

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

IN RE: : **NO. 6635**
:
FQM, :
:
minor child :

OPINION AND ORDER

AND NOW, this 24th day of **June, 2022**, before the Court is a Petition for Involuntary Termination of Parental Rights filed by SM and her fiancé, BG, on March 25, 2019. Said petition is with regard to the rights to SM's child, FQM, born March 30, 2016. SM and BG seek to terminate the parental rights of the child's biological father, SS, as a prerequisite to having the child adopted by BG. A pre-trial conference on the Petition was held on May 10, 2019, at which time SS did not appear but was represented by Andrea Pulizzi, Esquire. By Order dated May 10, 2019, this Court scheduled the hearing on the Petition for Involuntary Termination of Parental Rights for July 17, 2019, and appointed Melody Protasio, Esquire, as counsel for the child. On July 11, 2019, Mother's then-counsel, Ryan Gardner, Esquire, filed a continuance request, indicating SS's felony criminal matter involving the child was scheduled for Call of the List in August 2019, and he did not want to subject SM to cross-examination prior to the criminal trial; similarly, counsel for SS would advise him not to testify in the termination hearing prior to the resolution of his criminal matter. By Order dated July 11, 2019, this Court granted the continuance request with instructions that upon resolution of SS's criminal matter, counsel for the Petitioners should contact the Court and request that the matter be placed on the court schedule for a full-day trial on the Petition for Involuntary Termination of Parental Rights.

On July 9, 2020, this Court entered an Order releasing Melody Protasio, Esquire, as counsel for the child and appointing Tiffani Kase, Esquire, to act as legal counsel for the child.

By Order dated July 23, 2021, the Court indicated its understanding that SS's criminal matter had been resolved and scheduled a pre-trial conference for September 13, 2021, which was subsequently continued until October 29, 2021. At that time, SM appeared and was unrepresented. BG appeared and was represented by Sharon McLaughlin, Esquire. Tiffani Kase, Esquire, counsel for the child, also appeared. Neither SS nor his counsel, Andrea Pulizzi, Esquire, appeared. A hearing on the Petition for Involuntary Termination of Parental Rights was scheduled for January 3, 2022, and Attorney Pulizzi was ordered and directed to ensure that SS was served with notice of the hearing, with a verification of service being filed in the Office of the Register and Recorder by December 1, 2021.

The hearing took place as scheduled on January 3, 2022. SM appeared and was unrepresented. BG appeared and was represented by Sharon McLaughlin, Esquire. Tiffani Kase, Esquire, was present on behalf of the Child. Andrea Pulizzi, Esquire, appeared and indicated that she obtained an address for SS through his power of attorney and served him with notice of the hearing via certified and regular mail, neither of which was returned as undeliverable. After the hearing concluded, this Court contacted the Lycoming County Adult Probation Office to verify the address of record for SS. The address on file was consistent with the address Attorney Pulizzi provided. Prior to the commencement of the hearing, Attorney Pulizzi was granted leave to withdraw as counsel for SS pursuant to the Motion filed on December 29, 2021. The hearing was

held on January 3, 2022, in SS's absence, and on January 6, 2022, an Opinion and Order was entered, along with a Decree terminating SS's parental rights.

On January 16, 2022, SS filed a "Motion for Reconsideration and/or Petition to Reopen Record," wherein he alleged that he had not received notice of the hearing from Attorney Pulizzi, and therefore he did not have the opportunity to present testimony evidencing his continued attempts to have contact with the minor child. A hearing was held on January 24, 2022, at which time Attorney Pulizzi, appearing by telephone, conceded that it was possible that SS did not have notice of the January 3, 2022, hearing on the Petition for Involuntary Termination of Parental Rights. By Order docketed January 26, 2022, the January 6, 2022, Order terminating SS's parental rights was vacated and a new hearing on the Petition for Involuntary Termination of Parental Rights was scheduled. Jessica Feese, Esquire, of the Lycoming County Public Defender's Office was appointed to represent SS.

The rescheduled hearing on the Petition for Involuntary Termination of Parental Rights was held on June 3, 2022. BG was present and represented by Sharon McLaughlin, Esquire. SM was present and unrepresented, although her interests align with BG's. SS was present and represented by Jessica Feese, Esquire. Also present was Tiffani Kase, Esquire, counsel for FQM.

Finding of Facts

1. FQM ("Child") was born on [redacted]. The Child currently resides with her mother, SM ("Mother") and Mother's fiancé, BG ("Fiancé") at [redacted]. Mother and Fiancé have been in a relationship and living together since 2017 and are engaged to be married.

2. The Child's biological father is SS ("Father"). Father's last known address is [redacted].

3. Mother and Father were not married at the time of the Child's birth. Mother and Father did not live together when the Child was born, or at any time after her birth.

4. Father visited the Child in the hospital after her birth and was involved in raising the Child as a baby.

5. Father filed a Complaint for Custody on July 15, 2016, at Lycoming County Docket #[redacted]. The Court has taken judicial notice of the entirety of the custody file and has incorporated it by reference into the record in this matter.

6. Although the parties were unable to come to an agreement at the custody conference or the follow-up custody conference, they reached an agreement at the time of the pre-trial conference on February 16, 2017.

7. On June 5, 2017, Father filed a Petition for Modification, seeking shared legal and physical custody of the Child. Following a custody trial on November 30, 2017, an Order was entered giving the parties shared legal and physical custody.

8. Following Father's first weekend of custody under the November 30, 2017, Order, Mother filed a Petition for Emergency Custody on December 6, 2017, alleging that the Child was returned with bruises and was subsequently taken to the ER by Mother.

9. Following a hearing on December 8, 2017, the Court found there was evidence to support the allegation that the Child was endangered and that custody by Father was a threat to her safety and well-being. The emergency order entered on December 6, 2017, remained in full force and effect; however, Father was granted

periods of supervised visitation and the ability, in the absence of further developments or positive findings, to petition to dissolve the emergency order after 30 days.

10. A Petition to Modify Emergency Custody Order was filed on December 21, 2018, by Andrea Pulizzi, Esquire, on behalf of Father. A hearing was scheduled for March 25, 2019.

11. Father was charged criminally at Lycoming County Docket #CR-176-2018 for the incident which resulted in the emergency custody order. Father was charged with multiple crimes, including simple assault pursuant to 18 Pa.C.S. §2701 (M1) and endangering the welfare of children pursuant to 18 Pa.C.S. §4304 (M1).

12. Prior to the hearing on March 25, 2019, counsel for Mother filed a Motion to Stay the custody proceedings, in light of the Petition for Involuntary Termination of Parental Rights that was filed on that date.

13. A hearing was held on April 1, 2019, and after hearing argument from both counsel and the GAL, granted Mother's Motion to Stay. Father's periods of custody were suspended pending the resolution of the instant Petition. The Court's decision was based upon the Child's young age and the fact that Father had not had contact with the Child in over a year.

14. Following a trial on December 12, 2019, Father was found guilty on both of the above specified counts and not guilty on all remaining counts. Father was sentenced to state prison on January 13, 2020.

15. Father was released on parole from state prison sometime in September or October of 2020.

16. Mother and her Fiancé have two biological children together.

17. Mother and her Fiancé separated in or around December of 2020. Mother believes they were separated for approximately one month; Fiancé testified that they were separated for a “couple months.”

18. When Mother and her Fiancé were separated, a custody Order was entered granting Fiancé sole legal and primary physical custody of their children. Both Mother and her Fiancé testified that when their children were with Fiancé, the Child who is the subject of this matter would also stay with Fiancé.

19. Mother and her Fiancé have since reconciled and are again residing in the same residence as an intact family.

20. When Mother was hospitalized in approximately January 2021, she reached out to Father via telephone and offered to withdraw the Petition for Involuntary Termination if he “stepped up” as a father.

21. Father called Mother a few additional times while she was hospitalized.

22. Father texted Mother on March 13, 2021, to let her know that his parole officer indicated he did not have any restrictions on seeing the Child. Father indicated his desire to see the Child and asked Mother if she was willing to work something out.

23. Father again texted Mother on June 13, 2021, indicating that he had an Easter gift for the Child. He communicated to Mother that he loved and missed the Child.

24. Mother responded to Father’s text on June 17, 2021. Among other things, Mother told Father that the Child “really wants to talk” to him, and that “she could use you actually.”

25. Father is aware of Mother’s phone number and address.

26. The Child refers to Mother’s Fiancé as “Daddy.”

27. The Child knows of the existence of Father, but would not recognize him.

28. Mother's Fiancé has a father-daughter relationship with the Child. Fiancé loves and supports the Child and considers her his daughter.

29. Mother's Fiancé desires to proceed with the adoption of the Child.

Discussion

In cases of termination of 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 Adoption of A.C.H.**, 803 A.2d 224, 228 (Pa. Super.2002). The standard of clear and convincing evidence means 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 J.D.W.M.**, 810 A.2d 688, 690 (Pa.Super.2002). Mother and her Fiancé argue that the basis for termination in this case may be found in 23 Pa.C.S. §2511(a)(1) and (2), which provide 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 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.

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 orphans' court must then consider the parent's explanation for his or her abandonment of the child, in addition to any post-abandonment contact. **In re Adoption of C.J.A.**, 204 A.3d 496, 503 (Pa. Super. 2019).

When determining whether to terminate the rights of a parent, 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).

Father was involved with the Child immediately following her birth, and exercised his periods of custody consistently during the first 18 months of her life. Father even petitioned for, and was granted, shared physical custody. Father's last in-person contact with the Child was in December of 2017, when, after his first weekend of physical custody following the entry of the order granting him shared physical custody, Father dropped the Child off at daycare where she was discovered with bruises significant enough for Mother to take her to the ER. It was later determined that Father had abused the Child. This resulted in an emergency custody order, criminal charges, and a period of incarceration, all of which prevented Father from performing parental duties.

A parent has an affirmative duty to be part of a child's life. As a consequence of his own actions, Father has not seen the Child since approximately December of 2017. However, on September 7, 2018, Father filed a Motion for Bail Modification/Reduction to his criminal docket number seeking to modify his bail by appointing an agreed upon adult to conduct periods of visitation. (Ex. F3). It is noted in the Motion that at the preliminary hearing on the criminal charges bail was set with the condition that Father was to have no contact with the minor Child unless supervised by Children & Youth. (Ex. F3). At that time Father alleged that Children & Youth failed to return his phone calls and failed to set up visitations for Father and the Child. (Ex. F3). By Order of September 24, 2018, the Court acknowledged that, as Children & Youth had closed the case, there was no one to effectively supervise the Child. (Ex. F4). After the criminal court reached out to Children & Youth, the Court by Order dated October 4, 2018, deferred any change in bail status relating to his ability to visit the Child (victim) to the custody proceeding. (Ex. F5). Father then filed a Petition for Modification of Emergency

Custody to the custody docket number, referencing the criminal court Order and requesting the visits be reinstated and supervised by a court appointed individual. (Ex. F6).

A hearing on Father's Petition to Modify was scheduled for March 25, 2019. However, immediately prior to that hearing Mother filed a Motion to Stay the custody proceeding pending the outcome of the instant Petition for Involuntary Termination of Parental Rights, which was also filed on that date. The hearing was continued to April 1, 2019, after which the Court granted the Motion to Stay and suspended Father's periods of custody pending the resolution of the Petition for Involuntary Termination of Parental Rights. Although Father was unable to perform parental duties for the child in the six (6) months immediately preceding the filing of the Petition for Involuntary Termination of Parental Rights, the Court finds that he attempted to use the Court system to have his bail conditions modified so that he could have supervised visits. These were ultimately unsuccessful as the criminal court deferred the decision to family court, and this delay opened the door for Mother to file the Petition for Involuntary Termination of Parental Rights. The Court finds that although Father did not perform his parental duties in the six (6) months prior to the filing of the Petition for Involuntary Termination of Parental Rights, he was precluded from doing so by various restrictions and delays and deferrals within the Court system. The Court does not find that Father evidenced a settled purpose to relinquish his parental claim in the six (6) months prior to the filing of the Petition. Accordingly, the Petitioners have not met their burden under 23 Pa.C.S. § 2511(a)(1) by clear and convincing evidence.

Petitioners also allege that termination of Father's parental rights is warranted under 23 Pa.C.S. §2511(a)(2), Under Section 2511(a)(2), "[t]he grounds for termination

[of parental rights] due to parental incapacity that cannot be remedied are not limited to affirmative misconduct. To the contrary, those grounds may include acts of refusal as well as incapacity to perform parental duties.” In re: A.L.D., 797 A.2d 326, 337 (Pa. Super. 2002) (citations omitted). In the present case, it is not disputed that Father has not seen the Child since the end of 2017; nor that he was found guilty of endangering the welfare of a child and simple assault, and that this Child was the victim of his actions.

However, Father had an Outreach caseworker through CYS, with whom he worked on parenting classes. Father was sentenced to a period of incarceration for his crimes, and was released from incarceration early upon the successful completion of the Quehanna Boot Camp, where he engaged in more intensive parenting education, anger management, and counseling while incarcerated.

Mother testified that Father has made no attempts to contact her, despite her phone number remaining the same and her Fiancé owning convenience stores at which Father could have found him. Mother testified that she reached out to Father as recently as January 2021 and offered to withdraw the instant Petition if he simply stepped up as a Father. Mother further testified that Father said he would get back to her and he never did. Father, on the other hand, testified that when Mother called him from the hospital, she asked him to get her vehicle from Mother’s Fiancé and then they would go pick up the Child together. Father testified that he chose not to do that because he did not have a driver’s license, but he called Mother 2 or 3 more times while she was in the hospital and, based upon Mother’s statements to him, he felt that co-parenting would be an option.

Father followed up with Mother on March 13, 2021, in which he stated that his parole officer indicated that he had no restrictions on seeing the Child. Father asked to see the Child and inquired as to whether Mother was still willing to work something out. (Ex. F1). Father again sent Mother a text on June 13, 2021, indicating that he had an Easter/birthday gift for the Child that he had been holding until they communicated. Father expressed that he loved and missed the Child. (Ex. F1). When Mother responded on June 17, 2021, she told Father that the Child “really wants to talk to you” and “she could use you actually.” (Ex. F1). Although Father did not file a Petition for Modification of the custody Order after he was released from prison, he testified that he felt that based upon his conversations with Mother that he and Mother were going to be able to come to an agreement to co-parent together and that Court intervention would be unnecessary.

There were no specific details in the Petition for Involuntary Termination of Parental Rights regarding exactly what incapacity Petitioners were alleging that Father cannot or will not remedy. While this Court does not condone the actions which led to Father’s criminal charges, his conviction alone is insufficient to warrant termination of his parental rights. Father served his sentence, and his inability to participate in the Child’s life has been resolved. Furthermore, while he was unavailable to perform parental duties for the child, Father engaged in parenting classes, anger management, and counseling to better himself. As soon as he received the original decree terminating his parental rights, Father petitioned the Court for reconsideration due to the fact that he did not have notice and was unable to meaningfully fight for the preservation of his parental rights. The Court finds that Father made a concerted effort to remedy the incapacity which previously resulted in his inability to see the Child and therefore the

Petitioners have not met their burden by clear and convincing evidence that Father cannot or will not rectify his alleged incapacities.

The Court finds that SM and BG have not established by clear and convincing evidence that Samuel Saldivar's parental rights should be involuntarily terminated pursuant to 23 Pa.C.S. §2511(a)(1) or (2). Accordingly, the Petition for Involuntary Termination of Parental Rights filed on March 25, 2019, is **DENIED**.

By the Court,

Ryan M. Tira, Judge

RMT/jel

c. Sharon McLaughlin, Esquire
SS
Tiffani Kase, Esquire
Gary Weber, Esquire
Jennifer E. Linn, Esquire