, Mother was present with her counsel, Marc Drier, Esquire. Father was present with his counsel, Jeffrey Frankenburger, Esquire. The Guardian Ad Litem, Angela Lovecchio, Esquire, was present on behalf of the child.

**Finding of Facts**

1. CAG was born on September 7, 2010. She currently resides with her mother, EAS, mother's husband, ES, half-brother JS at 318 Burke Street, Jersey Shore, Lycoming County, Pennsylvania. EAS and ES married on August 24, 2013.
2. The child's father is SG. Father is currently incarcerated at SCI Mercer.

3. Mother and Father were not living together upon the birth of their child in September 2010. Father did come to Mother's residence to stay for a short period of time after the child's birth.

4. Father was in a DUI- related motorcycle accident on September 18, 2010. The accident caused Father severe injuries necessitating rehabilitation. Around Halloween of 2010, Mother and child moved in with Father and Paternal Grandmother.

5. Mother and the child moved in with Maternal Grandmother in January of 2011.

6. After the parties separated Mother maintained primary physical custody of the child. At the time of separation Mother and Father agreed on Father's periods of custody as every other weekend.

7. In April 2011, Mother filed a petition for custody. The May 18, 2011 custody Order granted period of supervised custody based around Paternal Grandmother's work schedule. If Paternal Grandmother had two days off, Father was awarded one overnight. If Paternal Grandmother had three days off, Father was awarded two overnights. Mother was awarded sole legal custody.

8. Father was incarcerated from June 29, 2011 until July 6, 2011, also from August 6 until August 13, 2011 and again from December 7, 2011 until December 14, 2011.

9. Father petitioned for additional custodial time on February 28, 2012. On April 2, 2012 the Court did not order any increased visitation for Father. Mother retained sole legal custody.

10. Father was incarcerated April 4, 2012 until May 9, 2012. Paternal Grandmother brought the child to visit Father during his work release.

11. Father was in a halfway house from May 9, 2012 until August 19, 2012. Father did not have any visits with the child during this period.

12. On August 31, 2012, Mother petitioned for Modification seeking Father's periods of custody to be designated as alternating weekends. The Court's Order of October 4, 2012 granted Father alternating weekends from Friday to Sunday with Paternal Grandmother to be generally present. Mother maintained sole legal custody.

13. Father generally exercised all of his periods of custody when not incarcerated.

14. Father again became incarcerated on January 26, 2013. He remains incarcerated and expects his release date to be in 2016.

15. Father has not seen the child since the week prior to his incarceration.

16. Paternal Grandmother has been exercising period of custody of the minor child at least each month since Father's incarceration in January of 2013.

17. Mother did not receive any phone calls, letters, or gifts for the child since Father became incarcerated in January 2013 until the time of filing in September of 2013.

18. Father has spoken to his daughter on at least 5 occasions since his incarceration in January 2013 and prior to the filing of the Petition for Termination. These phone calls took place while the minor child was in the custody of Paternal Grandmother.

19. Father sent the child two pictures in the summer of 2013. Father sent these pictures to Paternal Grandmother to provide the minor child.

20. Father sent Paternal Grandmother a third Birthday Card to provide to the minor child.

21. Father inquired about the minor child and asked Paternal Grandmother to relay messages to the child in multiple letters during his period of incarceration and prior to the filing of the Petition for Termination.

22. Father and Paternal Grandmother discussed having the minor child visit him. Both Father and Grandmother believe Mother's permission is necessary for visitation to occur at the state prison.

23. Mother is married to ES. They have resided together since October of 2011.

### **Discussion**

Mother argues that the basis for termination in this case may be found in 23 Pa.C.S. §2511(a)(1), 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.

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).

Where a parent is incarcerated, the fact of incarceration does not, in itself, provide grounds for the termination of parental rights. However, a parent's responsibilities

are not tolled during incarceration. The focus is on whether the parent utilized resources available while in prison to maintain a relationship with his or her child. An incarcerated parent is expected to utilize all available resources to foster a continuing close relationship with his or her children.

*I. re N. M. B.*, 2004 PA Super 311, P19 (Pa. Super. Ct. 2004) (internal citations omitted).

Father has maintained a genuine effort to communicate with the minor child through the resources available to him while incarcerated. Father maintained regular phone contact through the monthly visits Paternal Grandmother exercised. Father inquired about how his child was doing to Paternal Grandmother and relayed messages through Paternal Grandmother. Father also made an affirmative effort to send pictures and a card to the minor child through Paternal Grandmother. Father and Paternal Grandmother were both credible when they discussed the multiple contacts Father had with the minor child during the period of his incarceration prior to the Petition for Termination filed by Mother. This Court believes that Paternal Grandmother may have shielded the information on Father's contact with the minor child from Mother. The fact that Mother was not aware of the contact is not in any way a reflection that Father has failed to perform parental duties.

In order to involuntarily terminate parental rights, the party seeking termination must prove by clear and convincing evidence the grounds for termination. *Santosky v. Kramer*, 455 U.S. 745 (1982); *In re Adoption of J.D.P.*, 471 A.2d 894, 895, (Pa. Super. Ct. 1984). "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.'" *In re A.S.*, 11

A.3d 473, 477 (Pa. Super. Ct. 2010) (quoting *In re J.L.C. & J.R.C.*, 837 A.2d 1247, 1251 (Pa. Super. Ct. 2003)).

A parent has an affirmative duty to be part of a child's life, Father's contact with the child through Paternal Grandmother carried out that duty. The Court acknowledges that Father should have taken additional forceful steps in maintaining more frequent contact with his daughter. The Court finds that Mother has not met her burden of clear and convincing evidence that Father has evidence a settled purpose of relinquishing his parental claim to the child. In addition Mother has not demonstrated that it would be in the child's best interest for Father's parental rights to be terminated.

“Once the statutory requirement for involuntary termination of parental rights has 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).” *Id.* at 483. An analysis of 23 Pa. C.S. § 2511 (b) is not necessary in this case due to the fact that the statutory requirements for involuntary termination have not been established.

This Court most note its concern over the failure of ES as the proposed adoptive Father to offer any testimony. Should Mother have met her burden under both 23 Pa.C.S. §2511 (a) and (b) this Court would still have needed to consider the proposed adoption with very limited testimony regarding the prospective adoptive father. In a similar instance in which the proposed adoptive parent failed to testify the Superior Court has held:

As the petitioner, it was incumbent upon Mother to present adequate evidence in support of the petition. Mother must now bear the responsibility for any complaint that the court issued a decision on an incomplete record, as it was her burden to offer unequivocal factual support for S.S.'s potential adoption of

Child. Although the hearings contained ample testimony on Father's parenting deficiencies, there was a noticeable absence of solid facts about the "contemplated adoption" element required under the Adoption Act and how the "proposed adoption" would foster a new family unit in Child's best interests.

*In re E.M.I.*, 57 A.3d 1278, 1290 (Pa. Super. Ct. 2012)

**Conclusions of Law**

1. The Court finds that EAS has not established by clear and convincing evidence that SG's parental rights should be involuntarily terminated pursuant to 23 Pa.C.S. §2511(a)(1).

The petition for involuntary termination of parental rights of Father, SG is hereby DENIED.

By the Court,

Joy Reynolds McCoy, Judge