The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2021
PHILADELPHIA, SEPTEMBER 16, 2021
An ALM Publication

Recent Pa. Supreme Court Decision Addresses Tough Custody Cases

BY LAWRENCE J. "SKIP" PERSICK

You get a call from a young mom, more likely the parent of a young mom. She has been raising her child with significant help from her parents. That help is financial, emotional and substantial. The mother and child live with grandparents, or the grandparents are with the mother and the child almost all of the time, providing childcare, driving the child here and there, coaching the team with mom—you name it.

And where is the father? You have come across guys like this before. He has some combination of mental health/substance abuse/criminal issues that keep him from playing an active role in his child's life. He is thousands behind in child support, maybe in prison, and shows little interest in the child. As the child gets older, the contact with the father seems to become less frequent and of shorter duration. The reports you get are that the child doesn't even remember who the father is. I don't mean to sound sexist, but in 30-plus years I can only remember two "dead beat mom" stories. That being said, the reverse situation obviously does occur.

Complicating things is that the father's behavior seems to go in cycles. He disappears for a while but after a stint in jail or rehab, he has decided to clean up his act and be a father to his child. At first, the mother accommodates him and then as the cycles go on and time passes by, the mother and her family go from avoiding the guy to outright thwarting any efforts the father may make to contact his child. For a while, the father puts up with this and then, spurred on by his family or a new significant other, he files for custody.

The mother, or the mother and her family, come to you. Their instructions to you? The deadbeat does not see that child. How exactly do you do this? Later in this article, I will offer some ideas on what a family law practitioner can do, but some recent opinions of the Pennsylvania Supreme Court have told us what we *cannot* do.

The more recent of the cases to which I refer is *In re Adoption of C.M.*, __A.3rd__, 2021 Lexis 3063 (Pa. July 21, 2021). That case addresses a fact pattern much like what I described above. The parents resided together in Texas; however, the child was born in Pennsylvania in 2016, while the mother was

Weber Gallagher Simpson Stapleton Fires & Newby partner Lawrence J. "Skip" Persick.

residing with her parents. The father was present in Pennsylvania for the birth and bought a few items for the child, went back to Texas but later also moved back to Pennsylvania. The father tried to reach the mother by telephone for a period of time, but she blocked his calls. She did allow the father to see the child in a park for a few visits and then stopped these visits. The father tried to schedule more visits but gave up for a period of time, which was followed by incarceration, in-patient treatment for post-traumatic stress disorder and then a half-way house.

The father then settles down, gets married, and has another child. Over two years after last seeing the child in question, the father attempts to contact the mother again and gets

a text telling him not to contact her anymore. The father files a custody complaint and almost immediately after a custody conciliation conference where the parties could not reach an agreement, the maternal grandparents, joined by the mother, file for termination of parental rights under 23 Pa CSA Section 2511(a)(1), citing a failure to perform parental duties for six months prior to filing the petition. The interesting twist in this case is that the mother signed a consent to adoption relinquishing her parental rights in favor of her parents adopting her child.

The grandparents and the mother cited the mother's diagnosis of lupus as the reason why she chose to relinquish her parental rights. The trial court, based on the mother and maternal grandfather's testimony alone—meaning that there was no expert testimony—accepted that the mother's lupus was sufficiently life threatening, and that it justified an adoption of the child by the maternal grandparents; and based on father's tenuous relationship with the child, the trial court granted the petition for involuntary termination, relative to the father, and accepted the mother's consent to adoption.

The father appealed to the Pennsylvania Superior Court and that court reversed in a 2-1 decision. The Superior Court focused on one particular fact: that the mother and the child lived with the maternal grandparents and would continue to do so for the foreseeable future with the maternal grandparents acting more as parents for the child than as grandparents. Additionally, the mother's relationship with the child would not change whether her rights were terminated or not. Based on these facts, the Superior Court concluded that the proposed adoption was not valid because it did not create a new family unit or a new parent-child relationship, which is the purpose of the Adoption Act. On top of that, the Superior Court found that the filing of a petition to terminate the father's parental rights constituted gamesmanship in a custody proceeding and not an appropriate use of the Adoption Act.

In large part, the Superior Court opinion in the *C.M.* case relies on an earlier Pennsylvania Supreme Court case: *In re Adoption of M.R.D.,* 145 A 3rd 1117 (Pa. 2016). To understand the holdings of both the Superior and Supreme Court in *C.M.*, an understanding of *M.R.D.* is necessary. The facts are similar to those in *C.M.*; both parents lived together in another state and the mother became pregnant, moving back to her parents' residence in Pennsylvania to give birth to twins. Over the next few years, the father made a few half-hearted and, ultimately, unsuccessful efforts to contact the mother and have a relationship with the children. After his efforts were frustrated, the father filed a custody complaint.

The mother and the maternal grandparents' response, much like in *C.M.*, was to file to terminate father's parental rights. The difference between *C.M.* and *M.R.D.* is that in *M.R.D.*, the mother and the maternal grandfather sought to have the father's parental rights terminated with the mother retaining her rights and the grandfather becoming both an adoptive "father" and biological grandfather. Similar to *C.M.*, the natural grandfather in *M.R.D.* filled the void left by the father's absence, regularly sharing parental duties with the mother in the father's absence.

The adoption issue in *M.R.D.* is whether or not the "cause" exception in 23 Pa C.S.A. Section 2901 is applicable to this fact situation. This exception comes from *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002), that being Pennsylvania's same sex adoption case where a birth parent was ultimately granted court permission to not specifically comply with every requirement of the Adoption Act so that her same-sex partner could adopt her child.

The trial court in *M.R.D.* granted the exception and allowed the adoption. The Superior Court affirmed, focusing on birth father's poor history. The Supreme Court reversed, citing the purpose of the Adoption Act and no new familial relationship being created.

Importantly, in *M.R.D.* the Superior Court raised the issue of misusing the Adoption Act in difficult child custody cases. In fact, that is what both *C.M.* and *M.R.D.* are, custody cases that have gone to an extreme. In both, the fathers who had been far from exemplary, particularly in their children's younger years, filing for custody after their efforts to establish relationships with their children were foiled by the children's mothers and maternal grandparents. In response, the mothers and maternal grandparents have filed to terminate the fathers' parental rights.

In *M.R.D.,* there is an admonition to the family law bar that this is a

misuse of the Adoption Act, and that the Supreme Court must "ensure that we do not open the floodgates to such gamesmanship." It is noteworthy that *M.R.D.* was decided in 2016 and the termination of parental rights petition in *C.M.* was filed in 2019. Obviously, counsel for the maternal grandparents in *C.M.* was aware of the *M.R.D.* decision and tried to tailor his or her case to the *M.R.D.* holding. Ultimately, this strategy failed.

The Supreme Court reversed the Superior Court's *C.M.* decision on sufficiency of the evidence grounds, not purely on the gamesmanship idea cited by the Superior Court. Specifically, the father filed for custody, participated in the Common Pleas Court's custody process, and then was served with a termination petition. The section of the Adoption Act cited by the maternal grandparents in *C.M.* and the mother and the maternal grandparents in *M.R.D.* in their termination of parental rights petitions is 23 Pa C.S.A. Section 2511(a)(1), dealing with a settled purpose or failure to perform parental duties. This section states that the time period to consider whether or not there has been such inaction is six months immediately preceding the filing of the petition. The Supreme Court specifically holds that filing a custody complaint and participating in custody litigation constitutes an affirmative performance of a positive parental duty, so in seeking custody the six-month period is tolled and grounds for termination no longer exist. Also implicit in the Supreme Court's *C.M.* opinion is that there is a distinct difference between a custody proceeding and an adoption proceeding, and one should not be used in retaliation for the other. Also, while the majority opinion in *C.M.* relies on sufficiency of evidence, there are two joining opinions that rely heavily on the *M.R.D.* concept of custody gamesmanship.

In any event, the message to practitioners is clear: do not use a termination of parental rights petition as a response to a custody action. So, what do you say to that young mother and her parents who call you for representation? They want the "deadbeat" out of their lives. There are a few things you can propose. If this has been an ongoing situation, and there is no custody proceeding pending—if the facts so warrant, a termination of parental rights petition can be filed before the father seeks custody. Just as a termination of parental rights petition is not an appropriate response to a custody complaint, a custody complaint is not an appropriate response to a termination petition.

Also—and I understand the concept of trying to get blood from a stone—but consider a support complaint. An increasing arrearage balance and aggressive enforcement efforts make the signing of a consent to adoption that much more appealing to an on-again, off-again father. Finally, and I realize most clients do not like this idea, but just let the custody process run its course. In my experience, no court is going to give overnight visits to a father who has been out of a child's life for, literally, years. Initially, there will be requirements like mental health evaluations, drug and alcohol testing, and parent education and counseling. Those requirements lead to controlled or supervised visits, followed by a few hours, then larger visits, and finally, assuming all of that has gone well, full weekends. That process takes time and also focuses on the part of the parent. Those parents who are truly motivated and concerned for their child will follow through, much to the child's benefit, but that is the exception more than the rule. Usually, the parent who has been absent for so long will fall back into prior habits, gradually fading away. After another period of fading away, that is when you reexamine the grounds for termination of parental rights, and, if the facts warrant, file the appropriate petition and move forward.

Lawrence J. "Skip" Persick, *a partner at the King of Prussia office of Weber Gallagher Simpson Stapleton Fires & Newby, concentrates his practice on resolving complex family law issues such as divorce, custody disputes, child support matters, and adoptions. Contact him at spersick@wglaw.com.*

Reprinted with permission from the September 16, 2021 Edition of THE LEGAL INTELLIGENCER © 2021 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-256-2472, reprints@alm.com or visit www.almreprints.com. # TLI-09232021-520881