

plaintiff, Stanley H. Locke has not met the threshold requirements of the Pennsylvania No-Fault Motor Vehicle Insurance Act, which would permit him to maintain this action and, therefore, the motion should be granted. To the contrary the plaintiffs allege in their answer to defendant's motion, and contend in their brief, that Dr. Ernest E. Somers, a board-certified orthopedic surgeon, reported plaintiff, Stanley H. Locke, "sustained serious and permanent injuries in the nature of soft tissue and ligamentous damage and tears to the cervical spine at the level of C5-6 and of C6-7 with damage to the intervertebral disk between C5 and C6," and as a result thereof he is "completely disabled in regard to his ability to engage in heavy physical labor such as is required in the performance of work necessary to take care of his farm"; and the doctor estimated the permanent/partial disability was 60% of the whole person.

A copy of Dr. Somers' report to counsel for the plaintiffs was attached to the plaintiffs' brief. Counsel for the defendant stipulated at argument that Dr. Somers would testify, if called, in accordance with the information set forth in his report.

Pa. R.C.P. 1035 provides inter alia:

"(b) The adverse party, prior to the day of hearing, may serve opposing affidavits. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there was no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..."

Section 301(a) (5) of the No-Fault Act (40 Pa. C.S. Sec. 1009.301(a) (5) permits recovery for non-economic detriment in the following pertinent subsections:

- (A) Serious and permanent injury;
- (B) Medicals in excess of \$750;
- (C) Medically determinable physical or mental impairment which prevents the victim from performing all or substantially all of the material acts and duties which constitute his usual and customary daily activities and which continues for more than 60 consecutive days.

In the case at bar, the facts do not indicate that the plaintiffs' medical expenses exceeded \$750.00 or that the plaintiff, Stanley H. Locke, was prevented from performing all or substantially all of his usual and customary daily activities for more than 60 consecutive days. In fact, it appears the medical expenses were substantially less than \$750.00, and Mr. Locke was

not prevented from performing his usual and customary daily activities as a supervisor of a cement laying crew for any time since the date of the accident. However, we have the report of

Dr. Somers describing Mr. Locke's injury as "serious and permanent" and elaborating on that conclusion with his specific finding, and the testimony of both plaintiffs that Stanley H. Locke is completely unable to operate his small farm and do the necessary work involved in that operation ever since the accident.

Whether or not the evidence presented at trial will establish Mr. Locke's injury as serious and permanent is irrelevant at this stage of the proceeding. In our judgment this Court has no right to "second guess" the qualified medical expert's finding and hold as a matter of law that the plaintiff, Stanley H. Locke, has not suffered a serious and permanent injury. In our judgment at this stage this constitutes a genuine issue as to a material fact. In addition, we are not prepared to say that the physical impairment reported by Dr. Somers which has prevented the plaintiff, Stanley H. Locke, engaging in his daily farming activities would not also overcome the threshold test of the No-Fault Act.

ORDER OF COURT

NOW, this 10th day of December, 1980, the Motion for Summary Judgment is denied.

Exceptions are granted the defendant.

IN RE: ADOPTION OF Y, C.P. Fulton County Branch, No. 51 of 1980 - OC

Adoption - Involuntary Termination of Parental Rights

1. A parent who makes support payments but has no contact with his child for seven years has not shown a continuing interest in the child nor a genuine interest to maintain communication and association with the child.

2. A parent who claims that he has not maintained contact with his child because the parent's presence upset the child has the burden of attempting to rectify that situation by seeing more of the child.

Gary D. Wilt, Esq., Attorney for Petitioners

Timothy S. Sponseller, Esq., Attorney for Respondent

OPINION AND ORDER

EPPINGER, P.J., December 15, 1980:

Grandparents have petitioned for the involuntary termination of father's parental rights over his son Y. The petitioners are Y's maternal grandparents, with whom he has resided since he was two months old.

The petitioners alleged that father maintains no contact with Y, that he has not visited or indicated an intention to visit him, that he has not telephoned him, and that he has not sent him any gifts, cards or letters since September of 1973. In his Answer, father admitted these allegations and his limited contact with Y, but said that was because the grandparents told him on numerous occasions that his contact with Y caused the boy emotional upheaval and damage. Both sides admit that, pursuant to court order entered January 23, 1973, father has paid \$20.00 per week toward Y's support.

The Adoption Act provides that parental rights may be terminated, after hearing, when "the parent by conduct continuing for a period of at least six months either has evidenced a settled purpose of relinquishing parental claim to a child, or has refused or failed to perform parental duties." Act of July 24, 1970, P.L. 620, No. 208, 1 P. S. Sec. 311(1).

In determining whether a parent has refused or failed to perform parental duties we must examine the particular circumstances of each case. The parental duty is a positive, affirmative one which 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. *In re Burns*, 474 Pa. 615, 379 A.2d 535 (1977); *In re Adoption of McCray*, 460 Pa. 210, 331, A.2d 652 (1975). A parent must "exert himself to take and maintain a place of importance in the child's life." *Appeal of Diane B.*, 456 Pa. 429, 321 A.2d 618 (1974), quoting *In re: Adoption of J.R.F.*, 27 Somerset L.J. 298, 304-05 (1972). A parent will not be found to have "failed" or "refused" to perform parental duties so long as he "uses all available resources to preserve his parental relationship" and "exercises reasonable firmness in declining to yield to obstacles." *Adoption of S.H.*, 476 Pa. 608, 383 A.2d 529 (1978) (cites omitted).

We conclude that father has not taken affirmative action to provide Y with the "love, protection, guidance and support" required by a child. *Matter of Adoption of David C.*, 479 Pa. 1, 8, 387 A.2d 804, 807 (1978). Father admitted that he has not maintained any contact with the child for the past seven years. But he claims this was because his presence upset his son and cites *Adoption of Farabelli*, 460 Pa. 423, 333 A.2d 846 (1975), as rendering this a justification.

We believe *Farabelli* is easily distinguished from the instant situation. In *Farabelli*, the child and her father lived with the child's maternal grandparents. (The child's mother died five days after childbirth.) When the child was two years old, the father moved out of his in-laws' home because of strained relationships between him and them. Five years later, the grandparents petitioned unsuccessfully to terminate the father's parental rights. The Court noted that during this period the father visited his daughter at three to four-week intervals, made unsolicited support payment, sought legal advice on obtaining visitation rights and custody of the child, and changed his lifestyle (remarried, bought and furnished a home) to achieve that end. Although during one five-month period the father only saw his daughter once and spoke to her by telephone twice, this separation was counseled by a priest who believed it might lessen hostilities between the parties. The court observed that the father was very concerned about his child's welfare, intensely desired to regain her custody and affirmatively demonstrated his love and affection for her. A significant fact was that the separation between the father and child "was not in any way occasioned by the dereliction or lack of interest on the part of the father." To the contrary, the evidence suggest[ed] that the father was unable to continue to maintain his relationship with his child primarily because of the attitude of the grandparents." 460 Pa. at 434, 333 A.2d at 852.

Here, no evidence was presented to indicate that the grandparents prevented or tried to prevent father from seeing or communicating with his son. There was no evidence of open hostility as was present in *Farabelli*. It appears to us that father merely chose not to cultivate a relationship with Y; he certainly manifested no *genuine* interest in him since September of 1973. (As noted above, support payments alone do not constitute the type of interest required and they will not prevent termination of parental rights where termination is otherwise warranted.)

Father asks us to believe that he cared so much for his son that he stayed away from him. But we believe that if fathers' presence upset Y emotionally, the burden was on father to

LEGAL NOTICES, cont.

Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: April 2, 1981.

DILLMAN First and final account, statement of proposed distribution and notice to the creditors of Paul R. Dillman, executor of the estate of Roscoe H. Dillman, late of Quincy Township, Franklin County, Pennsylvania, deceased.

GREENAWALT First and final account, statement of proposed distribution and notice to the creditors of Gladys N. Greenawalt, executrix of the estate of Howard H. Greenawalt, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

JONES First and final account, statement of proposed distribution and notice to the creditors of J. Carlton Jones, executor of the estate of Frances C. Jones, late of Washington Township, Franklin County, Pennsylvania, deceased.

LAMAN Second and final account, statement of proposed distribution and notice to the creditors of Allen C. Rebok, trust officer for Farmers & Merchants Trust Company, administrator of the estate of Robert H. Laman, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

MENTZER First and final account, statement of proposed distribution and notice to the creditors of Dorothy J. Mentzer Leblanc and Junior C. Mentzer, executors of the estate of Maude E. Geesaman Mentzer, late of Washington Township, Franklin County, Pennsylvania, deceased.

ORRIS First and final account, statement of proposed distribution and notice to the creditors of Hazel L. Gilbert, administratrix of the estate of Raymond D. Orris, a/k/a Ray D. Orris, late of Antrim Township, Franklin County, Pennsylvania, deceased.

RAPP First and final account, statement of proposed distribution and notice to the creditors of Elizabeth Turner, administratrix of the estate of William C. Rapp, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

ROSS First and final account, statement of proposed distribution and notice to the creditors of Winifred J. Ross, executrix of the last will and testament of Charles A. Ross, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

SANDERS First and final account, statement of proposed distribution and notice to the creditors of Robert P. Shoemaker, executor of the estate of Alice D. Sanders, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

UMBRELL First and final account, statement of proposed distribution and notice to the creditors of Jack Umbrell and George Umbrell, executors of the last will and testament of Newton A. Umbrell, late of Metal Township,

LEGAL NOTICES, cont.

Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of Orphans' Court of
Franklin County, Pennsylvania

(3-6-81, 3-13-81, 3-20-81, 3-27-81)

rectify the situation. The proper solution entailed seeing more of Y and caring more about him, not dropping out of the picture entirely. Father had the power to develop a non-upsetting relationship with his son; indeed, it was his parental duty to do so. The task might not have been easy but he was bound to work at it. "Parental rights may not be preserved by complete indifference to the daily needs of a child or by merely waiting for some more suitable financial circumstance or convenient time for the performance of parental duties and responsibilities (while others adequately provide the child with [his] immediate and continuing physical and emotional needs)." *Smith Adoption Case*, 412 Pa. 501, 505, 194 A.2d 919 (1963). We conclude that father did not utilize the resources at his command to establish and preserve a relationship with Y. By conduct continuing for a period of at least six months, it is clear that father has refused or failed to perform his parental duties.

We are mindful of the seriousness of terminating a parent's rights to his child, but termination is proper in some situations and we believe this to be one of them. The Legislature has recently expanded the grounds for termination proceedings give primary consideration to the needs and welfare of the child. See Act of 1980, October 15, P.L. , No. , 23 Pa. C.S.A. Sec. 2511(A), (B). Although this new Adoption Act will not take effect until January 1, 1981, we note these policies expressed therein which seem to facilitate termination.

Having concluded that father by conduct continuing for a period of at least six months has refused or failed to perform parental duties, we terminate his parental rights over Y. The child shall remain in the custody of the petitioners.

ORDER OF COURT

December 15, 1980, the rights of father in his son Y are terminated.

ROMALA INVESTMENT CORP. v. JOINER, C.P. Franklin County Branch, Docket Volume 7, Page 157, In Equity

Equity - Watercourses - Easement by Implication - Laches - Standing to Sue

1. The owner of higher land owns the dominant tenement and has a right