

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

IN RE: :  
Involuntary Termination :  
of Parental Rights of : No. 19-9116  
David E. Furry, II and :  
Tia Green in and to :  
A.K.F., a Minor :

Cynthia A. Dyrda-Hatton, Esq. Counsel for David E. Furry and  
Theresa L. Schaeffer

Arley L. Kemmerer, Esquire Counsel for Tia Green

Robert J. Magee, Esquire Counsel for David E. Furry, II

Mark E. Combi, Esquire Counsel for A.K.F.

2022 FEB 23 P 2:55  
CARBON COUNTY  
REGISTERED CLERK OF ORPHANS COURT

FILED

MEMORANDUM OPINION

Serfass, J. - February 23, 2022

Here before the Court is the appeal of Tia Green relative to our Final Decree entered on January 4, 2022 granting the "Petition for Involuntary Termination of Parental Rights" filed by David E. Furry and Theresa L. Schaeffer (hereinafter "Appellees") and terminating the parental rights of David E. Furry, II (hereinafter "Father") and Tia Green (hereinafter "Mother/Appellant") (collectively "Parents"), the natural parents of the subject child, A.K.F. (hereinafter "the Child"). We file the following Memorandum Opinion pursuant to Pa.R.A.P. 1925(a), respectfully recommending that the instant appeal be dismissed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL HISTORY

The subject child, A.K.F., was born to David E. Furry, II and Tia Green on October 13, 2017 in Allentown, Pennsylvania and is now

four (4) years old. Father resides at 8 Country Club Road, Northampton, Pennsylvania. Father has two (2) other children: McKenna, who he voluntarily terminated his parental rights to, and Alexis, who currently resides with Karen Ahn (hereinafter "Paternal Grandmother"). Mother resides at 911 State Route 903, Jim Thorpe, Pennsylvania. Mother has two (2) other children: Alexis and Remington. Parents were never married to one another. A.K.F. has never met Father and only lived with Mother until January 2018 due to both parents being incarcerated on drug-related charges.

Father was incarcerated in May 2017 at the Carbon County Correctional Facility ("CCCF"). On October 10, 2017, Father was transported to SCI Graterford for classification. In February 2018, Father was transported to SCI Laurel Highlands. In July 2019, Father was transported back to CCCF. Father was released from prison on November 8, 2019. Mother was incarcerated in February 2018 at CCCF and was released in August 2018. Mother was reincarcerated at CCCF in February 2019 due to a drug relapse and was re-released in May 2019.

On February 12, 2018, the parties entered into a custody agreement approved by this Court wherein Appellees received primary physical custody of A.K.F. and Parents received partial physical custody subject to supervised visitation as agreed upon by the parties with the condition that any visitation that would take place in prison would have to be ordered by the Court. Since this agreement, A.K.F. has resided with Appellees, who have been married for thirteen (13)

years, at their residence at 8 Tree Loft Circle, Jim Thorpe, Pennsylvania along with their two (2) sons, H.S. and L.S.

On April 5, 2019, Appellees filed their "Petition for Involuntary Termination of Parental Rights" pursuant to 23 Pa.C.S.A. §2512(a)(3). On August 9, 2019, Appellees filed a "Report of Intention to Adopt" pursuant to 23 Pa.C.S.A. §2531. On December 4, 2019, this Court appointed Mark E. Combi, Esquire as guardian *ad litem* for the Child. On November 21, 2019, Father filed a modification petition seeking primary physical custody of the Child. On February 20, 2020, Appellees filed a "Praecipe to Add Averment" to add grounds for termination pursuant to 23 Pa.C.S.A. §2511(a) to their involuntary termination petition. Hearings on Appellees' involuntary termination petition were held before the undersigned on March 6, 2020, July 14, 2020, February 25, 2021, and February 26, 2021. Testimony was taken from Appellees, Parents, and Paternal Grandmother.

Appellees also presented the testimony of Dr. John P. Seasock, who performed a psychological evaluation with bonding assessment of A.K.F. on September 15, 2020. Dr. Seasock's testimony and evaluation indicated that A.K.F. views Appellees as her natural parents and would view Parents as strangers, and expressed concern with A.K.F. being reintroduced to Parents at this time without counseling services. Attorney Combi found that terminating the parental rights of Parents would be in the Child's best interest based upon Dr. Seasock's evaluation.

On December 30, 2021, we issued our Final Decree terminating Parents' parental rights based upon our finding that Appellees had established by clear and convincing evidence that both parents failed to fulfill their parental duties for a period of at least six (6) months preceding the filing of the involuntary termination petition and that the termination of Parents' parental rights would best serve the needs and welfare of the Child. (Court's Final Decree of 12/30/21). Our Final Decree was entered on the docket on January 4, 2022 and the parties were notified of such entry as well as Parents' notice of the right to appeal that same day. On February 7, 2022, Appellant filed an Appeal to the Superior Court of Pennsylvania requesting review and reversal of this Court's Final Decree entered on January 4, 2022 as well as her "Concise Statement of Errors Complained of on Appeal" pursuant to Pa.R.A.P. 1925(a)(2)(i).

#### ISSUES

In her Concise Statement, Appellant raises the following issue:

1. Whether the Court erred in finding that Appellees had established by clear and convincing evidence valid grounds for the termination of Appellant's parental rights where the record indicated that Appellees obstructed her efforts.

#### DISCUSSION

1. The instant appeal should be dismissed because it is untimely.

The Pennsylvania Rules of Appellate Procedure provide that "the notice of appeal ... shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a). Time

limitations on the taking of appeals are to be strictly construed, and a court may not extend the time for filing a notice of appeal as a matter of indulgence or grace. Commonwealth v. Gaines, 127 A.3d 15, 17 (Pa.Super. 2015) (citing Commonwealth v. Pena, 31 A.3d 704, 706 (Pa.Super. 2011)). Generally, the appellate courts of this Commonwealth cannot extend the time for filing an appeal. See Pa.R.A.P. 105(b). The Superior Court has held that it will address an otherwise untimely appeal "if fraud or breakdown in the trial court's processes resulted in an untimely appeal." Commonwealth v. Khalil, 806 A.2d 415, 420 (citing Commonwealth v. Anwyll, 482 A.2d 656, 657 (Pa.Super. 1984)).

Appellant has failed to file a timely appeal within thirty (30) days after the entry of this Court's Final Decree. Specifically, our Final Decree was entered on the docket on January 4, 2022 and Appellant was notified of the entry of the decree as well as her notice of right to appeal that same day. Therefore, Appellant had until February 3, 2022 to file a timely appeal. There is nothing within the record indicating that Appellant's late filing on February 7, 2022 was the result of fraud or breakdown in the Court's processes. As such, we respectfully recommend that the instant appeal be dismissed.

2. This Court did not err in finding that Appellees had established by clear and convincing evidence valid grounds for the termination of Appellant's parental rights pursuant to 23 Pa.C.S.A. §2511(a)(1).

If the Superior Court finds that the instant appeal should not be dismissed based upon the aforesaid reasons, we respectfully recommend that the instant appeal be dismissed because Appellees met their burden of establishing that Appellant failed to perform her parental duties within the six (6) months preceding the filing of the involuntary termination petition.

Section 2512 governs who may file a petition for termination of parental rights. In this case, Appellees had the authority to file their petition pursuant to Section 2512(a)(3) as they have physical custody of A.K.F., who is under the age of eighteen (18). The grounds upon which a party may seek the termination of the parental rights in and to a child are set forth in 23 Pa.C.S.A. §2511. Appellees sought the termination of parental rights pursuant to Section 2511(a)(1), which provides for termination when "[t]he 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." 23 Pa.C.S.A. §2511(a)(1).

Under this subsection, Appellees could have pursued their claims in one of two different ways: 1) that Parents had, for at least six (6) months prior to the filing of the instant petition, conducted themselves in such a way that they had shown that they wanted to relinquish their parental rights to the Child; or 2) that Parents had, for at least six (6) months prior to the filing of the instant petition, refused or failed to perform parental duties for and on

behalf of the Child. These duties are broad, and involve both the tangible and intangible aspects of being a parent.

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, [the Pennsylvania Supreme 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., 832 A.2d 457, 462 (Pa.Super. 2003) (quoting In re Burns, 379 A.2d 535, 540 (Pa. 1977)), *appeal denied*, 859 A.2d 767 (Pa. 2004).

"In termination cases, the burden is upon the petitioner to prove by clear and convincing evidence that its asserted grounds for seeking termination of parental rights are valid." In re S.H., 879 A.2d 802, 806 (Pa.Super. 2005). "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 J.L.C. & J.R.C., 837 A.2d 1247, 1251 (Pa.Super. 2003). "The trial court is free to believe all, part, or none of the evidence presented and is likewise free to make all credibility determinations

and resolve all conflicts as the evidence." In re M.G., 855 A.2d 68, 73-74 (Pa.Super. 2004).

In seeking to terminate the parental rights of Appellant in and to A.K.F., Appellees contended that Appellant refused or failed to perform parental duties during the relevant six-month period prior to the filing of the instant petition, i.e., from October 2018 until April 2019. If the trial court determines that the parent's conduct warrants termination under Section 2511(a), it must then determine whether termination would best serve the best interests of the child under Section 2511(b), taking into consideration the development, physical and emotional needs of the child. In re B.C., 36 A.3d 601, 606 (Pa.Super. 2012). In cases where a bonding evaluation is performed, the trial court can equally emphasize the safety needs of the child, and should also consider the intangibles, such as the love, comfort, security, and stability the child might have with the foster parent, as well as the importance of continuity of relationships and whether any existing parent-child bond can be severed without detrimental effects on the child. In re Z.K.S., 946 A.2d 753 (Pa.Super. 2008). "In cases where there is no evidence of any bond between the parent and child, it is reasonable to infer that no bond exists." Id. at 762-63.

"Although it is the six months immediately preceding the filing of the petition that is most critical to the analysis, the trial court must consider the whole history of a given case and not 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 or her 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).

In considering the explanation(s) of a non-custodial parent for neglecting his parental duties, the Superior Court has held:

Where a non-custodial parent is facing termination of his or her parental rights, the court must consider the non-custodial parent's explanation, if any, for the apparent neglect, including situations in which a custodial parent has deliberately created obstacles and has by devious means erected barriers intended to impede free communication and regular association between the non-custodial parent and his or her child. Although a parent is not required to perform the impossible, he must act affirmatively to maintain his relationship with his child, even in difficult circumstances. A parent has the duty to exert himself, to take and maintain a place of importance in the child's life.

Id. at 855-56 (internal citations omitted).

Of significance in this case was the fact that Parents were previously incarcerated and unable to perform their parental duties during their periods of incarceration.

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.

Id. at 855 (internal citations omitted).

Appellant understandably argued that her periods of incarceration prevented her from performing her parental duties on behalf of the Child. However, the record contains sufficient evidence indicating that Appellant did not exert a serious willingness to maintain a relationship with A.K.F. before and after her periods of incarceration. In In re Adoption of M.P.B., III, the trial court terminated a mother's parental rights where the mother had neglected the child for a majority of his life due to her drug addiction, the mother had sent cards and letters to the child while incarcerated but otherwise had no contact with him, and the mother failed to show any efforts to act as a parent to the child even when she was not incarcerated. In re Adoption of M.P.B., III, 4 Pa. D. & C. 5th 272 (C.C.P. Lawrence 2008).

In making this determination, the trial court cited the Superior Court's decision in In re D.J.S., where the Superior Court upheld the termination of the parental rights of a father who failed to make meaningful efforts to maintain a relationship with his child while incarcerated. "In that case, the Superior Court held that letters, some child support, and gifts that the incarcerated father sent to his child did not indicate a serious intent to re-establish a parent-child relationship and a willingness and capacity to undertake a

parental role." Id. at 277-78 (citing In re D.J.S., 737 A.2d 283 (Pa.Super. 1999)).

Here, Appellant had been incarcerated for a majority of A.K.F.'s life. Appellant did not avail herself of any parental programs during her periods of incarceration. Appellant did not inquire about the Child's medical or educational status nor did she send the Child money while incarcerated. Appellant has not had any phone contact with the Child. During the relevant six-month period, Appellant testified that she sent a Christmas gift to Appellees in 2018 that was not received, but otherwise had not sent any cards or letters to the Child. Since the entry of the custody order, Appellant had one (1) visit with A.K.F. at a Burger King in September 2018. Appellant has not filed any custody petition nor enforced her visitation rights under the custody order. Dr. Seasock's testimony and evaluation indicated that A.K.F. has no bond with Appellant and would view her as a stranger, and he expressed concern with reintroducing A.K.F. to Appellant at this time without counseling services.

We do not take lightly the seriousness of the termination of Appellant's parental rights. However, based upon the foregoing, we found that Appellant did not utilize all of her available resources nor did she exercise a reasonable firmness in resisting any alleged obstacles placed on the path of maintaining her parent-child relationship to warrant denial of Appellees' petition. Appellant failed to take or maintain a place of importance in A.K.F.'s life and demonstrated only a passive interest in the Child. Therefore, we

found that there was clear and convincing evidence to support the termination of the parental rights of Appellant pursuant to Section 2511(a)(1).

We next considered whether the termination of Appellant's parental rights would be in A.K.F.'s best interest. A.K.F. has resided with Appellees since she was four (4) months old. A.K.F. has developed a strong and healthy emotional attachment and bond with Appellees, who have provided a stable, loving environment for the Child. Dr. Seasock's testimony and evaluation indicated that there would be no adverse consequences for A.K.F. if Appellant's parental rights were terminated because she views Appellees as her natural parents and has no relationship with Appellant. Attorney Combi found that terminating the parental rights of Appellant would be in the Child's best interest based upon Dr. Seasock's evaluation. Appellant testified that she informed Appellees she was staying away from A.K.F. because she believed it was in the Child's best interest. Therefore, we found that terminating the parental rights of Appellant would best serve the needs and welfare of the Child.

#### CONCLUSION

Based upon the foregoing, we respectfully recommend that the instant appeal be dismissed and that our Final Decree terminating Appellant's parental rights be affirmed accordingly.

BY THE COURT:

A handwritten signature in black ink, appearing to read "S.R. Serfass", written over a horizontal line.

Steven R. Serfass, J.