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**SUPERIOR COURT AFFIRMS DECISION TO DENY PETITION FOR  
INVOLUNTARY TERMINATION OF PARENTAL RIGHTS DUE TO FAILURE  
TO OFFER SUFFICIENT EVIDENCE THAT PROPOSED ADOPTION  
WOULD SERVE THE CHILD'S BEST INTERESTS  
BY JONATHAN T. HOFFMAN, ESQ.**

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IN RE E.M.I., 57 A.3d 1278 (Pa. Super. 2012)

**SUMMARY**

On Dec. 11, 2012, the Superior Court of Pennsylvania (Gantman, Wecht and Fitzgerald, J.J.) affirmed the Clarion County Court of Common Pleas (Arner, J.) decision to deny mother's petition for involuntary termination of father's rights. In rendering its decision, the Superior Court found that mother offered insufficient evidence that the proposed adoption of the child by mother's domestic partner would serve the child's best interest under the Adoption Act.

**FACTUAL AND PROCEDURAL HISTORY**

Appellant L.J.I. (mother) and D.J.C. (father) are the natural parents of E.M.I. (child), who was born in 2008. The parties were in their early 20s, were never married and ended their relationship prior to mother's delivery of the baby in 2008. Father resides in Butler County, where he is employed, and mother resides in Clarion County, near the university she currently attends.

After child's birth and while mother was living in Karns City with maternal grandfather, father would visit the child on a weekly basis. Over time, father spent less time with child, resulting in monthly visits that would last approximately one to two hours. When mother moved to Clarion County, father's relationship with child diminished to informal visits with child when mother would come to Karns City to visit maternal grandfather. Often times, the informal visits would "fall through" and father would not see child. Since 2009, father has only seen child a few times.

Father does not pay child support, has no telephone contact with child and has not written to child. During father's last visit, child did not recognize him.

In 2009 mother began a relationship with a woman she has continuously dated, with the exception of a two to three month period at the end of 2010, when mother and her partner temporarily split up. Mother and her partner currently live with child, maternal grandmother and maternal step-grandfather. Mother is a student, but has saved money by working at various summer jobs.

Mother's partner, at the time of the hearing, was planning to enlist in the military and would leave for basic training in the summer of 2012. In December 2011, mother and her partner traveled to New York and married in a civil ceremony.

Child is a well-adjusted 4-year-old who is enrolled in school and involved in a variety of activities. Mother's partner assists with child's care, including bathing, feeding and dressing child. She also picks up child up from school when mother or maternal grandmother are not available. Mother alleges that her partner and child are extremely close, express mutual affection, and say "I love you" to one another. Parts of Judge Arner's record describe the partner's relationship with child as "friend-like" while other parts support mother's notion that mother's partner is a secondary parent.

On Dec. 2, 2011, mother filed a petition for involuntary termination of father's rights. Mother alleged that father had no relationship with child and that mother's partner planned to adopt child. During two hearings, mother, father, maternal grandmother, maternal grandfather and paternal grandmother testified. Despite mother's partner's presence at the hearings, mother's partner did not testify and little testimony was elicited from the other witnesses regarding the partner's intent to adopt child. Substantial testimony was heard from each side about father's role in child's life.

After the conclusion of the hearing, Judge Arner issued a decision denying mother's petition for involuntary termination of father's rights. Judge Arner found that father had no meaningful relationship with child, that father's inaction demonstrated a settled purpose to relinquish his rights to child, that child was well cared for while with mother and that termination of father's rights would not negatively affect the child's well-being. Significantly, however, Judge Arner found that mother had failed to demonstrate the strength of her partner's potential adoption of the child. As the adoption was a necessary prerequisite to the success of mother's petition to terminate father's rights, Judge Arner denied the petition.

Mother filed a timely notice of appeal on May 17, 2012, after which Judge Arner authored a concise statement of errors complained of on appeal. Mother timely complied and raised three issues on appeal.

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## CASE NOTES

### ANALYSIS

Mother's first claim on appeal centers around her belief that since Judge Arner found that father failed to fulfill his parental duties and that the termination of his parental rights would not adversely affect child's best interests, the decision to not grant her petition to terminate runs contrary to the child's best interests and results in maintenance of delinquent father's rights to child.

Mother's additional issues on appeal center on her disagreement with Judge Arner's reading and interpretation of the Adoption Act. Mother specifically challenges Judge Arner's analysis of Section 2511(b), which focused on whether a termination of parental rights would serve the developmental, physical and emotional needs of child.

The burden of proof in a termination case rests with the petitioning party who must establish valid grounds for termination by clear and convincing evidence. *In re J.L.C.*, 2003 PA Super 466, 837 A.2d 1247, 1251 (Pa. Super. 2003).

Mother's petition falls under the Adoption Act at 23 Pa. C.S.A. §2101. Strict compliance with the Adoption Act is a prerequisite to the trial court's jurisdiction to hear a petition to terminate parental rights in connection with a proposed adoption.

Section 2512 of the Adoption Act determines who may bring a petition for involuntary termination and what the petition must contain. Subsection (a)(1) allows either parent to file a petition to terminate the other's rights with respect to a child under the age of 18. Subsection (b) requires a specific statement regarding the grounds and facts for the termination. In addition, a petition must contain an averment that the petitioner will assume custody of the child until such time as the child is adopted and that an adoption of the child is foreseeable.

The relevant case law has analyzed Subsection (b) of Section 2512 and determined that even where one parent has clearly abandoned a child, without a plan for an anticipated adoption of the child, any petition to terminate must be denied. Further, in Judge Arner's review of the legislative intent of the Adoption Act, he found it clear that the Legislature viewed the granting of an involuntary petition for termination to be available solely as an aid to adoption. As such, without an attendant plan for adoption, termination of one of the parent's rights would be an improper remedy that would not serve the best interests of a minor child.

The Adoption Act, under Section 2312, allows any individual to become an adopting parent as long as he or she complies with the statutory requirements of the act. Since Pennsylvania does not recognize same-sex marriages, mother's partner's potential adoption must be considered as a non-spouse adoption rather than an adoption as a spouse or step-parent under Section 2903. As such, different statutory requirements will apply.

As a general rule, the filing biological parent does not have to file an accompanying report of intention to adopt at the time of the filing of their petition to terminate; however, for non-spouse

adoptions, the case law suggests that the petition to terminate should be accompanied by the a non-exempt person's intention for adoption. *In re Adoption of L.J.B.*, 18 A.3d 1098, 1107 (Pa. 2011).

Assuming the termination meets the threshold requirements of the Adoption Act, the Superior Court proceeded to the two-part test statutorily established for termination of paternal rights under Section 2511 of the act. The initial consideration of the test focuses on the conduct of the parent whose rights are at issue. The party seeking termination must demonstrate under Section 2511(a)(1) that the other parent has shown a settled purpose to relinquish his/her parental claim to the child or failed to perform parental duties for at least six months prior to the termination petition. The second prong of the test focuses on the needs and welfare of the child. The case law interpreting this provision broadly focuses on "whether termination of parental rights would best serve the development, physical, and emotional needs and welfare of the child." *In re Z.P.*, 994 A.2d 1108, 1121 (Pa. Super. 2010). Included in this determination should be an inquiry into intangibles such as "love, comfort, security, and stability" when determining the needs and welfare of the child. *In re T.D.*, 949 A.2d 910 (Pa. Super. 2008). In order to meet the requirements of the second prong of Section 2511 test, case law indicates that at the termination hearing, the petitioning parent must demonstrate that the planned adoption is also in the child's best interest of the child.

In the present matter, mother's petition to terminate appropriately addresses father's parental issues, raises her partner's desire to adopt child after termination and mother's agreement to assume and continue to assume custody of child until the time child is adopted. Accordingly, mother satisfies the minimal requirements to invoke the trial court's jurisdiction.

The court's decision in the matter then properly focused on the analysis of Sections 2511 (a) and (b). Mother argues that father's rights should have been terminated as she met the requirements of Section 2511(a), however mother's position does not take into account the requirement to examine the "contemplated adoption" as part of the 2511(b) analysis. In order to succeed on her petition, mother had to prove to Judge Arner that another person existed with the present intent to adopt child.

Judge Arner made findings under Section 2511(a) regarding father's parental role in child's life including that "it cannot be said that termination of his [(father's)] rights will negatively effect the general welfare of the child." Accordingly, the first prong of Section 2511(a) was clearly satisfied by mother. However, the Section 2511(b) requirements remained at issue.

In conducting this "proposed adoption" analysis under Section 2511(b), the Superior Court borrowed the "cause shown" standard of Section 2901 of the Adoption Act, which gave the Superior Court foundation for deciding whether a proposed adoption of the child by mother's partner would place child in a new parent-child relationship with mother's partner, foster the creation

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## CASE NOTES

of a new family unit for child and further child's best interest. The purpose of the "cause shown" analysis was consistent with legal precedent that requires trial courts to review the integrity of the proposed adoption and whether the adoption was likely to happen. *In re T.R.*, 502 Pa. 165, 169 n.10, 465 A.2d 642, 644 n.10 (1983).

Under this analysis, the Superior Court had concerns regarding the proposed adoption, including the lack of parent-child relationship between mother's partner and child, that an adoption by mother's partner would not create a new family unit for child and would not serve child's best interests. The Superior Court's concerns were supported by Judge Arner's findings that despite mother's partner living with the family, maternal grandmother, maternal step-grandfather and mother have assumed the primary responsibilities for care of child. The presence of these family members and their roles as caregivers and sources of financial support led the Superior Court to conclude that mother's partner had not played a defined parental role in child's life. Further, mother and her partner never lived alone as a family unit. Mother and her partner's courtship was approximately three years, with a break-up in 2010 for three months and there was no evidence of record that showed that mother and her partner were able to financially support themselves or that mother's partner had ever financially supported child.

In addition to the above findings, mother's partner's plan to join the military and be separated from the family for an extended period of time could create instability in child's life and perhaps in mother's relationship with her partner. This finding, coupled with mother's partner's absence from the first two years of child's life, were heavily considered by the Superior Court.

Judge Arner, in a later opinion, also felt that mother had a full opportunity to show cause why mother's partner should be able to adopt child. However, without mother's partner's testimony regarding this matter, the Superior Court had difficulty in determining the stability of her relationship with mother, how mother's partner viewed her role in child's life, mother's partner's intent to adopt child, the effect of mother's partner's enrollment in the military, her being moved away for an extended period of time, and how mother's partner would realistically maintain a parental role in child's life. Distilled to its essence, mother's decision to not have her partner testify at the hearing played a significant role in the Superior Court's rejection of the "proposed adoption" element relied upon by the Court in its 2511(b) analysis.

It was mother's clear burden to present adequate evidence to support her petition to terminate father's rights, and as such, mother must bear the responsibility for her complaints that the Superior Court made a decision based on an incomplete record. mother attempted to rely on a similar case to support her notion that the matter should be remanded to garner further information. However, the Superior Court was able to clearly distinguish the case. In the case mother cited, the trial court failed to conduct

an analysis of the Section 2901 "good cause" standard. Here, the "good cause" standard was explored and it was found that there was insufficient evidence to establish the necessary "good cause" to terminate father's parental rights. In further distinguishing mother's cited case, the Superior Court noted that in the former case, the Superior Court received significant testimony from grandfather (the person seeking adoption) of his role in the child's life, his care-giving duties, his financial support in the past and his future planned financial support. As such, the Superior Court found no validity in mother's comparison to the case.

Based on the above, the Superior Court found that Judge Arner did not abuse his discretion denying mother's petition to terminate.

## CASE NOTE AUTHOR'S EDITORIAL COMMENTS

At a minimum, it appears that there are two lessons the practitioner can learn from the above matter. First, the case law seems to point that the non-exempt parent's intention to adopt should be included in the filing parent's petition to terminate. While the case law is not clear on the detail the averment of intention to adopt needs to be, or whether it needs to be attached to the petition to terminate, it appears that attaching the filing and providing as many details as possible would be advisable. In addition, without the potential adopting parent's testimony as to his or her intentions to adopt, relationship with the child, defined parental role, ability to support the child and feelings toward the child, it would be extremely difficult for a trial court to make any of these necessary findings. With the above testimony in this case from mother's partner, the outcome may very well have been substantially different.