

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

IN RE:	:	NO. 6420
	:	
ADOPTION OF	:	
XWK,	:	
Minor child	:	

OPINION AND ORDER

AND NOW, this **23rd** day of **February, 2015**, before the Court is a Petition for Involuntary Termination of Parental Rights filed by Mother, KLP in regards to the rights of her child, XWK on April 16, 2014. Mother seeks to terminate the parental rights of the child's biological father, MJK, Jr., as a prerequisite to having the child adopted by her husband, JBP. A hearing on the Petition was held on February 9, 2015. The hearing was originally scheduled for October 13, 2014 but continued at the request of Mother. Mother requested the hearing to be rescheduled to January 2015 due to Stepfather's cancer surgery and treatment scheduled out of state. At the time of the hearing, Mother was present with her counsel, Lori Rexroth, Esquire and Father was present with his counsel, Jeffrey Frankenberger, Esquire. The Guardian Ad Litem, Angela Lovecchio, Esquire, was present on behalf of the child.

Finding of Facts

1. XWK was born on February 1, 2001. He currently resides with his mother and his stepfather, JBP and two half- siblings at 2670 Route 287 Highway, Jersey Shore, Lycoming County, Pennsylvania.

2. JBP has been involved with Mother and Child since the time of the Child's birth. Mother married JBP on July 25, 2003.

3. Mother has always maintained primary physical custody of the child.

4. The child's father is MJK, Jr . Father is currently incarcerated in Michigan.

5. Mother and Father met and shortly thereafter Mother became pregnant.

6. Father became incarcerated immediately prior to Child's birth on January 28, 2001. Mother and Father remained a couple and were married during Father's incarceration. Mother and Father divorced during Father's incarceration.

7. Father remained incarcerated until his release February 3, 2005, when Child was four years old. During his initial period of incarceration, Mother, for a time, voluntarily brought Child to visit Father. Father sought and was granted Court Ordered visitation thereafter. Mother confirmed that Father always fought for visits during his periods of incarceration.

8. Father has a history of being incarcerated. From his release in 2005 until his incarceration in 2011, Father has served approximately 12 sentences ranging from 2 days to 8 months. The majority of Father's convictions concerned property offenses.

9. During the period of time when Father was not incarcerated, Father exercised periods of partial custody. During Father's most recent period of incarceration, Child did not visit Father by agreement of the parties.

10. Father last saw Child in December 2010. Father has been incarcerated since January 18, 2011 until the present. By agreement of the parties, Child has not visited Father during this period of incarceration. Father's upcoming parole hearing is scheduled for February 23, 2015. Father was denied parole in 2014.

11. Mother and Step-Father relocated to Pennsylvania in approximately 2012. Father did not object because he felt Child was in a good situation and felt Mother would continue to bring the child back to Michigan.

12. Father has sent Child presents and cards while incarcerated. Father ordered Child magazine subscriptions.

13. Father has maintained that he wanted to speak to the Child on the telephone. Phone call had been fairly consistent throughout Father's incarceration until August of 2013, when Mother requested Father call less frequently. Mother believed the phone calls were upsetting Child. Father agreed with Mother's request, but did continue to call sporadically. Child was unaware Mother requested the phone calls to be less often.

14. Father sent Child a Christmas gift in December 2013.

15. Father attempted to contact Mother around January 11, 2014. Mother missed the call but responded via email.

16. Mother wrote Father a letter in February 2014 requesting he voluntarily relinquish his rights. Mother received a phone call from Father after he received the letter. Father did not agree to relinquish his parental rights.

Discussion

In order for the Court to find the statutory grounds for involuntary termination of parental rights the petitioner must prove through clear and convincing evidence that the grounds exist. *In re: Adoption of Charles Ostrowski*, 324 Pa. Super, 471 A.2d 541, 542 (Pa. Super. 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).

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 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: N.M.B., 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). Both the Pennsylvania Superior Court and the Pennsylvania Supreme Court have interpreted what evidencing a settled purpose as required in 23 Pa. C.S. § 2511 (a) (1) entails and the respective courts have held:

. . . . that the section has been interpreted as requiring a deliberate decision on the part of the parent to terminate the parental relationship and that parent must persist in that determination throughout the six-month period. . . . The term “settled purpose” implies finality of purpose In our efforts to determine if such a purpose was present, this Court has required an “affirmative indication of a positive intent” to sever the parental relationship before we have upheld an involuntary termination.

. . . .

Thus, this court has held that evidence of parental inaction and lack of interest for six months does not conclusively establish a settled purpose.

In re: Adoption of Charles Ostrowski at 219-20 (citing *Adoption of Baby Girl Fleming*, 471 Pa. 73, 369 A.2d 1200, 1202 (Pa. 1977)).

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.

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

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)).

Mother has failed to meet her burden by clear and convincing evidence that Father has evidenced a deliberate decision to terminate his parental relationship or has he failed or refused to perform parental duties. No evidence was presented to support Father having evidenced a settled purpose to terminate his parental rights. Mother testified that Father was upset when she suggested voluntary relinquishment. Father was, by Mother’s own testimony, in almost monthly communication with Mother and Child in the six months preceding the filing of the Petition for Termination. The Child indicated that until December 2014 he spoke with Father regularly. Father sent gifts to the Child regularly

including a gift for Christmas of 2013. Additionally, Father made requests of his father, paternal grandfather to send gifts and cards to Child. Father has used the resources available while in prison to maintain a relationship with his child.

Alternatively, Mother avers Father's parental rights should be terminated under 23 Pa.C.S. §2511(a)(2), which provides the following grounds for termination:

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

Mother argues that Father's repeated incarceration is a repeated and continued incapacity which has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the condition of Father's repeated incarceration and incapacity therefrom cannot or will not be remedied. The Supreme Court has held:

“that incarceration is a factor, and indeed can be a determinative factor, in a court's conclusion that grounds for termination exist under § 2511(a)(2) where the repeated and continued incapacity of a parent due to incarceration has caused the child to be without essential parental care, control or subsistence and that the causes of the incapacity cannot or will not be remedied.”

In re Adoption of S.P., 616 Pa. 309, 328-329 (Pa. 2012)

Father has absolutely been incarcerated the majority of Child's life. This has left Mother in the role of primary caretaker and often sole parent most of the time. Father is not sure if he will be released at the upcoming parole hearing. However, Mother offered no evidence to support that at any time Child was lacking parental care, control or subsistence necessary for his physical or mental well-being. At all points during Father's

incarceration, Mother has filled the role of parent. During the brief time Mother was unavailable due to Step-Father's illness, the Child's needs were still met by extended family as arranged by Mother. No case law was provided which stated that this specific grounds for termination could be met while Child remains in the care of one parent.

“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).” *In re A.S.*, 11 A.3d 473, 483(Pa. Super. Ct. 2010). 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. However, the Court feels compelled in this case to advise the parties that if such analysis were required the Court finds that there is a bond between Child and Father which is necessary and beneficial. Child is clearly bonded to Stepfather. Stepfather has filled the parental role while Father has been unavailable to do so. Father has not interfered with Child creating a bond with Stepfather. Even with his repeated incarceration, Child and Father have a relationship which is necessary and beneficial to the Child. *See In re T.S.M.*, 620 Pa. 602, 633 (Pa. 2013). Child loves both of his “Dads” and has missed his Father. Child would like to see Father again and receive phone calls.

Conclusions of Law

1. The Court finds that KLP has not established by clear and convincing evidence that MJK, Jr.'s parental rights should be involuntarily terminated pursuant to 23 Pa.C.S. §2511(a)(1) or 23 Pa.C.S. §2511(a)(2) .

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

By the Court,

Joy Reynolds McCoy, Judge