

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: ADOPTION OF J.A.J.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

APPEAL OF: M.S. & K.S.

No. 1166 MDA 2015

Appeal from the Order Entered June 10, 2015
In the Court of Common Pleas of Franklin County
Orphans' Court at No(s): 35-ADOPT-2014

BEFORE: PANELLA, J., OTT, J., and JENKINS, J.

MEMORANDUM BY OTT, J.:

FILED FEBRUARY 02, 2016

M.S., step-father, and K.S., birth mother ("Step-father" and "Mother," respectively, or "Petitioners," collectively) appeal from the order entered June 10, 2015, in the Court of Common Pleas of Franklin County, denying their petition to terminate the parental rights of J.J., birth father ("Father"), to J.A.J. ("Child"), pursuant to 23 Pa.C.S. § 2511(a)(1). Petitioners contend the trial court abused its discretion (1) in not finding they met their burden of proving grounds for termination of Father's parental rights pursuant to 23 Pa.C.S. § 2511(a)(1), and (2) in not finding termination would serve the needs and welfare of Child pursuant to 23 Pa.C.S. § 2511(b). Based on the following, we affirm.

The trial court made the following findings of fact:

[J.A.J.] was born [in] June [of] 2007. He is the son of [J.J.], his natural father, and [K.S.], natural mother. Petitioners in the case

are [K.S], natural mother, and her husband, [M.S.], step-father. Natural father, [J.J.], natural mother, and [J.A.J.] lived together in California during approximately the first 6 months of [J.A.J.'s] life. Subsequently, Mother and [J.A.J.] relocated to Charlotte, North Carolina. Both Mother and Father have a number of relatives living in the Charlotte, North Carolina area. Father is a production assistant and actor. He lives in Los Angeles, California. For many years subsequent to Mother's move, Father regularly returned to the Charlotte, North Carolina area, using his mother's standby flight options with Southwest Airlines to travel to and from Charlotte and Los Angeles, sometimes taking multiple connector routes to allow him to travel more cheaply and thus more frequently to see [J.A.J.].

At some time in mid-July 2011, there were altercations or disagreements between Mother and paternal grandmother. Natural father, [J.J.], sided with his mother in the dispute with natural mother. This precipitated Mother having negative views towards Father, and by Thanksgiving 2011, Mother denied Father an opportunity to see [J.A.J.]. Mother filed for custody of [J.A.J.] in the Family Court of Mecklenburg, North Carolina on November 29, 2011. The Court is without full explanation as to why there was such a delay in hearing, but a hearing was ultimately held in February 2013, at which Mother appeared, but Father did not. Father testified he did not receive notice of the hearing.

Upon Father learning of an order of court asserting that he did not have rights to [J.A.J.], on April 30, 201[3], Father filed a *pro se* motion to modify the North Carolina custody order. Subsequent to the filing of the petition to modify custody between April 30, 201[3] and March 24, 2014, there were a series of mediations, in which Father returned to North Carolina in an effort to modify the custody agreement. Mother did not attend any of those mediations. Ultimately, on March 24, 2014, the North Carolina Court held a hearing which both parties attended. The Court in North Carolina dismissed Father's motion because there was not a significant change in circumstances. On May 23, 2014, Father filed a motion for relief from the order of dismissal, [and the court granted relief and vacated the order of dismissal,] leaving open Father's claim for visitation.

On June 3, 2014, the North Carolina Court scheduled a hearing on Father's motion []. Mother filed a motion for continuance,

alleging that she and the child no longer resided in North Carolina and that she could not attend the hearing due to medical problems. Father attended the June 24, 2014, North Carolina hearing in person. Mother appeared by phone. The North Carolina Court entered an order that granted Father visitation time with his son [J.A.J.].

On July 1, 2014, approximately 7 days following the hearing in North Carolina, Mother and step-father filed a petition with this Court seeking to terminate Father's parental rights. On July 24, 2014, Mother was made aware of the North Carolina custody order granting Father the right to exercise custody from August 4, 2014 through August 14, 2014.

Mother, instead of responding to the North Carolina action, filed a petition for custody in the 39th Judicial District of Pennsylvania. On August 15, 2014, a joint hearing between the North Carolina Custody Court and the Franklin County Custody Court was held to determine jurisdiction of the custody matter. At the conclusion of that hearing, the North Carolina Court determined that it had continuing jurisdiction in the custody matter. Father's counsel in this jurisdiction filed preliminary objections to Mother's petition for termination of parental rights, but they were subsequently withdrawn. Subsequent to the various pleadings that were filed in North Carolina, the North Carolina Court held a custody hearing on April 9, 2015. Father appeared for the hearing. Mother did not. The North Carolina Court granted Father's request for further custody, and [o]n April 21, 2015 granted him custody.

The child's guardian *ad litem* in the 39th Judicial District, Steven Kulla, testified that he interviewed the various parties, spent time with the child, and made a recommendation in the best interest and welfare of the child that the parental rights of Father should be terminated given the depth of relationship that child has established with step-father.

Trial Court Order, 6/10/2015, at 1-3.¹

¹ For readability, we have reformatted the text of pages 2 and 3 into paragraphs.

A hearing on Petitioners' termination petition was held on May 4, 2015, and May 14, 2015. By order entered June 10, 2015, the trial court denied the petition. The trial court concluded that Petitioners had not demonstrated clear and convincing evidence sufficient to terminate Father's parental rights pursuant to 23 Pa.C.S. § 2511(a)(1). **See** Trial Court's Order, 6/10/2015, at 6. The trial court also made a best interest analysis pursuant to 23 Pa.C.S. § 2511(b) and determined that for Child's welfare and well-being, Child should be permitted to have two father figures in his life — Father and Step-father. **See id.** at 7. This appeal followed.²

In light of the North Carolina custody order regarding Child, we first address the issue of jurisdiction in Pennsylvania of the instant termination petition. In this regard, we must consider the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, which contains specific provisions governing the jurisdiction of courts to entertain custody determinations. In our review, we are aided by the discussion of the PKPA in ***In the Adoption of N.M.B.***, 764 A.2d 1042 (Pa. 2000):

[B]efore the courts of this Commonwealth may assert jurisdiction over a child custody or visitation matter with interstate dimensions, the courts must engage in a multi-step analysis. First, the Pennsylvania court must decide whether the matter before it acts as a modification to a custody or visitation order of another State that was rendered "consistently with the provisions" of the PKPA. 28 U.S.C.A. § 1738A(a). Assuming

² Appellants filed a concise statement of errors along with their notice of appeal, in accord with Pa.R.A.P. 1925(a)(2)(i).

these conditions are met, the PKPA requires that then the Pennsylvania court must look to whether it could, absent the out-of-state proceeding assert appropriate jurisdiction. 28 U.S.C.A. § 1738A(g)(1). If, as is the case before us, Pennsylvania is the “home state” of the child, the PKPA allows Pennsylvania to modify the other State’s decree only if that other State “no longer has jurisdiction’ or has declined jurisdiction. 28 U.S.C.A. § 1738(g)(2), (h). The language, “no longer has jurisdiction” in Section 1738A(g)(2) and (h) should be read in conjunction with Section 1738A(d), *supra*, that specifies when a State has continuing jurisdiction. The PKPA provides that the other State would have “continuing jurisdiction” if the initial decree complied with the PKPA at the time the decree was rendered; if under that other State’s law, the State maintains jurisdiction over the decree; **and, the other State remained the residency of any of the parties at the time of the Pennsylvania proceeding.** 28 U.S.C.A. §§ 1738A(d), 1738A(c)(1).

Id. at 1047–1048 (emphasis added).

Here, given that Father has not lived in North Carolina for approximately nine years, and Mother and Child have not resided in North Carolina for two years,³ we find North Carolina does not have jurisdiction of this termination action under the PKPA. **See *In re Adoption of K.S.***, 581 A.2d 659, 664 (Pa. Super. 1990.) (“Exclusive continuing jurisdiction under the PKPA is available only so long as the state which issued the original decree remains the residence of the child or any contestant.”). Therefore, we proceed to examine Petitioners’ claims.

Petitioners first challenge the trial court’s conclusion that grounds for termination pursuant to Section 2511(a)(1) were not established by clear

³ Mother and Child started residing in Pennsylvania in May, 2013. N.T., 5/4/2015, at 98.

and convincing evidence. The legal principles that guide our review are well-established:

Section 2511(a)(1) permits involuntary termination of parental rights where a parent exhibits a settled purpose of relinquishing his or her parental claim or refuses to perform parental duties for six months prior to the filing of a termination petition. 23 Pa.C.S.A. § 2511(a)(1). On appeal, Appellants argue the orphans' court erred because the record reflects clear and convincing evidence of Father's settled purpose of relinquishing his parental rights or failure to perform parental duties for at least six months prior to Appellants' petition.

Although the six month period immediately preceding the filing of the petition is most critical to the analysis, the court must consider the whole history of the case and not mechanically apply the six-month statutory provision. The trial court must examine the individual circumstances of each case and consider all of the explanations of the parent to decide if the evidence, under the totality of the circumstances, requires involuntary termination.

In re I.J., 2009 PA Super 48, 972 A.2d 5, 10 (2009). "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." ***In re B.,N.M.***, 2004 PA Super 311, 856 A.2d 847, 855 (Pa. Super. 2004).

Our courts have provided the following guidance on the meaning of parental duty:

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'.

In re C.M.S., 2003 PA Super 292, 832 A.2d 457, 462 (Pa. Super. 2003) (quoting ***In re Burns***, 474 Pa. 615, 379 A.2d 535, 540 (Pa. 1977)), *appeal denied*, 580 Pa. 687, 859 A.2d 767 (2004).

We review the orphans' court's decision for abuse of discretion or error of law, and we must defer to the orphans' court's findings of fact if the record supports them. ***In re L.M.***, 2007 PA Super 120, 923 A.2d 505, 511 (Pa. Super. 2007). As we have already noted, termination of parental rights is appropriate only where clear and convincing evidence supports termination under § 2511(a). ***Id.***

In re S.S.W., 125 A.3d 413, 416 (Pa. Super. 2015).

The burden of proof is on the party seeking termination to establish by clear and convincing evidence the existence of grounds for termination. ***In re Adoption of Atencio***, 650 A.2d 1064, 1066 (Pa. 1994). The evidence must be 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." ***Id.*** (citation omitted). Circumstances a court may consider include explanations for apparent neglect offered by the parent facing termination, including whether the party seeking termination "has deliberately created obstacles and by devious means erected barriers intended to impede free communication and regular association between the non-custodial parent and his or her child." ***In re C.M.S.***, 832 A.2d 457, 463

(Pa. Super. 2003) (quoting *In re Shives*, 525 A.2d 801, 803 (Pa. Super. 1987)). In the face of such barriers, “a parent must exert a sincere and genuine effort to maintain a parent-child relationship; the parent must use 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.” *Id.*

Petitioners argue that Father, by his own testimony, indicated that the last time he spoke with J.A.J. was in July 2014 and the last time that he saw J.A.J. was in July 2011. *See* Petitioners’ Brief at 19. Petitioners maintain that Father did not utilize all available means to maintain contact and association with J.A.J. in that, other than pursuing his custody rights through the North Carolina Court system, Father put forth no effort at all. *See id.* at 22. Petitioners claim Father could have had telephone contact, FaceTime, and Skype with J.A.J., but for no apparent reason, Father declined to do so. *See id.* Petitioners further assert Father could have been maintaining contact, association, and a relationship with J.A.J. while the North Carolina custody action progressed, but he declined to do so. *See id.*

Based on the evidence presented at the hearing, the orphans’ court found:

Father’s intense efforts to maintain the custody action in North Carolina gives this Court substantial pause, and the Petitioners fail to carry their burden on showing that Father has evidenced a settled purpose of relinquishing his parental rights.

Trial Court Order, at 4.

The court expressed concern that Father had not paid child support “in any meaningful way,” and stated that Father’s geographical distance from Child “does not excuse Father from making plans to spend time with his child when returning to the East Coast.” **Id.** at 4, 5. The court further pointed out that “regular telephone, Skype, FaceTime, or other similar type[s] of interaction, even [] regularly established emails that the child could read, would evidence an effort by Father to show interest in the child’s life, and a desire to provide guidance for the child.” **Id.** at 5. The court found that “Father is willing to pursue litigation to enforce his rights and to gain access to his child, yet his actual interaction with his son [is] limited.” **Id.** at 6.

The court also discussed “Mother’s apparent efforts to move [from North Carolina to Pennsylvania] and to discourage any contact between Father and child.” **Id.** at 5. The court found: “Mother’s activities truly jeopardize her claims that Father has refused or failed to perform parental duties as her efforts to mislead the courts of North Carolina and Father as to her residential location[] certainly undermine her credibility with this Court as to her motives and intent.” **Id.** The court added it “does not find that Mother has been encouraging a relationship between Father and son for many years.” **Id.**

The trial court reasoned:

In this instance, given Father’s lack of support and given Father’s lack of real effort to overcome the impediments placed by Mother, this Court may be warranted in granting the petition,

but the Court finds there is not clear and convincing evidence that Father had failed to perform Fatherly duties regularly, as there were substantial impediments put in place by Mother to prevent him from having contact and performing parental duties with [J.A.J.].

Id. at 6. The record supports the trial court's determination.

The record reflects that Father last saw Child in July, 2011. N.T., 5/4/2015, at 22. Father talked to Child in June, 2012. **Id.** at 101. Father talked to Child in the Spring of 2013, and on July 1, 2014. **Id.** at 103-104. Father also mailed Child birthday cards, Christmas cards, and gift cards, including a birthday card in 2014. **Id.** at 142-143, 163, 171. **See also id.** at 74-75. Father has been pursuing his custody rights for Child through legal action in the North Carolina court since April 29, 2013.⁴

While Mother argues that Father could have done more to preserve his relationship with Child, she ignores her own efforts to impede that relationship. The record shows that on Thanksgiving, 2011, Mother denied Father access to Child. **Id.** at 104-105, 167-168. Mother then filed a custody action in North Carolina in November of 2011. **Id.** at 137. Father did not receive notice of the North Carolina custody hearing or the entry of an order in 2013. **Id.** at 169. Father did not find out about the custody action until February, 2013, when Mother told him that he had no rights to

⁴ By order dated April 21, 2015, the North Carolina court granted Father custody for "one weekend per month, preferably an extended weekend, and three consecutive weeks during the summer." **Id.** at 174; Father's Exhibit 6.

Child based on a temporary custody Order entered by a North Carolina court. **Id.** at 170. At the March 24, 2014, hearing in North Carolina on Father's motion to modify custody, Father discovered Mother had moved from North Carolina to Pennsylvania. **Id.** at 171. Up until that point, Father was sending Child cards to the North Carolina address. **Id.** at 171.

On June 24, 2014, the North Carolina court entered a temporary order that granted Father custody from August 4, through August 14, 2014.⁵ **Id.** at 143-144. On July 1, 2014, Petitioners filed the instant petition to terminate Father's parental rights.

Father testified that he regarded the situation on Thanksgiving, 2011, as "a clear sign to just, you know, play pretty much – go through the Court system and don't do anything else." **Id.** at 174. Father stated that he did not immediately pursue legal action, but he "sprung into action" when he became aware of the North Carolina custody action. **Id.** at 179. He testified he used funds for an attorney that he could have used to pay J.A.J.'s child support, stating: "[I]t's either pay child support until [J.A.J.] is 18 and get no time with him, or sacrifice the child support for a little while and fight to be a part of his life and to have him be a part of my life, as well." **Id.**

⁵ Mother informed Father she would not follow the North Carolina court's order, and Father did not exercise custody from August 4 to August 14, 2014. **Id.** at 144, 172.

“[W]here a parent makes **reasonable** attempts to overcome obstacles created by the party seeking to terminate parental right, a mere showing that the parent could conceivably have pursued legal action more promptly cannot justify termination of parental rights.” **Adoption of M.S.**, 664 A.2d 1370, 1374 (Pa. Super. 1995) (emphasis in original) (quotations and citations omitted). Further, “obstructive behavior on the part of the custodial parent aimed at thwarting the other parent’s maintenance of a parental relationship will not be tolerated, and certainly will not provide a sound basis for the involuntary termination of parental rights.” **Id.** (quotations and citation omitted).

We find that this Court’s words in **Adoption of C.M.W.**, 603 A.2d 622 (Pa. Super. 1992), are equally appropriate here: “It is clear from the record that [Father] has not been a model parent. However, the record also shows that he has not shown an intent to relinquish his parental rights nor has he failed to perform his parental duties to such an extent that termination is warranted.” **Id.** at 626. Here, Father, from April, 2013, to the time of the filing of the termination petition and beyond, pursued custody of Child through the North Carolina court. He sent Child birthday and Christmas cards, and he did talk to Child on several occasions, the last time being in July, 2014.

As stated above, the party seeking termination of parental right bears the burden of establishing by clear and convincing evidence the existence of grounds for termination. Further, the trial court’s decision will not be

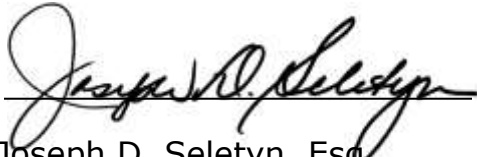
disturbed unless it lacks support in the record or represents an abuse of discretion or error of law. Here, competent evidence supports the court's conclusion that "the Petitioners fail[ed] to carry their burden on showing that Father has evidenced a settled purpose of relinquishing his parental rights" and that "substantial impediments put in place by Mother to prevent him from having contact and performing parental duties with [J.A.J.]." Orphans' Court Order, 6/10/2015, at 4, 6. Therefore, we agree with the orphans' court that Petitioners failed to prove grounds for termination pursuant to Section 2511(a)(1).

Finally, we turn to Petitioners' contention that the trial court abused its discretion in not finding that Petitioners met their burden of proving that the welfare of the child would be adversely affected by the court's denial of their petition for involuntary termination of Father's parental rights pursuant to Pa.C.S. § 2511(b). It is well settled that consideration of Section 2511(b) may not occur until a finding has been made that the statutory requirements for termination of parental rights under Section 2511(a) have been met. **See In re I.G.**, 939 A.2d 950, 955 (Pa. Super. 2007). Because the court's finding that Petitioners failed to satisfy their burden of proof pursuant to Section 2511(a) is supported by the record, we need not address Petitioners' second issue related to the court's determination under section 2511(b). **See In re C.L.G.**, 956 A.2d 999, 1009 (Pa. Super. 2008) (only after determining parent's conduct warrants termination of parental rights under

section 2511(a), may court engage in second part of analysis under section 2511(b)). Accordingly, we affirm.

Order affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/2/2016