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Family Law - Involuntary Termination of Parental Rights - Mental Incapacity

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FAMILY LAW—INVOLUNTARY TERMINATION OF PARENTAL RIGHTS—MENTAL INCAPACITY—The Supreme Court of Pennsylvania held that a court must examine the strength of the existing emotional bond between the natural parent and the child before involuntarily terminating parental rights.

In re E.M., 620 A.2d 481 (Pa. 1993).

Elizabeth M. ("Appellant") was the natural mother of Louis C. and Erick C.[1] Appellant suffered from mental retardation[2] and her children were similarly afflicted.[3] In 1982, Children and Youth Services of Allegheny County ("CYS") became aware of Appellant's difficulties in providing for her children.[4] CYS observed major deficiencies in Appellant's capacity as a parent.[5] For example, Appellant failed to feed her children properly and failed to maintain clean and sanitary living conditions.[6]

Shortly before 1982, Appellant began receiving assistance from various remedial programs designed to enhance her skills so that she could better provide for her children.[7] Appellant diligently participated in the programs but failed to make any progress and it was determined that she was not able to care for her children.[8] Consequently, CYS determined that, in order for Appellant to resume caring for her children, Appellant would require twenty-four

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1. In re E.M., 620 A.2d 481, 482 (Pa. 1993). Louis C. and Erick C. were seven and nine, respectively, at the time of the hearing. *In re E.M.*, 620 A.2d at 482.

2. Appellant received a high school diploma from the Mon Valley School for Exceptional Children. In re E.M., 584 A.2d 1014, 1024 (Pa. Super. Ct. 1991), *rev'd*, 620 A.2d 481 (Pa. 1993).

3. *In re E.M.*, 620 A.2d at 482. Erick suffered from both physical and mental retardation and had an impairment in his ability to walk and speak. *Id.* Louis was learning disabled and had an attention deficiency. *Id.*

4. *Id.* The Appellant was a victim of domestic violence by the children's natural father ("Mr. C.") and was having difficulty with rent payments and food purchases. *Id.* Mr. C. had expensive drug and alcohol habits. *Id.* By March of 1983, the situation had worsened; the family was evicted from its residence and forced to seek shelter at a Salvation Army facility. *Id.*

5. *Id.*

6. *Id. See also, In re E.M.*, 584 A.2d at 1015. Appellant fed her children from dirty bottles of spoiled and diluted milk, left dirty diapers in the family's living space for days at a time, and provided insufficient medical care. *In re E.M.*, 620 A.2d at 482-83.

7. *Id.* at 483. Appellant participated in these programs for approximately six years. *Id.*

8. *In re E.M.*, 620 A.2d at 483. The children had special needs as a result of their own disabilities. *Id.* See note 3.

hour supervision by an assistant skilled in the care of special needs children.[9] In 1983, the children were declared dependent and placed with a foster family.[10] The children had remained in the care of the same foster family since 1983, and their foster parents wished to adopt them.[11] Appellant continued to have an interest in the children and visited them regularly.[12] In 1987, Appellant moved into a clean apartment with her paramour who expressed a willingness to assist in caring for Appellant's children; nonetheless, he recognized that he and Appellant would need assistance if they were to attempt to provide care.[13] However, CYS had already determined that reunification of the family was impossible and that the best interests of the children would be served by a plan of adoption.[14]

In 1989, CYS filed a petition to terminate Appellant's parental rights on the grounds that she was unable to properly provide for her children.[15] Thereafter, Appellant's rights were terminated involuntarily by the Court of Common Pleas of Allegheny County pursuant to the Adoption Act[16] ("Act") due to her inability to adequately care for the children.[17] Consequently, an appeal to the su-

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9. *Id.* The children were very difficult to manage and Appellant was unable to control them. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* Appellant continued to hope that someday her children would be returned to her. *Id.*

13. *In re E.M.*, 620 A.2d at 483.

14. *Id.* CYS made this determination sometime in 1985 or 1986 after the programs designed to improve the Appellant's parenting skills had proven futile. *Id.*

15. *Id.* This was done in order to facilitate the children's adoption by the foster parents. *Id.*

16. 23 PA. CONS. STAT. § 2511 (1991 & Supp. 1993). The Act provides in pertinent part:

> Grounds for voluntary termination
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> (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:
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> . . .
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> (2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.
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> . . .
>
> (b) Other considerations. - The court in terminating the rights of a parent shall give primary consideration to the needs and welfare of the child. . . .

23 PA. CONS. STAT. § 2511(a)(2); (b) (1991 & Supp. 1993).

17. *In re E.M.*, 620 A.2d at 482. The court of common pleas originally denied the petition but exceptions were filed, and, upon reconsideration, the court reversed its decision

perior court was taken by Appellant.[18] The superior court affirmed the lower court's decision and employed a three-part test for involuntary termination pursuant to the Act to review the propriety of parental termination.[19] The court stated that there was competent testimony of Appellant's lack of progress and inability to increase her parenting skills; hence, the court determined that Appellant was an incompetent parent.[20] Accordingly, the court maintained that the record clearly and convincingly[21] supported the finding that the needs and welfare of the children would be served best through termination of Appellant's parental rights.[22] Moreover, the superior court found that there was no need to determine whether a bond existed between the Appellant and her children because adoption was imminent.[23]

Appellant appealed to the Supreme Court of Pennsylvania by writ of allocatur.[24] The supreme court focused on the issue of whether the decree terminating Appellant's parental rights was adequately supported by the evidence and was based on proper consideration of the needs and welfare of the children.[25] The court agreed with the superior court that Appellant had been unable to

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and thereby granted the petition. *Id.* at 483. Further, the parental rights of the father were terminated with his consent. *Id.*

18. *Id.*

19. *In re E.M.*, 584 A.2d at 1018. The three-part test was as follows: "(1) repeated and continued incapacity . . .; (2) that such incapacity . . . caused the child to be without essential parental care, control or subsistence; and (3) that the causes of the incapacity . . . cannot or will not be remedied." *Id.* (citing In re Geiger, 331 A.2d 172 (Pa. 1975)).

20. *In re E.M.*, 584 A.2d at 1019. The court opined that CYS provided Appellant with a plan for the return of her children and that CYS changed its goal to adoption only after exhausting available services. *Id.*

21. The court defined clear and convincing evidence as "testimony [which] is so clear, direct, weighty, and convincing as to enable the [fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Id.* at 1018 (citing In re Trust Est. of LaRocca, 192 A.2d 409, 413 (Pa. 1963)).

22. *In re E.M.*, 584 A.2d at 1022.

23. *Id.* The court further stated that this holding disregarded any beneficial relationship that existed between Appellant and her children, but that it was for the legislature to consider the propriety of this result. *Id.* at 1023.

Judge Johnson dissented on the grounds that the trial court's decision to terminate was not supported by competent evidence. *Id.* at 1024. Judge Johnson stated that the record was devoid of evidence addressing the effect upon the children of cutting off the undisputed beneficial relationship with the natural mother. *Id.* (Johnson, J. dissenting).

24. *In re E.M.*, 620 A.2d at 481. Allocatur is a latin term which the Supreme Court of Pennsylvania uses to describe allowance of appeals; it means "it is allowed". BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

25. *In re E.M.*, 620 A.2d at 483. The court contended that its review was limited to the determination of whether the decree of termination was supported by competent evidence. *Id.* at 484.

provide adequate care for her children.[26] Further, the court concluded that Appellant's incapacity would not be remedied because she had failed to progress in remedial programs.[27] However, the court determined that this incapacity did not in itself require that Appellant's parental rights be terminated unless termination served the needs and welfare of the children.[28]

Moreover, the supreme court determined that the Act provided a basis to terminate parental rights when a parent was physically or mentally impaired.[29] Nonetheless, the court held that the termination of parental rights could not be sustained when there had not been adequate consideration of the emotional needs of the children.[30] Accordingly, the court discerned that the emotional bond between the Appellant and her children had been inadequately considered in the proceedings below.[31] The court opined that although the existence of some bond between Appellant and the children would not of itself block a termination of rights, it was at least a factor that should have been more fully explored.[32] The court asserted that because the psychological evaluations recommended by CYS's own expert witness had not been performed,[33] CYS had not met its burden of proving the necessity for terminat-

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26. *Id.*

27. *Id.*

28. *Id.* at 484.

29. *Id.* at 483 (citing In re Adoption of J.J., 515 A.2d 883, 892 (Pa. 1986)).

30. *In re E. M.*, 620 A.2d at 483. Appellant alleged that a strong emotional bond existed between her and the children. *Id.* at 484. The court, relying on the Superior Court of Pennsylvania's decision in In re P.A.B., 570 A.2d 522 (Pa. Super. Ct. 1990), *appeal granted*, 585 A.2d 469 (Pa. 1991), *appeal dismissed*, 607 A.2d 1074 (Pa. 1992), held that "[a] court, in considering what situation would best serve the child's needs and welfare, must examine the status of the natural parental bond to consider whether terminating the natural parents' rights would destroy something in existence that is necessary and beneficial." *In re E.M.*, 620 A.2d at 483 (citing *In re P.A.B.*, 570 A.2d at 525.)

In re P.A.B. involved an appeal from an order involuntarily terminating mentally incapacitated parents' parental rights where a parent-child bond existed. *In re P.A.B.*, 570 A.2d at 522. The court in that case found that a court must consider the parent-child bond before terminating a natural parent's rights. *Id.* at 525. See notes 91 - 104 and accompanying text.

31. *In re E.M.*, 620 A.2d at 483. The court reasoned that the emotional bond was an important element relating to the needs and welfare of the children. *Id.*

32. *In re E.M.*, 620 A.2d at 485.

33. *Id.* at 485. The CYS expert in this case, a psychologist, testified that the children interacted well with their foster mother and that they had formed a strong bond with her. *Id.* at 484. No observation was made of the children's interaction with their foster father or with the Appellant. *Id.* The expert further stated that interaction with both should have been observed to make the determination of whether to terminate the Appellant's parental rights. *Id.* The psychologist also testified that the children continued to have an emotional bond with Appellant and expressed a desire to live with both their foster parents and their natural parents. *Id.* at 483.

ing Appellant's parental rights.[34]

Further, the supreme court disagreed with the superior court's determination that where adoption was imminent there was no need to evaluate the emotional bond between the children and their natural parent.[35] Instead, the court stated that a decision to terminate parental rights without consideration of existing emotional bonds was not proper.[36]

The court concluded that the issue of whether a bond existed between Appellant and her children, so that the severance of their relationship would be improper, must be more fully explored by the evidence.[37] Therefore, the supreme court reversed and remanded the case to the court of common pleas for a reevaluation of the needs and welfare of the children.[38] The court mandated that the lower court take into consideration the bond which may have existed between Appellant and her children, along with any other factors concerning the needs and welfare of the children.[39]

Prior to the passage of the Adoption Act of 1970,[40] abandonment was the only basis the courts could use to involuntarily terminate parental rights.[41] With the passage of the Adoption Act of 1970,

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34. *Id.* at 484-85. It had been established that in a proceeding to involuntarily terminate parental rights, the burden of proof is upon the party seeking termination to establish by clear and convincing evidence the existence of grounds for doing so. *Id.* at 484 (citations omitted).

35. *Id.* at 485. The supreme court maintained that it was conceivable that a beneficial bond could have existed between a parent and child such that, if the bond was broken, the child could have suffered extreme emotional consequences. *Id.* This would be true regardless of whether adoption was imminent. *Id.*

36. *Id.* The court specifically explained that termination was not proper because a bond to some extent did exist between the children and the natural mother and the expert witness for CYS indicated that this factor had not been adequately studied. *Id.*

37. *In re E.M.*, 620 A.2d at 485. The court remarked that the existing record was inadequate regarding this issue. *Id.*

38. *Id.*

39. *Id.*

40. PA. STAT. ANN. tit. 1, §§ 101 - 603 (Supp. 1974) (repealed 1980).

Section 311 of the Adoption Act regarding involuntary termination was derived from section 1.2 of the 1925 Adoption Act of April, 1925, Pub. L. No. 127 § 1.2, which required a finding of abandonment for at least six months. PA. STAT. ANN. tit. 1 § 311 (Supp. 1974) (repealed 1980). The grounds for abandonment were broadened by the Act, wherefore relinquishment of parental claim or failure or refusal to perform parental duties was sufficient. 23 PA. CONS. STAT. ANN. § 2511 (1991 & Supp. 1993).

41. Jones Appeal, 297 A.2d 117, 119 (Pa. 1972). Abandonment was defined as "parental conduct exhibiting a settled purpose of relinquishing parental claim to the child and a refusal to perform parental duties." *Jones Appeal*, 297 A.2d at 119 (citing Act of April 4, 1925, Pa. Laws. No. 127, as amended, PA. STAT. ANN. tit. 1, § 1.) This act was repealed by Act of July 24, 1970, Pa. Laws. No. 208 (codified at PA. STAT. ANN. tit. 1, § 601). *Jones Appeal*, 297 A.2d at 119.

the Pennsylvania Legislature developed a new standard for the involuntary termination of parental rights.[42] Indeed, the legislature intended to facilitate adoption and to liberalize the requirements for a showing of involuntary termination thereby creating a new basis for termination.[43] Accordingly, the only requirements necessary to terminate parental rights under the Adoption Act of 1970 were the filing of a petition, the holding of a pre-termination hearing and the finding of non-remedied grounds of repeated and continued incapacity, abuse, neglect or refusal of the parent which caused the child to be without essential care.[44]

However, in *Jones Appeal*, the Supreme Court of Pennsylvania strictly construed the requirement of repeated and continued incapacity, abuse, neglect or refusal on the part of the parent.[45] In *Jones Appeal*, the parental rights of the natural mother, Mrs. Jones, were terminated after she was convicted of aiding and abetting the rape of her fourteen-year old daughter.[46] Although the court determined that the 1970 Adoption Act was an expansion of its powers to terminate parental rights, the court reversed the lower court's termination of Mrs. Jones' parental rights, finding that the statutory standard of evidence necessary to support termination was nonetheless demanding.[47] The court concluded that the legislature intended that courts should not disturb the parent-child relationship unless compelling evidence of repeated and continued incapacity, abuse, neglect or refusal to provide essential parental care existed.[48]

Section 5 of the Act of 1925 repealed prior adoption acts as early as the Act of 1855. PA. STAT. ANN. tit. 1, §1 (1963) (repealed 1970).

42. *See* Catherine B. Strauss, Comment, *Involuntary Termination of Parental Rights Under the Pennsylvania Adoption Act*, 48 TEMP. L.Q. 1050 (1975).

43. *Strauss*, cited at note 42, at 1050. Under the previous act, parental abandonment of the child was the only rationale the courts could utilize to terminate parental rights involuntarily. *Id.* at 1050 n.14. Abandonment was extremely difficult prove. *Id.*

44. *Id.* at 1050 n.3.

45. *Jones Appeal*, 297 A.2d at 117. *See also* Strauss, cited at note 42, at 1056.

46. *Jones Appeal*, 297 A.2d at 119. After her arrest, the natural mother was committed to Mayview State Hospital for psychiatric evaluation and was found to be neurotic and unstable. *Id.* at 118.

47. *Id.* at 119.

48. *Id.* The court further held that the mother's guilty plea to the accessory to rape charge did not in itself meet the statutory standard of continued abuse necessary to support termination. *Id.* The court remanded the case for further proceedings because of the importance of the adjudication of the children's well being. *Id.* at 121.

The Adoption Act of 1970 was repealed by the Adoption Act of 1980 which expanded the grounds by which involuntary termination of parental rights could occur, such as where the natural parent was unknown and could not be found and when the child is in foster care

Courts were cautious to exercise the power of involuntary termination of parental rights, particularly when dealing with natural parents with mental disabilities who wanted to retain custody of their children. Accordingly, in *In re C.R.*,[49] the orphan's court exercised caution when determining whether involuntary termination was proper.[50] *In re C.R.* involved a mother who was diagnosed with schizophrenia with a slight chance of recovery.[51] The relationship of the natural mother to her daughter was greatly affected by the mother's mental incapacity because she could not provide essential parental care.[52]

In its opinion, the court asserted that its power to terminate parental rights should be used sparingly, with great caution and only when the evidence was quite clear and convincing.[53] Nonetheless, the court determined that in this case the natural mother's condition could not be remedied;[54] thus, her rights were terminated due to her continued incapacity.[55] The court emphasized that the interests of the child outweighed the interests of the parent.[56]

Later in *Involuntary Termination of Parental Rights to R.W.B.*,[57] the court determined that the legislature's intent in its passage of the Act was to terminate parental rights despite a parent's desire to perform parental obligations and regardless of fault.[58] In *R.W.B.*, the child never resided with her mother who was a paranoid schizophrenic.[59] The mother had a history of mental illness and prognosis for recovery was poor.[60] However, the

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and the conditions leading to the placement of the child in foster care cannot be remedied. 23 PA. CONS. STAT. ANN. §2511 (1991 & Supp. 1993), as amended.

49. 66 Pa. D. & C.2d 155, 161 (Butler, 1974).

50. *In Re C.R.*, 66 Pa. D. & C.2d at 161.

51. *Id.* at 157.

52. *Id.* at 158. The court determined that because of the mother's illness she was unable to provide the emotional support that her daughter would require. *Id.* at 161.

53. *Id.*

54. *Id.* at 158.

55. *In re C.R.*, 66 Pa. D. & C.2d at 159. The court based its decision on the terms of the Act calling for termination in the case of continued incapacity. *Id. See also* 23 PA. CONS. STAT. ANN. §2511(a)(2) (1993). The court stated that it would not rely on psychiatrist testimony of incapacity alone but that there was ample evidence to conclude that the natural mother's incapacity was of long duration and continuous. *Id.*

56. *Id.* The natural mother had maintained an interest in and concern for the child while the child had been in foster care. *Id.* at 157.

57. 73 Pa. D. & C.2d 369 (Phila. 1975).

58. *R.W.B*, 73 Pa. D. & C.2d. at 376. The court posed the question as whether the incapacity must be determined to have been the fault of the parent before the parent's rights could terminated. *Id.*

59. *Id.* at 370-71.

60. *Id.* at 373.

mother maintained constant interest and concern for her daughter.[61] Notwithstanding this fact, the court concluded that there was competent evidence of continued incapacity which could not be remedied, and therefore, the court terminated the mother's parental rights although it found that the incapacity was not her fault. [62]

Subsequently, in *In re William*,[63] the Supreme Court of Pennsylvania considered whether the Act violated the due process rights of parents whose rights were involuntarily terminated.[64] In *In re William*, three of appellant's five children were removed from her home because of appellant's incapacity and failure to provide for their essential needs.[65]

The parents argued that they had a constitutional right to associate with their children.[66] However, the court asserted that prior to the termination of parental rights, a court had to find the existence of continued incapacity coupled with an inability to meet the child's essential needs.[67] Moreover, when an agency has petitioned

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61. *Id.* at 373. Nonetheless, the mother never provided support for the child. *Id.* at 374.

62. *Id.* at 375.

63. 383 A.2d 1228 (Pa. 1978), *cert. denied*, 439 U.S. 880 (1978).

64. *In re William*, 383 A.2d at 1229.

65. *Id.* at 1237. Children's Services determined that the condition of appellant's home was severely substandard and that the home was unfit for the occupancy of children. *Id.* Appellant was given aid by Children's Services but it was determined that she could only care for one child because she could not perform simple everyday tasks without aid. *Id.* at 1238. Further, she failed to make progress in dealing with problems on her own despite continuous assistance. *Id.* Therefore, Children's Services refused to return the children to appellant upon her request. *Id.* When asked, appellant's children stated that they did not want to live with her. *Id.* at 1238-39.

66. *Id.* at 1231. The parents relied on the First, Ninth, and Fourteenth Amendments of the United States Constitution. *Id.*

The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The Ninth Amendment of the United States Constitution provides: "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 1.

67. *In re William*, 383 A.2d at 1232. The court further stated that because it was

a court for involuntary termination of parental rights, the Commonwealth required that services were provided to the parent to help remedy the causes of removal.[68] The supreme court held that these requirements gave the parent sufficient notice to satisfy due process.[69]

The court concluded that the Act posed very demanding standards that must be met before Children's Services interferes with a family and that the Act protected parental conduct which did not deprive a child of its essential needs.[70] Therefore, the state supreme court determined that the Act did not violate substantive due process and that a state had a compelling interest in the welfare of the children and could constitutionally intervene to terminate parental rights when a natural parent's incapacity did not allow the parent to provide for the essential needs of the child.[71]

The United States Supreme Court in *Santosky v. Kramer*[72] established that clear and convincing evidence, its equivalent, or a higher standard, was the standard of proof to be used by a state

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required that the parents' conduct caused the termination, any notice argument was thereby negated. *Id.* Consequently, the court declared that in this case parental rights were not terminated without sufficient notice. *Id.*

68. *Id.* It was clear that the parents were provided with years of assistance from Children's Services and public agencies. *Id.*

69. *Id.* The court said that the requirement that parental conduct be irremediable also negated the parent's notice argument. *Id.*

70. *Id.* at 1234. The court stated that extended entrustment of the child to another's care based on parental incapacity was relevant in determining whether the child had been without essential parental care. *Id.* at 1232. In this case, all of appellant's children had been in foster care for an extended period of time. *Id.* Appellant's youngest son had been in foster care since he was one year old. *Id.* at 1238-39.

71. *Id.* at 1234. The scope of appellate review was limited to determining whether the lower court's termination of parental rights was supported by competent evidence. *Id.* (citations omitted.) The court declared that in this case there was competent evidence which supported the termination of appellant's parental rights. *Id.* at 1236. The supreme court agreed with the decision in *R.W.B.* and determined that fault or misconduct of the parent was not necessary for the termination of parental rights. *Id.* at 1239. Further, the court stated that the legislative intent was that a parent who was incapable of performing parental duties was just as unfit as a parent who refuses to perform parental duties. *Id.* Hence, the supreme court concluded that the termination of parental rights was based on competent evidence and affirmed the lower court's decision. *Id.* at 1238, 1247.

Justice Nix dissented and argued that a child could not be declared neglected just because his condition might be improved by changing parents; further, termination of appellant's parental rights violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution because it demonstrated the classification between the wealthy and the poor. *Id.* at 1248, 1250.

Justice Manderino also dissented and maintained that if a parent was incapacitated, the state should provide care for the children outside of the parent's custody but should not terminate the parent's rights because this was too final. *Id.* at 1252.

72. 455 U.S. 745 (1982).

when terminating parental rights.[73] In *Santosky*, the petitioners' parental rights were terminated after various proceedings in which it was determined by a preponderance of the evidence that they were incapable of meeting their children's needs.[74]

The respondent claimed that the termination proceedings did not interfere with the parents' fundamental rights.[75] The Supreme Court rejected this argument and held that when a state moves to destroy family bonds, it must provide the parent with fair procedures.[76] The Court maintained that the standard of preponderance of the evidence was appropriate only when society had minimal concern with the outcome of the proceeding; therefore, this was not a sufficiently stringent standard when dealing with fundamental rights.[77] Nonetheless, the United States Supreme Court stated that the beyond a reasonable doubt standard was too strict.[78] Hence, the Court determined that an intermediate standard of clear and convincing evidence, or its equivalent, should be used by a state when terminating parental rights.[79] The Court further held that a state may use a higher standard of proof than clear and convincing evidence if it so desired.[80] The Supreme Court concluded that the clear and convincing evidence standard struck a fair balance between the rights of the natural parents and the interest of a state.[81]

Thereafter, in *In re Adoption of J.J.*,[82] the Supreme Court of Pennsylvania addressed the issue of whether clear and convincing evidence was the proper standard of proof when involuntarily terminating the rights of a parent who suffered from a mental impairment.[83] Here, the parental rights of the appellee were terminated

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73. *Santosky*, 455 U.S. at 769. The Court mentioned that Pennsylvania used clear and convincing evidence as its standard of proof. *Id.* at 750.

74. *Id.* at 751. This proceeding was held after the children were removed from the home following incidents of neglect. *Id.* The petitioners had five children, two were born after the first three were removed from the home. *Id.* The state never took action to remove the two children who remained in the care of the petitioners. *Id.* at 752.

75. *Id.* at 752 n.7.

76. *Id.*

77. *Id.* at 755.

78. *Santosky*, 455 U.S. at 755.

79. *Id.* The Supreme Court said that this intermediate standard should be used when individual interests were at stake which were particularly important and more substantial than the mere loss of money. *Id.*

80. *Id.* at 769-70.

81. *Id.* at 769. Therefore, the Court vacated the lower court's judgment and remanded the case for further proceedings. *Id.* at 770.

82. 515 A.2d 883 (Pa. 1986).

83. *In re Adoption of J.J.*, 515 A.2d at 885.

due to his schizophrenic condition.[84]

The court reaffirmed that in a proceeding to involuntarily terminate parental rights, the burden of proof was on the party seeking termination to prove by clear and convincing evidence the grounds for termination.[85] However, the supreme court considered whether a higher standard of proof should be used when the parent's rights were terminated on the grounds of mental incapacity.[86] The court answered this question in the negative.[87] Instead, the state supreme court determined that it was the child's needs and welfare with which the court must be concerned and that the child's interests should prevail over that of the parents.[88] Therefore, a higher standard of proof would not improve the function of the court; instead, it would only inhibit efforts to offer neglected children the possibility of adoption.[89] The court concluded that the Act provided for termination regardless of fault or misconduct; hence, no higher standard for mentally impaired parents was necessary.[90]

Recently, in *In re P.A.B.*,[91] the Superior Court of Pennsylvania determined that the parent-child bond must be considered when deciding whether to terminate parental rights.[92] *In re P.A.B.* dealt with mentally incapacitated natural parents of three children with special needs.[93] The children were removed from the family home despite the parents' continued effort to care for them.[94] CYS ar-

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84. *Id.* at 886-87. The appellee had been diagnosed as schizophrenic with mood disturbance. *Id.* at 887. Appellee's condition could be helped by medication but the condition would become active if he stopped using the medication. *Id.* The appellee's rights were terminated because his illness caused him to be incapable of performing parental duties. *Id.*

85. *Id.* at 886 (citations omitted).

86. *Id.* at 891.

87. *Id.* at 892.

88. *In re Adoption of J.J.*, 515 A.2d at 891-92.

89. *Id.* at 892-93. The court found no merit in the argument that a more rigorous standard would protect mentally incapacitated parents; instead, the court was only concerned with protection of the children. *Id.* at 892.

90. *Id.* The court stressed that the best interests of the child must be considered. *Id.* The supreme court held that parents have an affirmative duty to work towards having the child returned to them and that the appellee had not met this duty. *Id.* at 890. The court noted that the parent at least must cooperate with the agency to obtain services to help meet the goal of the return of the child. *Id.* The court held that appellee often acted with hostility directed towards the agency when it was trying to help him. *Id.*

91. 570 A.2d 522 (Pa. Super. Ct. 1990), *appeal granted*, 585 A.2d 469 (Pa. 1991), *appeal dismissed*, 607 A.2d 1074 (Pa. 1992).

92. *In re P.A.B*, 570 A.2d at 522.

93. *Id.* at 523. P.A.B. was moderately retarded, M.E.B. suffered from developmental problems and M.A.B. took medication for a heart disease. *Id.*

94. *Id.* The parents received aid from various agencies after the removal of the children. *Id.* They continued to strive towards the children's return despite the extreme hard-

gued that a permanent mental disability alone was sufficient to satisfy involuntary termination of parental rights.[95] However, the court disagreed and held that the Act required a decision based upon the needs and welfare of the children.[96] The superior court defined needs and welfare as encompassing both tangible and intangible needs such as food and parental love.[97] The court opined that the parent-child bond was unique and irreplaceable; hence, preservation of the family unity was best for the child.[98] Moreover, the court maintained that when the natural parents were a solid presence in the child's life, termination would not be in the best interests of the child.[99]

The superior court held that for purposes of the Act, the parental bond, must be considered before terminating parental rights due to the importance of that bond, regardless of the parent's mental capacity.[100] Thus, the court concluded that the parental bond must be examined to determine whether termination would sever that which was necessary and beneficial to the child.[101] Accordingly, the superior court reversed the order terminating the parents' rights and determined that it was possible for the children to live outside the parental home and yet preserve the parent-child relationship.[102]

Pennsylvania courts have dealt in a consistent manner with the termination of parental rights in cases involving parents adjudged incapacitated due to a mental impairment. Hence, in *Jones Appeal*, the Superior Court of Pennsylvania set forth the law with regard to incapacitated parents' rights; that is, absent clear and convincing evidence of continuous, recurring parental incapacity, the courts should not disturb the parent-child relationship.[103] The superior court in *In re P.A.B.* set forth the principle that the parent-child bond must be considered by the court when deciding to

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ship which resulted. *Id.*

95. *Id.* at 525.

96. *Id.*

97. *In re P.A.B.*, 570 A.2d at 525.

98. *Id.*

99. *Id.*

100. *Id.* at 525-26.

101. *Id.* at 525. The court resolved that the party seeking termination must prove that the parent-child bond did not exist or that the bond hindered the child. *Id.* The court further determined that removing a child from the parental home did not necessarily lead to the breaking of the parental bond. *Id.*

102. *In re P.A.B.*, 570 A.2d at 522, 528. The court concluded that the children's family could be extended, thereby enriching the lives of the children. *Id.* at 528.

103. *Jones Appeal*, 297 A.2d at 119. See notes 45-48 and accompanying text.

terminate parental rights.[104] The Supreme Court of Pennsylvania in *In re E.M.* did not deviate from this principle. In fact, the court did not even ponder the issue of the due process rights of the parents because the issue had been clearly decided by prior case law.[105] Further, the court quickly disposed of the issues regarding scope of review, burden and standard of proof because *Santosky v. Kramer*[106] had settled these issues.[107]

In short, the supreme court set forth three standards for termination of parental rights: repeated and continued incapacity; such incapacity caused the children to be without essential parental care; and the causes of the incapacity could not be remedied.[108] Consequently, the court determined that these standards were sufficient to terminate parental rights on the basis of mental incapacity regardless of fault or misconduct.[109] The supreme court in *In re E.M.* agreed with the superior court that Appellant's incapacity was irremediable and rendered her incapable of caring for her children.[110] However, the supreme court disagreed with the superior court's decision that the termination of Appellant's rights was consistent with the needs and welfare of the children.[111] More specifically, the court agreed with Appellant's contention that the emotional bond between Appellant and the children was not adequately considered.[112]

Notwithstanding the court's decision, a viable option which the court failed to consider was the possibility of an open adoption, by which Appellant's parental rights would have been terminated and a decree of adoption could have been entered which would have included a clause that Appellant would be allowed visitation with her children.[113] Open adoption would allow the foster parents of the children to adopt them and have full authority to make all decisions concerning the children while allowing the Appellant to

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104. *In re P.A.B.*, 570 A.2d at 522. See notes 91-102 and accompanying text.

105. *See In re William*, 383 A.2d at 1231. See notes 63-71 and accompanying text.

106. 455 U.S. at 745. See notes 72-81 and accompanying text.

107. *In re E.M.*, 620 A.2d at 484.

108. *Id.* at 483. *See also* 23 PA. CONS. STAT. ANN. § 2511 (1991 & Supp. 1993).

109. *In re E.M.*, 620 A.2d at 483-84.

110. *Id.* at 484.

111. *Id.* at 485.

112. *Id.* It was on this basis that the court reversed and remanded the case. *Id.*

113. Appellant's Brief at 11, *In re E.M.*, 584 A.2d 1014 (Pa. Super. Ct. 1991) (No. 88). The child advocate agreed that open adoption would be a just solution to this matter. Child Advocate Brief at 12, *In re E.M.*, 584 A.2d 1014 (Pa. Super. Ct. 1991) (No. 88). The superior court in *In re E.M.* left the issue of open adoption to the legislature. *In re E.M.*, 584 A.2d at 1023. The supreme court failed to address the issue.

continue her relationship with the children.[114] An open adoption could benefit the children and avoid the psychological harm which could result from the severance of ties between the children and their mother.[115]

Nevertheless, some courts have found open adoption harmful because it interferes with the development of a new relationship between the child and the adoptive parents.[116] However, in the present case the children already had a relationship with their foster parents and the continuation of the relationship with their natural mother would not have hindered this relationship; instead, it would have expanded the family of the children and enhanced their lives.[117] Open adoption would lessen the uncertainty in the children's lives and provide them with security.[118] Indeed, a child's fear of being removed from home at any time coupled with feelings of insecurity have been among the main reasons courts have terminated natural parent's rights.[119]

A New York court noted that where a child had lived with the natural mother, had a continued relationship with the natural mother and was currently a teenager or a preteen, severing the bond between the child and mother would be detrimental to the needs and welfare of the child, especially where the child had a desire to continue the relationship with the parent.[120] Therefore, the court concluded that open adoption was the proper solution.[121]

In the instant case, Appellant's children had previously resided

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114. Child Advocate Brief at 12, *In re E. M.*, 584 A. 2d 1014 (Pa. Super. Ct. 1991) (No. 88).

115. Danny R. Veilleux, Annotation, *Post Adoption Visitation by Natural Parent*, 78 A.L.R. 4th 218, 223 (1990).

116. Veilleux, cited at note 115, at 223.

117. *In re P.A.B.*, 570 A.2d at 528.

118. *See In re P.A.B.*, 570 A.2d at 528, wherein the court said that there was no precedent that prevented children from maintaining a relationship with a natural parent while living outside the parental home. Also, courts in Maryland, Massachusetts, Missouri, Nevada, New Jersey, New York and Utah have held that post adoption visitation rights may be granted to a natural parent if it were in the best interests of the child. *See* Veilleux, cited at note 115, at 240.

119. *See In re P.A.B.*, 570 A.2d at 526.

120. In the Matter of the Custody and Guardianship of Dana Marie E., 492 N.Y.S.2d 340, 343 (1985). This case involved a termination of parental rights proceeding brought against both natural parents by a home for children. *Dana Marie E.*, 492 N.Y.S.2d at 341. The court records state that the natural mother suffered from paranoid schizophrenia, which rendered her unable to provide proper care for the child. *Id.* at 342.

121. *Id.* at 343-44. Although the *Dana Marie E* court acknowledged that post-adoption visitation was inappropriate in most circumstances, it declared that there were select cases, especially those in which the children were teenagers or preteens, that open adoption was appropriate. *Id.* at 343.

with their mother and had had a continued relationship with her since birth.[122] The fact that the children had expressed their desire to continue the relationship with their natural mother should not have been ignored.[123] In fact, Judge Johnson, dissenting from the superior court's opinion in *In re E.M.*, agreed that severing the rights of Appellant was not in the best interest of the children.[124] CYS gave only the option of adoption or returning the children to Appellant.[125] However, Judge Johnson maintained that these alternatives were not exclusive and believed that the children should be permitted to visit with their mother.[126] Open adoption would have provided this result.

The superior court believed that it did not have the power to order an open adoption and decided that it was appropriate to leave the question to the legislature.[127] Perhaps the court reasoned that the legislature would better balance critical choices of social policy along with the fragile issues of the family relationship involved to make such a determination.[128] However, in this case, open adoption would have provided a satisfactory outcome with regard to all parties and would have best served the needs and welfare of the children. Hence, the court would have been justified in allowing open adoption.

It appears as though courts are exercising less caution when terminating parental rights of the mentally impaired than they had in the past. Indeed, as the decision in *In re E.M.* revealed, courts will terminate parental rights even though these parents were not at fault and had done everything possible to try to regain full custody of their children. Although Pennsylvania courts have held that parents do not have to be at fault in order to have their rights terminated,[129] this author contends that the courts should consider the fact that some parents did not deliberately fail to meet the

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122. *In re E.M.*, 620 A.2d at 482. At the time of the decision, one of Appellant's children was a preteen and one was a teenager. *Id.*

123. *See In re Dana Marie E.*, 492 N.Y.S.2d at 342. See also note 121.

124. *In re E.M.*, 584 A.2d at 1024 (Johnson, J. dissenting).

125. *Id.* at 1027.

126. *Id.*

127. *Id.* at 1023.

128. *See* In the Matter of Gregory B., 542 N.E.2d 1052, 1059 (NY 1989). The Court of Appeals of New York held that incarcerated fathers failed to provide for the future of the children, thereby leaving them in foster care for the majority of their childhood and thus supporting the termination of their parental rights. *In re Gregory B.*, 542 N.E.2d at 1052, 1058. The court refused to allow open adoption and held that it was for the legislature to institute open adoptions. *Id.* at 1059.

129. *In re E.M.*, 620 A.2d at 484 (citing *In re William*, 383 A.2d at 1239.)

needs of their children; hence, they should not be punished because of their mental impairments.

The state should not be able to dissolve a natural parent-child relationship because another family might be more advantageous to the child.[130] A mother's rights should not be terminated when she has tried her best to provide for her children, given the mental capacity with which she was born.[131] Although the courts have held that it is the rights of the child and not the parent with which they were concerned,[132] the rights of the natural parent should not be completely disregarded, especially where the needs and welfare of the children would not best be met by termination of the parent-child relationship.

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130. *In re William*, 383 A.2d at 1249. A court could not declare a child neglected simply because changing parents would improve the child's condition. *Id.* For example, a court should not be able to terminate the rights of an uneducated parent on the ground that educated parents would provide a better environment. *Id.*

131. *Id.*

132. *In re C.R.*, 66 D.& C.2d at 161.