

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

IN RE: J.P.F.

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

APPEAL OF: E.D.F., BIOLOGICAL FATHER

Appellant

No. 838 WDA 2012

Appeal from the Orders of April 23, 2012  
In the Court of Common Pleas of Greene County  
Orphans' Court at No(s): No. 16 O.C. 2011

IN RE: N.R.F.

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

APPEAL OF: E.D.F., BIOLOGICAL FATHER

Appellant

No. 839 WDA 2012

Appeal from the Orders of April 23, 2012  
In the Court of Common Pleas of Greene County  
Orphans' Court at No(s): No. 17 O.C. 2011

IN RE: C.R.F.

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

APPEAL OF: E.D.F., BIOLOGICAL FATHER

Appellant

No. 840 WDA 2012

Appeal from the Orders of April 23, 2012  
In the Court of Common Pleas of Greene County  
Orphans' Court at No(s): No. 18 O.C. 2011

BEFORE: MUSMANNO, J., WECHT, J., and COLVILLE, J.\*

MEMORANDUM BY WECHT, J.:

Filed: February 19, 2013

Appellant, E.D.F. ["Father"], appeals from three orders issued by the Greene County Court of Common Pleas on April 23, 2012. Those orders terminated Father's parental rights to his three minor children: J.P.F., a daughter born in August of 2005; N.R.F., a son born in July of 2008; and C.R.F., a daughter born in January of 2010 [collectively "the Children"]. We vacate and remand.<sup>1</sup>

The trial court summarized the factual history as follows:

[The parents of the Children recently had their parental rights terminated.] Their mother, N.D.K. ["Mother"], voluntarily relinquished her rights and [the trial court] confirmed her relinquishment on April 23, 2012. On the same day, [the trial

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> On May 23, 2012, *sua sponte*, we consolidated the appeals at 838, 839, and 840 WDA 2012.

court] entered an order involuntarily terminating the parental rights of [Father]. On May 23, 2012, [Father], with the assistance of court appointed counsel, appealed this termination. As part of the fast-track appeal process, he included a statement of matters complained of on appeal.

The record shows that [J.P.F.] became known to Greene County Children and Youth Services ["CYS"] at the time of her brother's, [N.R.F.'s], birth, in August of 2008 because he was born with opiates in his system. At the time, [J.P.F.] had already been voluntarily been [*sic*] placed by her parents with her aunt and uncle. [N.R.F.] went to live with another aunt and uncle. Both of these children were found to be dependent in August of 2008. Father was in jail for at least part of August of 2008, but was released by the end of the month. He was scheduled for two visits with [J.P.F.] in September of 2008 but failed to appear for either. He did appear for a visit on October 6, 2008, but was arrested on an outstanding warrant. He was released from this incarceration on October 20, 2008. He attended a visit in January of 2009 and a few others in the first part of 2009. His last visit with the children was at the CYS offices on May 27, 2009.

Father's only contact with [N.R.F.] was at Halloween in 2008 when [N.R.F.] was an infant. Thereafter, there were a few supervised visits at the agency. The last visit with [N.R.F.] was likewise on May 27, 2009.

[C.R.F.] was born on January 23, 2010, and was found to be dependent on March 11, 2010, due to problems she suffered while in her mother's care. At that time, [C.R.F.] was placed with her maternal grandmother, where she remains. Father was at the time incarcerated at SCI-Pittsburgh. Father entered into the custody of the Department of Corrections on January 25, 2010, two days after [C.R.F.]'s birth. He has never seen her.

Trial Court Opinion ["T.C.O."], 6/11/12, 1-2.

On December 1, 2011, CYS filed petitions to terminate Father's parental rights to all three Children pursuant to 23 Pa.C.S.A. §§ 2511(a)(1), (2), (5), (8), and (b). A hearing was scheduled for February 6, 2012. On

December 19, 2011, the trial court received a letter from Father stating that he was opposed to the termination of his parental rights. Father also requested that the court reschedule the termination hearing to some date later than his scheduled release date, which was February 24, 2012. In response to Father's request, the trial court continued the hearing to March 6, 2012.

On January 23, 2012, Father filed a motion requesting "one last continuance" to enable him to attend the termination hearing. The trial court denied Father's motion, finding nothing in the motion to suggest that Father's release date was anything other than February 24, 2012. The order was sent to Father at SCI-Camp Hill.

On March 5, 2012, CYS's attorney requested a continuance. The court granted the request and continued the hearing until April 23, 2012. The Clerk of Court's notation on the record indicates that a copy of the March 5, 2012 order rescheduling the hearing to April 23, 2012 was sent to Father at his SCI-Camp Hill address. However, by the time of the April 23, 2012 hearing, Father had been moved to SCI-Rockview. The trial court opined that Father "probably did [receive the order] because [CYS] was keeping track of Father through the Department of Corrections inmate locator[,] and the caseworker said that Father was moved to Rockview about two weeks prior to the hearing." T.C.O., 6/11/12, 2-3. The trial court noted that Father knew about the March 6, 2012 hearing date, and that Father knew that his request for a continuance had been denied. The trial court also

noted that Father made no request to be brought back for the hearing, made no request to participate by telephone, did not submit any reasons why his parental rights should not be terminated, and did not file any response to CYS's original petition for termination. *Id.* at 3.

On April 23, 2012, Father's current counsel, who was substituting for Father's appointed counsel, requested a continuance, which the trial court denied. The trial court then proceeded directly to conduct the termination hearing in Father's absence. At the conclusion of the hearing, the trial court issued orders terminating Father's parental rights to the Children.

On May 23, 2012, Father filed timely notices of appeal.<sup>2</sup> On the same date, Father filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i).

Father raises four issues for our review:

1. Whether sufficient notice of the hearing occurring on April 23, 2012, was given to [Father?]
2. Whether the Court committed prejudicial error in denying Father's motions for a continuance of the trial on termination of parental rights[?]
3. Whether the [trial court] made an adequate finding that [Father] is an unfit parent, as is required for constitutional due process, and whether that determination was supported by the evidence and applicable law[?]

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<sup>2</sup> Because Mother voluntarily relinquished her rights to the Children, she is not a party to the current appeal.

4. Whether, as a matter of law, grounds for involuntary termination of parental rights were satisfactorily established as required under Title 23 Pa.C.S.A. § 2511[?]

Father's Brief at 10.

We need only address Father's first issue, because it is dispositive. Father asserts that he was not provided sufficient notice of the termination hearing held on April 23, 2012. Our standard of review is well-settled:

When reviewing a decree entered by the Orphans' Court, this Court must determine whether the record is free from legal error and the court's factual findings are supported by the evidence. Because the Orphans' Court sits as the fact-finder, it determines the credibility of the witnesses, and on review, we will not reverse its credibility determinations absent an abuse of that discretion.

***In re Adoption of K.G.M.***, 845 A.2d 861, 863 (Pa. Super. 2004).

Father asserts that he did not receive notice of the new hearing date because he was moved from SCI-Camp Hill to SCI-Rockview shortly before the hearing, and the notice did not follow him. At the hearing, Davine Arnold ["Ms. Arnold"], a CYS caseworker, testified that notice of the new hearing date was mailed via certified mail to Father at SCI-Camp Hill, where he was previously confined. Notes of Testimony ["N.T."], 4/23/12, at 12, 20. Ms. Arnold testified that the notice was "probably [sent] about February, sometime in February." ***Id.*** at 20-22. However, the order rescheduling the termination hearing was dated March 5, 2012. Notice could not have been sent in February, because the trial court had not yet changed the hearing date. Further, Ms. Arnold testified that she could not confirm

that she or her office had received proof of service upon Father. *Id.* Ms. Arnold was aware that Father had recently been moved to SCI-Rockview. *Id.* at 12.

CYS was required to give Father at least ten days' notice of the termination hearing. 23 Pa.C.S.A. § 2513(b). "At least ten days' notice shall be given to the parent or parents, putative father, or parent of a minor parent whose rights are to be terminated, by personal service or by registered mail to his or their last known address or by such other means as the court may require." *Id.* If the evidence of record is insufficient to establish that a party to a termination of parental rights hearing received notice of that hearing, and no effort was made to serve notice at a parent's last known address, the order terminating parental rights must be vacated. *In re Adoption of K.G.M.*, 845 A.2d at 864-65 (Pa. Super. 2004). "One cannot rely on mailed notice which clearly did not reach the party to be notified when some other form of service which will be effective can easily be used or the actual address at which the party may be found is readily available." *Adoption of Walker*, 360 A.2d 603, 607 (Pa. 1976).

The trial court determined that "it is unclear if the Order of March 5, 2012, which continued the hearing to April 23, 2012, caught up with [Father]." T.C.O. at 3. The trial court speculated that "[the notice] probably did because the Agency was keeping track of Father through the Department of Corrections inmate locator service and the caseworker said that Father was moved to Rockview about two weeks prior to the hearing." However,

the record includes no positive proof whatsoever indicating that Father had actual notice of the April 23, 2012 termination hearing that would have allowed him to participate (whether in person or by video or audio connection) if he so desired. **See** 23 Pa.C.S.A. § 2513(b); ***In re Adoption of K.G.M.***, 845 A.2d at 864-65. Further, Father's actual address was readily available to CYD, which sent Father notice via certified mail, instead of registered mail as required by 23 Pa.C.S.A. § 2513(b). We conclude that there is no competent evidence of record verifying that Father received actual notice of the hearing. "We are unwilling to allow the termination of Father's parental rights. . . without strict compliance with the procedures set forth by the Legislature." ***In re Adoption of K.G.M.***, 845 A.2d at 864-65. Under these circumstances, the trial court erred in proceeding to terminate Father's parental rights in absentia.

We remand the case to the trial court in order for a new termination hearing to be held within sixty days of this Memorandum. Father is to be given proper notice of the date of the hearing.

Order vacated. Case remanded. Jurisdiction relinquished.