

L.A.G., Petitioner, v. J.E.S., Respondent  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Fulton County Branch  
Orphan's Court Division, Adoption Docket No. 24-2002

*Infants; Adoption; Involuntary Termination of Parental Rights; Evidence*

1. The controlling statute requires a showing that a parent's conduct evidenced a conscious intention to relinquish his parental claim to a child or a failure to perform parental duties, not both. 23 Pa.C.S.A. §2511(1)(1).
2. The statutory six-month requirement will not be mechanically applied, and parents who fail to perform their parental duties for a six-month period do not automatically and without further evidence forfeit their parental rights.
3. Although the statutory period of abandonment is not to be mechanically applied in an involuntary termination of parental rights case, neither is it to be ignored; it does provide a starting point for the Court's examination of Father's circumstances.
4. The court must examine individual circumstances of the case and any explanation offered by the parents to determine if that evidence, in light of the totality of the circumstances, clearly warrants involuntary termination of that parent's rights.
5. To benefit from any explanation, the parent must show that he exhibited reasonable firmness in attempting to overcome the obstacles or obstructive behavior of other parties in attempting to contact his child, and he must affirmatively demonstrate love, protection, and concern for the child.
6. The burden of proof in an involuntary termination of parental rights case is on the petitioner to show by clear and convincing evidence that the respondent has, through his conduct, demonstrated a settled intent to relinquish a parental claim to the child or that he failed to perform his parental duties.
7. When the Court considers involuntary termination of parental rights, the proceeding focuses on the conduct of the parents as set forth in 23 Pa.C.S.A. §2511(1)(a); however, the Court must include a consideration of the child's best interests pursuant to §2511(b).
8. 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.

Appearances:

Barbara B. Townsend, Esq., *Counsel for Petitioner*

Janice M. Hawbaker, Esq., *Counsel for Respondent*

M. Teri Stiltner, Esq., *Court-Appointed Counsel for Child*

### Findings of Fact

1. These proceedings follow the filing of a petition to involuntarily terminate the parental rights of J.E.S. (hereinafter "Father"), the biological father of M.N.S., born June 7, 1991.
2. L.A.G. (hereinafter "Mother") and Father were married on November 28, 1981, separated in July 1992, and divorced in January 1993.
3. Mother and Father were married at the time of M.N.S.'s birth, and are also the parents of a son, born October 5, 1981. The parties' son has reached the age of emancipation and is not a subject of this action.
4. M.N.S. resided with Mother, Father, and the parties' son until Mother and Father separated when M.N.S. was approximately one (1) year old. From the time of separation, the parties' son primarily resided with Father, and M.N.S. has resided with Mother.
5. Mother and Father agreed to a stay of a support which was reduced to an Order of Court dated February 20, 1995, and each parent supported the child in his or her custody. There were no subsequent actions for support by either party.
6. The parties entered into a Stipulation and Agreement for custody that was reduced to an Order of Court dated May 25, 1993, and docketed to Fulton County Court, Number 168 of 1992-C. Under the Order, Father had primary physical custody of the parties' son, and Mother had primary physical custody of M.N.S. Father had partial physical custody of M.N.S. on alternate weekends, with provisions for holidays, birthdays, and vacations.
7. Sometime in February 1996, Father ceased to exercise his partial custodial rights as provided in the May 25, 1993, Order of Court.
8. The last time M.N.S. visited with Father was on her fifth (5th) birthday, June 7, 1996, when Father brought a bicycle to M.N.S.'s aunt's home, where the aunt (Mother's sister) was then providing childcare while Mother was at work. Father spent approximately one hour with M.N.S. at the aunt's home.
9. Mother subsequently married S.G. (hereinafter "Stepfather") on October 18, 1996, and M.N.S. has lived with Mother and Stepfather since that time. Mother and Stepfather are the parents of two (2) sons who also reside with Mother, Stepfather, and M.N.S. Stepfather desires to adopt M.N.S.
10. Father last saw M.N.S. on March 27, 1999, when he drove past Mother's home and noticed that M.N.S. was in her front yard playing with her brother, at which time Father decided to stop in order to see and talk to M.N.S. M.N.S. did not recognize him and fled into the house to Mother. Mother then determined that Father was intoxicated and refused to allow him to talk to M.N.S. as he had requested. Mother asked Father to leave the premises, and when Father refused, Mother called the Pennsylvania State Police who arrested Father. As a result of this incident, Father was in violation of probation provisions stemming from his prior conviction of defrauding creditors. Subsequently, Father's probation was revoked, and he was incarcerated for nine (9) months in the Franklin County Prison.
11. Father admitted that he had been drinking and had not intended to visit M.N.S. on March 27, 1999.
12. Father has since remarried and has three (3) step-children who reside with Father and his wife.
13. Father and Father's extended family have known of M.N.S.'s whereabouts from approximately 1995, at the time of his last period of partial physical custody, until the present.
14. Father and members of his family have made attempts, though minimal, over the years to speak to M.N.S. by telephone and to give her gifts; however, Mother would hang up the telephone and prevent their having telephone contact with M.N.S. and prevent M.N.S. from receiving their gifts and cards. Father was unable to give specific dates and times of his attempts.
15. Father's sister-in-law testified that Father did not ask her to intercede on his behalf or assist him in his attempts to contact M.N.S.

16. Father's mother has not seen the child for approximately four (4) or five (5) years even though she has been aware of M.N.S.'s place of residence. Father's mother has, however, spoken to M.N.S. on a few occasions and has sent cards and/or gifts to the child since M.N.S. has lived in her current residence.
17. Mother has resided at her current address since 1999, and her telephone number has been listed in the local phone directory during her entire residence there.
18. Father's mother attempted to have telephone contact with M.N.S. through Mother in December 2002. Mother informed Father's mother that M.N.S. was asleep and hung up the telephone.
19. On December 12, 2002, Father petitioned the Court to modify the May 25, 1993, Custody Order by filing a Complaint for Partial Custody of M.N.S., requesting that his partial custody commence with short but frequent visits with the goal of exercising a significant amount of partial custody of M.N.S. as their Father/Daughter relationship naturally develops.
20. Father's custody petition was scheduled for presentation to the Court on December 17, 2002, and Mother was given Notice of the scheduled proceeding.
21. Mother responded by filing a Petition for Involuntary Termination of Parental Rights on December 17, 2002, just minutes before Father presented in open court his petition for partial custody and a temporary order of partial custody of M.N.S.
22. An Order of Court dated December 30, 2002, directed that Mother's Petition for Involuntary Termination of Parental Rights be held in abeyance pending the resolution of Father's custody action.
23. Mother filed a Petition for Reconsideration, and by Order of Court dated January 22, 2003, the December 30, 2002, Order was vacated and a hearing on the Petition for Involuntary Termination of Father's Parental Rights was scheduled and held on April 14, 2003.
24. Upon learning that she may have to visit with Father, M.N.S. became very upset and suffered shortness of breath to such an extent that Mother sought medical treatment for M.N.S.
25. In preparation for hearing, Mother retained David R. Leaman, Ed.D., to do a psychological evaluation of M.N.S. and provide an expert opinion on what impact an involuntary termination of Father's parental rights would have on M.N.S.'s emotional and psychological well being, and to prepare a report (hereinafter "Report" or "Leaman Report") of his test results and to give his opinion as an expert in the field of psychology and counseling.
26. From his testing of M.N.S. and a Behavior Checklist completed by Mother, Dr. Leaman concluded that M.N.S. is "emotionally healthy and capable of rendering a realistic and valid opinion." Dr. Leaman further stated that "in [his] clinical judgment, [he] can see no benefit for M.N.S. to have mandated visitation with her biological father," believing that "such action would produce anxiety, confusion and perhaps be debilitating to her" and possibly "hinder M.N.S.'s well being at this time." Dr. Leaman opined that "when M.N.S. is 16 years old or older, she may be curious about her biological father and have sufficient ego strength to initiate contact with him." See Leaman Report at 2. At hearing, Dr. Leaman qualified his statement in his Report, explaining that it might have been wiser for him to have said that M.N.S. may have an interest about her biological father at age eighteen (18) rather than at age sixteen (16).
27. Father never attempted to exercise his alternate weekend partial custody rights through court intervention prior to December 2002, even though he had easy access to legal representation and advice through his brother who is a lawyer and who represented Father in a previous criminal matter. At one point, Father's brother advised Father to "get his life together" prior to attempting to contact the child.
28. The last time M.N.S. saw Father and recognized him was on M.N.S.'s fifth (5th) birthday; she is now eleven (11) years old.
29. M.N.S. has no recollection of what Father looks like and would not recognize him if she were to meet him in public. M.N.S. refers to Father as "my brother's father" or "my biological father."
30. M.N.S. has attended the same elementary school since 1996, and M.N.S.'s photograph has appeared in the local newspaper numerous times over the past several years in recognition of her achieving honor roll status at school and for participating in various church and civic activities. In the caption under the newspaper photographs, M.N.S. is identified as the daughter of Mother and Stepfather.
31. It is uncontested that M.N.S. does not know Father and does not have a relationship with him. She has had no relationship with any of Father's extended family members during Father's lengthy period of absence from M.N.S.'s life.

32. Father acknowledged that he does not wish to detract from M.N.S.'s established relationship with Stepfather, but rather desires to add his life and his family's lives to M.N.S.'s circle of family relationships as they all live within the same area and have easy access to one another.

33. Teri Stiltner, Esquire, was appointed by the Court to serve as Guardian ad Litem for M.N.S. in these proceedings. Attorney Stiltner reported M.N.S.'s very definite opinions about her desire to terminate the parental rights of her biological father in order to be adopted by Stepfather with whom M.N.S. has bonded. Attorney Stiltner also reported that M.N.S. does not desire to have contact with Father.

34. At hearing, Attorney Stiltner supported the prayer of the Petition for Involuntary Termination of Parental Rights of Father as being in the best interest of M.N.S.

35. At the conclusion of the hearing on April 14, 2003, attorneys for the parties were directed to submit to the court memoranda in support of their respective positions with citations to case law and statutes.

36. The Court received memoranda from the attorneys as directed.

#### Discussion

This matter came before the Court when L.A.G., biological mother of eleven-year-old M.N.S., filed a petition to involuntarily terminate J.E.S.'s parental rights pursuant to section 2511(a)(1) of the Adoption Act, 23 Pa.C.S., which provides as follows:

(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:

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....

23 Pa.C.S. §2511(a)(1).

The controlling statute above requires a showing that a parent's conduct evidenced a conscious intention to relinquish his parental claim to a child **or** a failure to perform parental duties, not both. In re Adoption of Dale A., II, 453 Pa.Super. 106, 115, 683 A.2d 297, 301 (1996) (citations omitted). Additionally, the Pennsylvania Courts have consistently held that the statutory six-month requirement will not be mechanically applied, and parents who fail to perform their parental duties for a six-month period do not automatically and without further evidence forfeit their parental rights. Id. "Rather, the court must examine the individual circumstances of the case and any explanation offered by the parents to determine if that evidence, in light of the totality of the circumstances, clearly warrants involuntary termination of that parent's rights." Id. In making its determination, the Court must look at any obstacles, either self-created or imposed by another party, that might reasonably have been a barrier to a parent's exercising his parental rights. Id. Even so, to benefit from such an excuse, the parent must show that he exhibited reasonable firmness in attempting to overcome the obstacles or obstructive behavior of other parties in attempting to contact his child, and he must "affirmatively demonstrate love, protection, and concern for the child." Id. The burden of proof in an involuntary termination of parental rights case is on the petitioner to show by clear and convincing evidence that the respondent has, through his conduct, demonstrated a settled intent to relinquish a parental claim to the child or that he failed to perform his parental duties. In re: C.S., 761 A.2d 1197 (Pa.Super. 2000).

In the case at bar, Father admits that he has not had any direct contact with M.N.S. since March 1999 when he attempted to have contact on the spur of the moment upon seeing M.N.S. playing in her yard with her brother. And since Father was intoxicated at the time of the March 1999 stop, Father's attempt to see and talk to M.N.S. was a disaster by any standard, to wit: M.N.S. did not know who he was; she was scared; Mother called the police; the police arrested Father; Father spent the next nine (9) months in jail for a probation violation. Father credibly testified that he tried to make telephone contact with M.N.S. through Mother, but that Mother thwarted his attempts by hanging up the telephone and/or otherwise obstructing his attempts at contact. Credible testimony from Father's extended family members indicated that several attempts at telephone contact with M.N.S. through Mother were similarly obstructed by Mother. The operative question for this Court is whether Father exhibited reasonable firmness in attempting to overcome Mother's obstructionist tactics. See In re Adoption of Dale A., II, 453 Pa.Super. 106, 115, 683 A.2d 297, 301 (1996). It is hard for this Court to find evidence of any sustained good faith efforts on the part of Father to create any semblance of a father-daughter relationship with M.N.S. after 1996.

Although the statutory period of abandonment is not to be mechanically applied in an involuntary termination of parental rights case, neither is it to be ignored; it does provide a starting point for the

Court's examination of Father's circumstances. Id. Since Father has been in and out of jail and has undergone substance abuse treatment in the years between 1996 and the present, at least some of the circumstances that prevented his having direct contact with his daughter were a result of his own action, as well as inaction. Father has lived in the same area as M.N.S. since he last had contact with her in 1996, so it seems reasonable that Father would have made contact through cards, letters, or presents even if he did not feel that he could have direct contact with M.N.S. Additionally, M.N.S.'s picture has been in the local newspaper many times as a result of her being on the honor roll at the local public elementary school, as well as for other church and civic accomplishments. If not Father, then surely someone else in his local extended family would have seen at least one such picture and reported it to Father, prompting him to acknowledge the occasion with a congratulatory note. However, no testimony was presented of such natural gestures from one family member to another. This Court finds little evidence that Father affirmatively demonstrated his interest, love, and concern for M.N.S. from 1996 until December 2002, when he filed his petition to modify the current custody order and requested visitation with M.N.S. But this Court counts as significant the fact that within the six (6) months immediately preceding Mother's filing of the petition, Father gathered his wits, money, resolve, and ego and took the risk of public humiliation and disappointment by asking the Court to let him, after too long a time, take baby steps back into his young daughter's life. However, no matter how compelling Father's desire now to establish a relationship with M.N.S., **his** desire and motivation is not the primary consideration of this Court in this involuntary termination action.

When the Court considers involuntary termination of parental rights, the proceeding focuses on the conduct of the parents as set forth in 23 Pa.C.S.A. §2511(a)(1). However, the Court must include a consideration of the child's best interests pursuant to §2511(b) which provides as follows:

(b) Other considerations.—The court in terminating the rights of a parent shall give primary consideration to the developmental, physical and emotional needs and welfare of the child....

23 Pa.C.S.A. §2511(b).

Stated another way, the primary consideration of this Court in this action is what would be in M.N.S.'s best interest. To assist the Court in consideration of a child's developmental, physical and emotional needs, this Court's custom is to substantially rely upon the test results, interviews, and interpretations/conclusions drawn therefrom, as articulated in the evaluator's expert report. At hearing, Dr. Leaman testified that although he has done six (6) or seven (7) child custody evaluations, this is the first evaluation that he has done for the purpose of determining "what impact [involuntarily terminating Father's rights] would have upon [M.N.S.'s] emotional and psychological well being. The most critical questions pertain to what is in the child's best interest." Dr. Leaman focused his evaluation on essentially two (2) questions:

1. Is it psychologically better for [M.N.S.] to have no contact with [Father] under an Order of Termination of the father's right, or is it more healthy for her to have systematic visitation with him?
2. Would it be traumatizing or emotionally detrimental for M.N.S. to have mandated visitation with [Father]?

From his evaluation, Dr. Leaman concludes that M.N.S. is "emotionally healthy and capable of rendering a realistic and valid opinion" which is that she wishes her life to remain as it is with Mother and Stepfather, with whom "she feels safe, secure, and loved," and she does not want to have contact with her biological father. Dr. Leaman further stated "the thought of having to visit with [Father] causes anxiety and frightens her." In his "Conclusions," Dr. Leaman ended his report by opining as follows:

In my clinical judgment, I can see no benefit for [M.N.S.] to have mandated visitation with her biological father. I believe such action would produce anxiety, confusion and **perhaps** be debilitating to her. It is not worth the **possible** risk of hindering her emotional well being at this time. When M.N.S. is 16 years old or older, she may be curious about her biological father and have sufficient ego strength to initiate contact with him. Such action would need to be carefully deliberated and initiated by [M.N.S.] at that time.

Regarding the issue of terminating the biological father's rights, I do not believe this legal mandate would impact [M.N.S.] negatively. She has no concept of [Father] being a father to her, and no meaningful relationship or connection with him. Therefore, such legal action is **not likely** to alter her lifestyle or affect her emotional status in any discernible manner. In fact, she **probably** will feel relieved to have the assurance of no contact with him. (Emphasis added).

Dr. Leaman's use of equivocating language in his final remarks is troubling for this Court. As this Court grapples with what is in the best interest of M.N.S., it is also weighing the magnitude of such an extreme action as legally terminating Father's parental rights. There is no question that Father has not maintained a place of familial importance in M.N.S.'s life, and the record suggests that Father's family was prevented

by Mother from doing so, but even they, too, seemed to exert minimal efforts to remain in M.N.S.'s life. But nowhere in his report does Dr. Leaman conclude that it would be in M.N.S.'s best interest if Father's parental rights were terminated. There is a great divide between asserting that he does "not believe that terminating Father's parental rights would impact M.N.S. negatively" and stating that to do so is in M.N.S.'s best interest. The same divide exists for the statement, "such legal action is not likely to alter her lifestyle or affect her emotional status in any discernible manner." This Court is not willing to equate the two statements as determinations of the best interest of the child standard or the clear and convincing evidence standard.

Causing further concern for Mother's position is the statement by Dr. Leaman that the child may wish to contact Father at some point in the future. This acknowledgement supports the strength of the biological bond that should only be severed in the most certain of circumstances.

#### Conclusion

"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." *Adoption of M.S.*, 445 Pa.Super. 177, 182, 664 A.2d 1370, 1372 (1995). In the case at bar, this Court cannot without hesitation involuntarily terminate Father's parental rights where the record is not clear concerning the effect of the termination of Father's rights on M.N.S. See *In re: Adoption of Charles E.D.M., II*, 550 Pa. 595, 708 A.2d 88 (1998). Without clear and convincing evidence that the involuntary termination of Father's parental rights is in the best interest of M.N.S., this Court is not willing to make such an extreme legal determination. Further, the Court gives great weight to the action of Father in seeking a determination of his custodial rights prior to Mother filing the instant Petition.

#### ORDER OF COURT

And now this 21st day of May, 2003, it is hereby ordered and decreed that:

1. Petitioner's Petition for Involuntary Termination of Parental Rights is denied.
2. The costs of the services of the Court-appointed attorney, M. Teri Stiltner, Esquire, shall be paid by the Petitioner, and it is hereby directed that Attorney Stiltner shall furnish counsel for the Petitioner with a statement for her services rendered. Payment shall be paid by Petitioner within thirty days of her legal counsel's receipt thereof.

At hearing, Dr. Leaman testified that it was not actually a Child Custody Evaluation as the heading on the report suggests, but rather a psychological evaluation of M.N.S. for the purpose of determining what impact the action of involuntary termination of Father's parental rights would have on M.N.S.

Leaman Report at 1.

Id.

Id. at 3.

Id.

Id.

Id.

Id.