

No.

19-8352

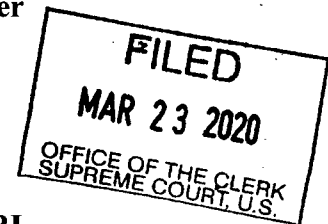
IN THE
SUPREME COURT OF THE UNITED STATES

**KENNETH SIMMONS., III
PETITIONER**

VS.

**R.E.R.S., A Minor,
D.M.P. Natural Mother and M.D.P. Step-Father
RESPONDENT**

ORIGINAL



ON PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

**KENNETH SIMMONS., III
SCI-ALBION
10745 ROUTE 18
ALBION, PA 16475-0001**

QUESTION(S) PRESENTED

Mr. Simmons alleges that the Court of Common Pleas, Superior Court and the Supreme Court erred in that natural father failed to show that he made the substantial efforts to maintain contact with minor child, prior to, during and following the critical 6-month period prior to the filing of the involuntary termination petition.

Did the Supreme Court err in deferring to the state court when it concluded that continuing parental rights for natural father would be contrary to the minor child's best interest.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the Supreme Court to review the merits appears at **Appendix A**, and the petition is reported at **691 MAL 2019** and is unreported, date December 27, 2019

The opinion of the Superior Court appears at **Appendix B**, and the petition is reported at **561 MDA 2019** and is unpublished, date October 8, 2019.

The opinion of the Orphan's Court and the Decree appears at **Appendix C** and is dated November 13, 2018.

The Notes of Testimony appears at **Appendix D**, dated December 14, 2018, pages 5 and 7.

The Notes of Testimony appears at **Appendix E**, date October 8, 2019, pages 11-61.

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Monthly statement where I sent my daughter money **Appendix F**.

My Angel Tree gift sent to my daughter **Appendix G**,

JURISDICTION

The Jurisdiction of this Court is invoked under **28 U. S. C. § 1257 (a)**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Before a state may sever completely and irrevocably the rights of parents in their natural child, due process clause of the **Fourteenth Amendment** insofar as it authorizes termination, over parental objection, of the rights of parents in their child upon a finding that the child is “permanently neglected” when the finding is supported by a fair preponderance of evidence.

Determination of the precise burden equal to or greater than the “clear and convincing evidence standard of proof, which is to be applied in a state’s parental rights law properly left to state legislatures and to state courts.

STATEMENT OF THE CASE

On December 11, 2017, natural mother D.M.P. and her husband M.D.P. filed a Petition for involuntary termination of parental rights. On January 19, 2018, natural father filed an affidavit in Propria persona wherein natural father opposed termination of his parental rights. On February 5, 2018, the Court appointed Robert M. Covell, Esquire as guardian ad item for the child. By order dated April 19, 2018, and filed April 20, 2018, the Court appointed Lance T. Marshall, Esquire to serve as counsel for natural father in the ITPR proceedings.

The first of two hearings were held by the Court on May 9, 2018, where natural father was represented by attorney Marshall. On September 24, 2018, Justin P. Miller, Esquire entered his appearance on behalf of natural father, replacing prior counsel Lance T. Marshall, Esquire. On October 10, 2018, the Court completed hearing on the petition for involuntary termination of parental rights, where natural father was represented by Attorney Miller. On November 13, 2018, the Court entered its Decree terminating the parental rights of natural father. On November 16, 2018, the Court filed a Memorandum with Findings of Facts supporting the Court's termination decree.

Natural father filed pro se pleadings throughout the proceedings, such that the Court entered an Order On April 1, 2019, fixing November 21, 2018, as the filing date for natural father's Notice of Appeal from the November 13, 2018. Order terminating natural father's parental rights. On April 1, 2019

the Court also entered a separate Order granting natural father permission to proceed Informa Pauperis. By Order dated April 17, 2019, and filed April 22, 2019, the Superior Court granted natural father's counsel, Attorney Justin P. Miller's application to withdraw.

By Order dated and filed April 29, 2019, the lower Court appointed William Tressler, Esquire to represent natural father. On or about June 24, 2019, William Tressler filed a Concise Statement of Errors Complained of on Appeal. On June 25, 2019, the lower Court entered an Order referencing the Court's written memorandum filed November 16, 2018, and the Court directed the Clerk of the Orphan's Court to transmit the record to the Pennsylvania Superior Court. The Supreme Court denied review on December 28, 2019. The Honorable George N. Zanic, President Judge's determination is to be reviewed.

REASONS FOR GRANTING THE PETITION

Natural father, K.O.S., III and natural mother D.M.P. started their relationship on or around December 14, 2014. *N.T. 5/9/2018 at page 5*. On December 10, 2015, R.E.R.S. (hereinafter "the child") was born to natural parents D.M.P. and K.O.S., III. *Id at page 7*. On July 18, 2015, natural father was incarcerated, initially at Cambria County. *Id at page 8* and *N.T., October 10, 2018 at page 4*. On or around March 28, 2017, natural father was transferred to a State Correctional Institution following a sentence of 11 to 25 years for his plea to third degree murder. *N.T., October 10, 2018 at pg. 4, pg. 7*. Natural father has remained incarcerated since initial incarceration to the present. *Id. at pg. 4*.

In the instant case, natural father utilized his limited resources to support his relationship with the child. Prior to state incarceration he would see his daughter weekly when natural mother would bring the child to Cambria County Jail for Saturday visits. When natural mother sought to cut off contact with natural father, K.O.S., III, would maintain regular contact with his daughter through his mother and then through his mother and father when paternal grandfather returned home in September, 2017. Natural father would call his daughter every other Saturday, when natural father's mother would have custody of the child. *N.T. October 10, 2018 at pg. 11.*

Natural mother, following her marriage, did nothing to make visitation and contact with the child workable. Yet, natural father continued to take affirmative steps to maintain his relationship with his daughter.

Natural father attended parenting classes in September 2018. Father first initiated parenting classes prior to the filing of the ITPR as was he was on a waiting list for parenting classes for a year. *Id. at 9-10.*

WHEREFORE, natural father K.O.S., III, prays that this Honorable Court vacate the trial court's order terminating his parental rights.

B. The trial court committed reversible error by failing to "give primary consideration to the developmental, physical and emotional needs and welfare of the child". 23 Pa. C.S.A. § 2511 (b).

23 Pa. C.S.A. § 2511 (b) requires the trial court to give "primary consideration to the developmental, physical, and emotional needs and welfare of the child. *In the Matter of K.K.R.S.*, 958 A.2d 529 (Pa.Super. 2008). In the case at bar natural father adduced ample evidence of the relationship he seeks to cultivate with his daughter. Despite natural mother's concerted efforts to bar a meaningful relationship between natural father and the child, the child knows who her father is when he calls. *N.T. October 10, 2019 at pg. 33.* Paternal grandfather testified that

natural father would have 15 minutes per call from prison. Natural father would call 3 or 4 times to speak with or speak to his daughter. *Id. at pg. 38.* Maternal grandmother testified that on the weekends where she had custody, natural father would telephone "a little after 10:00 o'clock and then we will tell [R.E.R.S.] "your dad's on the phone." *Id. at pg. 46.* Maternal grandmother placed pictures throughout her house. When the child is on the phone with natural father, she would say Daddy and I love you. *Id.* When maternal grandmother was taking the child to county jail to visit natural father, the child would kiss the glass between the child and natural father. *Id. at pg. 47.*

The trial court committed reversible error by failing to "give primary consideration to the developmental, physical and emotional needs and welfare of the child". 23 Pa. C.S.A. § 2511 (b). At the close of testimony by the parties, the Court erred in the following exchange between the trial court and the guardian ad litem.

THE COURT: You're the guardian ad litem in both cases?

MR. COVELL: Yes, [y]our Honor.

THE COURT: As far as what's in the – you're inclined what is in your client's best interest you don't need to offer an opinion as to that. We will deal with the facts on that. As far as the custody case goes, we're scheduled for that today as well. We do need to take some additional testimony on that because I need to determine what is appropriate there but I also don't think it's appropriate to proceed with that until I make a final determination on the termination of parental rights of Mr. S....., so I am going to recess both hearings. The testimony is complete on the termination and I will make a ruling on that.

Id. at pg. 60-61.

The Petitioner states that the Orphan Court's only support for their opinion against Petitioner is that he is incarcerated. In R. E. Adoption of S.P., 47 A.3d 817, 829-30 (Pa 2012). "Where a parent is incarcerated, the fact of incarceration does not in itself provide grounds for termination of parental rights. Id. at 286. In R.E. the Adoption of Dale, A., II Supra at 302. An incarcerated parent is expected to utilize all available resources to foster a continuing close relationship with his or her children. In The interest of A. P., 692 A.2d 240, 245 (Pa. Super 1997) (internal citations omitted). Petitioner K.O.S. has demonstrated that he made every attempt to be in his minor daughter's life as the certified record states. See N.T. October 10, 2018 at pg. 11. **Petitioner states that the certified record is contrary to the opinion of the Orphan Court, and the factual findings are not supported, the court made an error of law and abused its discretion in terminating K.O.S.'s parental rights.** In the process of litigation, the Orphan Court irrevocably prohibited Petitioner from contacting his daughter so he could not possibly maintain the relationship he was previously establishing.

As held in In R. E. Adoption of S.P., 47 A.3d 817, 826 Pa 2012 [A]ppellate Courts must apply an abuse of discretion standard when considering a trial Courts determination of a petition for termination of parental rights as in dependency cases, our standard of review requires an appellate Court to accept the findings of fact and creditability of the trial Court if they are supported by the record. In R.E.R.J.T., 609 Pa 9, A.3d 1179, 1190 (Pa.2010).

If the factual findings are supported, Appellate Courts review, to determine if the trial Court made an error of law or abused its discretion. In R.I.S., 36 A.3d 567, 572 (Pa. 2011), as has often been stated, an abuse of discretion does not result merely because the reviewing Court might have reached a different conclusion. Id. Instead, a decision may be reversed for an abuse of discretion only upon demonstration of unreasonableness, partiality, prejudice, bias, or ill-will Id.

Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence, therefore a state statute violates the due process of the Fourteenth Amendment insofar as it authorizes termination over parental objections of the rights of parents in their natural child upon a finding that the child is “**permanently neglected**” when the findings is supported by a fair preponderance of evidence. *John Santosky II and Anne Santosky vs. Bernhardt S. Kramer., Ulster County Department of Social Services* et al, 455 US 745, L.Ed. 2d 599, 102 S.Ct. 1388.

The fundamental liberty interest of natural parents in the care, custody and management of their child is protected by the Fourteenth Amendment and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. A parental right termination proceeding interferes with that fundamental liberty interest when the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. K.O.S. parental rights were taken well before the 6 month period because of the natural mothers inability to make the minor available to the natural father by failing to answer letters and by changing her residence without notification of the whereabouts of the minor. The Due Process Clause of the 14th Amendment demands more than this. Before a state may sever completely and irrevocably the rights of parents and their natural child Due Process requires that the State supports its allegations by at least clear and convincing evidence.

Every parent has a right to develop a good relationship with their child and every child has a right to develop a good relationship with both parents. *Constance W. 35 Pa Super 393, 506 A.2d 405 (1986)* Quoting *Fatemi v. Fatemi, 489 A.2d 798 (1985)* and *Zummo v. Zummo, 574 A.2d 1130, 1138 (1990)*. Pennsylvania

Courts scrupulously protect the non-custodial parent's right to maintain meaningful parental relationships with his or her child. To avoid unduly impinging upon a parent relationships, a court must sparingly impose restrictions on the relationship and must furthermore impose at least intrusive restriction(s) reasonably necessary to assure the child's welfare. Petitioner never at any time failed to involve himself with his daughter and needs to maintain a viable relationship with his daughter by any means necessary. I love my daughter and I pray that this Court reverse the Orphan Court's decision and reinstate his parental rights and vacate the termination of his rights.

CONCLUSION

Wherefore, Petitioner asks that this Court vacate the termination of his parental rights and remand him back to the Orphan's Court for relief and the reinstatement of his rights to his child and his rights pursuant to the Constitution.

Date: MARCH 22nd 2020

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