

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: J.R.M., A MINOR
IN THE INTEREST OF: K.M.M., A MINOR

IN THE SUPERIOR COURT OF
PENNSYLVANIA

APPEAL OF: N.H.

No. 1276 WDA 2013

Appeal from the Decree July 15, 2013
In the Court of Common Pleas of Blair County
Orphans' Court at No(s): 2013-AD-18, 2013-AD-18-A

BEFORE: BOWES, J., ALLEN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.

FILED: December 13, 2013

N.H. (Putative Father) appeals the decrees entered in the Court of Common Pleas of Blair County terminating his parental rights to his twin son and daughter. After a thorough review of the record, we affirm.

The trial court set forth the following factual and procedural history of the case:

K.M.M. and J.R.M are twin children born November 3, 2012. Their biological mother, E.W., voluntarily relinquished her parental rights during the May 2, 2013 Six-Month Permanency Review/Dispositional/Goal Change Hearing, combined with the Termination of Parental Rights proceeding. The subject children had been declared "dependent" children on or about November 6, 2012 and have remained in placement until the present time. The presumptive father, C.M., voluntarily signed a Consent to Adoption, and Blair County Children Youth & Families, who has legal and physical custody of the subject children, filed a Petition to Confirm Consent. C.M.'s consent was confirmed at the time of [the] May 2, 2013 hearing and his parental rights terminated.

An issue of paternity arose, and, therefore, . . . C.M. . . . submitted to paternity testing, which excluded C.M. as being the

biological father of the subject children. The Appellant, N.H., is the putative father.¹ At the time of the May 2, 2013 Review Hearing, N.H. made the request, through his legal counsel, for paternity testing. This Court entered a subsequent order on May 9, 2013, leaving it to the discretion of N.H. and his counsel to pursue paternity testing on their own behalf, and take any and all steps necessary to secure such paternity testing, including being financially responsible for same. We also directed that all relevant parties, specifically, the mother, E.W., BCCYF, and the foster parents, who had custody of the children, fully cooperate if [N.H.] pursued paternity testing. We also directed in our May 13, 2013 order that such paternity testing be accomplished so that the results were known prior to our July 1, 2013 hearing.

Unfortunately, [N.H.] was unable to arrange for the paternity testing prior to our July 1, 2013 hearing. After completion of the May 2 and July 1, 2013 hearings, we entered a Permanency Review Order dated July 8, 2013 wherein we found that both of the children remained dependent; that legal and physical custody remained in BCCYF; and we changed the goal for each child to adoption. These Orders were entered at the dependency proceedings.

Final Decrees were entered July 15, 2013 . . . terminating the parental rights of . . . N.H., on an involuntary basis as to each child.

Trial Court Opinion, 8/6/13, at 1-2.

N.H. filed a timely appeal in which he raises the following issues for our review:

1. Did the court err and/or abuse its discretion in finding that the Agency established by clear and convincing evidence that it is in the best interest of the minor children for [N.H.'s] parental

¹ On March 26, 2011, E.W. gave birth to a daughter, S.H. N.H. was the presumptive father of S.H. because he was listed on the birth certificate. However, paternity testing revealed that he was not the father. E.W. and N.H. relinquished their parental rights to S.H., and the rights of the biological father were involuntarily terminated. N.T. Six-Month Review and Termination of Parental Rights Hearing, 5/2/13, at 20. N.H.'s mother and stepfather subsequently adopted S.H.

rights to be terminated where the Agency failed to establish that [N.H.] exhibited a settled purpose of relinquishing his parental claim to the minor child[ren] or has refused or failed to perform parental duties[?]

2. Did the court err and/or abuse its discretion in finding that the Agency established by clear and convincing evidence that it is in the best interest of the minor children for [N.H.'s] rights to be terminated when [the Agency] failed to establish that [N.H.'s] actions have left the children without essential parental care necessary for their well-being, and that the causes of [N.H.'s] incapacity cannot be remedied within a time frame that attends to the best interest of the child[ren?]

3. Did the court err and/or abuse its discretion when it found that the Agency established by clear and convincing evidence that the child[ren] [have] been removed from the parent for a period of at least six months and that the conditions that led to the removal cannot or will not be remedied within a reasonable period of time, where [N.H.] was unaware that the children were his biological children and is able to parent the child[ren] with assistance from his family[?]

Brief of Appellant, at 10.

Our review of an order granting the termination of parental rights is well-established:

In cases involving termination of parental rights, our scope of review is broad. All of the evidence, as well as the trial court's factual and legal determinations are to be considered. However, our standard of review is limited to determining whether the order of the trial court is supported by competent evidence, and whether the trial court gave adequate consideration to the effect of such a decree on the welfare of the child. We have always been deferential to the trial court as the fact finder, as the determiner of the credibility of witnesses, and as the sole and final arbiter of all conflicts in the evidence. Moreover, this Court will affirm a termination of parental rights if competent evidence supports the trial court's findings, even if the record could support an opposite result.

In re S.D.T., Jr., 934 A.2d 703, 705-06 (Pa. Super. 2007).

Before parental rights can be terminated, the trial court must conduct a two-step analysis. First, the court must find, by clear and convincing evidence, that the parent has failed to perform his or her parental duties. 23 Pa.C.S. § 2511(a). Second, under section 2511(b), the trial court is required to conduct an evaluation to ensure that the termination of the bond between the natural parent and the child would not have a deleterious effect on the child.

Section 2511 of the Juvenile Act provides in relevant part:

(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.

* * * * *

- (5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services of assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of

the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

23 Pa.C.S. § 2511(a).

We need only agree with a trial court's decision as to one subsection of section 2511(a) in order to affirm the termination of parental rights. *In re N.A.M.*, 33 A.2d 95, 100 (Pa. Super. 2011) (citation omitted).

When considering termination under section 2511(a)(1), the court should not apply the six-month statutory provision in a mechanical manner. *In re Z.P.*, 994 A.2d 1108, 1117 (Pa. Super. 2012). Rather, "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. *Id.* (citations omitted).

Here, the record supports the conclusion that from the time of conception in February 2012, through the filing of the termination of parental rights petition in April 2013, N.H. did not intend to exert a claim of parental rights and that he failed to perform any parental duties. BCCYF caseworker, Christi Owen, testified that prior to the termination hearing she had two contacts from N.H. On January 23, 2013, N.H. indicated that he might be the father, and admitted that he had sex with E.W. in February 2012. During the phone call, he did not request paternity testing, did not indicate any desire to find out if he was the father, and did not indicate he

was pursuing custody. N.T. Hearing, 5/2/13, at 60-61. However, during a phone conversation initiated by Ms. Owen on April 16, 2013, N.H. asked for an attorney and paternity testing. *Id.* at 63-64.

N.H. argues that his lack of involvement was because he did not realize he was the father, did not understand what he had to do, did not know how to pursue paternity testing, did not have counsel, and was unaware of the children's placement or of the dependency proceedings. However, he testified that he had sexual intercourse with E.W. on February 18 and 19, 2012, and that since that time he realized that he could possibly be the father of her children. He further testified that he knew the children were his because he was aware of their breathing problems, which were similar to ones he experienced as a newborn. He also saw a photograph of the twins and believed their features were similar to his.

Since September 6, 2012, N.H. was aware that the children had been placed in the home of the pre-adoptive parents, who are related to N.H.'s stepfather. However, he did not ask for visitation, did not send anything for the children, did not file for custody, and did not seek reunification services, despite his awareness of their availability due to his participation in such services with respect to S.H.

Even after the May 2013 hearing, when the court gave N.H. the opportunity to pursue paternity testing, and directed all parties to cooperate in the process, N.H. failed to establish paternity.

As this Court has recognized:

Parental duty requires that the parent act affirmatively with good faith interest and effort, and not yield to every problem, in order to maintain the parent-child relationship to the best of his ... ability, even in difficult circumstances. A parent must utilize all available resources to preserve the parental relationship, and must exercise reasonable firmness in resisting obstacles placed in the path of maintaining the parent-child relationship. Parental rights are not preserved by waiting for a more suitable or convenient time to perform one's parental responsibilities while others provide the child with [the child's] physical and emotional needs.

In re Z.P., supra at 1119 (citations omitted).

In light of the facts set forth above, there is competent evidence to support the trial court's conclusion that N.H. has demonstrated a settled purpose of relinquishing his parental claim to the children and has failed to perform parental duties. **See** 23 Pa.C.S. § 2511(a)(1).

N.H. also argues that the court abused its discretion in finding that BCCYF established by clear and convincing evidence that his actions left the children without essential parental care necessary for their well-being, and that N.H. cannot remedy the causes of his incapacity. **See** 23 Pa.C.S. § 2511(a)(2). This Court has recognized the significant distinctions between subsections (a)(1) and (a)(2):

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 Z.P., supra at 111 (citations omitted).

At the May 2013 hearing, N.H. testified that he separated from E.W. in 2011 and lived in a homeless shelter for two months. Since then he has lived across the street from his parents in an apartment that is fully subsidized by the Community Action program. He is unemployed, and claims to be unemployable due to a shoulder injury. He has filed for social security benefits, but has not been approved. As the trial court noted:

There is absolutely no evidence or history that [N.H.] is capable of providing these young children with a safe, stable and secure home. There is absolutely no evidence or history that he is capable of meeting the needs of these young children.

[N.H.] voluntarily relinquished his parental rights in the past for another child (S.H.) so that his parents could assume the responsibility of caring for the child.

In this case, even though he was aware that he [might] be the biological father, [N.H.] was willing to let someone else (C.M.) raise these children with the mother. He took no affirmative action of any nature whatsoever to establish paternity; to pursue custody/visitation rights; to support the children; and generally did nothing to assume a parental role.

During the testimony, [N.H.] never clearly stated why he now desires to assume a parental role. In fact, he expressed a desire that the children be removed from the only home they've ever known (which he indicated "would be a good idea") and placed with his parents. He would then intend to move in with his parents to help care for the children.

Trial Court Opinion, 8/6/13, at 7.

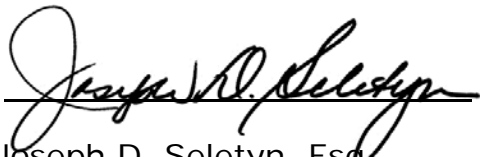
The evidence demonstrates that N.H. refused to take a role in the children's lives, took no steps to establish paternity, and did not act as a father to the children. Rather, their care, control and safety have been provided by others, and N.H. has shown no ability to take on those

responsibilities in the present or future. Accordingly, there was competent evidence to support termination under section 2511(a)(2).

With respect to section 2511(a)(5), N.H.'s sole argument is that with the help of his parents, he could have cared for the children. However, this is not a relevant factor. Under subsection (a)(5), the children had been in foster care more than six months by the time the hearing was concluded. With respect to N.H., the conditions that led to the children's placement were that he made no effort to establish paternity, never provided any parental care, control or assistance, and never proved that he could provide for the children. Because there is no evidence of record that N.H. was capable of providing for the care and safety of the children, the court properly held that termination under section 2511(a)(5) was appropriate.²

Decrees affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

² In the final decrees, the trial court noted: "Taking into consideration the developmental, physical and emotional needs and welfare of the child, termination of parental rights would best serve the needs and welfare of [the child]." Final Decrees, 7/15/13, at 2. N.H. did not challenge this determination on appeal.

J-S69043-13

Date: 12/13/2013