



# SWAN Legal Services Initiative

## December Legal Report

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## Pennsylvania Supreme Court

### **In the Interest of N.C.**

Date of Decision: December 15, 2014

Cite: 2014 WL 7090617

### **Holding:**

Affirmed. An accused juvenile's 6th Amendment right to confront witnesses against him is violated where evidence of an out of court, video-taped, forensic interview was admitted under the Tender Years Hearsay Act (TYHA), and the victim was not made available for cross-examination.

### **Facts and Procedural Posture:**

The victim alleged to her mother that she was inappropriately touched by N.C. while at maternal grandmother's house. During the investigation, the victim participated in a recorded forensic interview and disclosed N.C. digitally penetrated her. After the forensic interview, the victim subsequently disclosed two to three additional incidents to mother. The commonwealth filed a pre-trial motion to admit the victim's hearsay statements to mother and the forensic interviewer under the TYHA. The juvenile court determined the victim's initial statement to mother about the allegation and the recorded statements made to the forensic interviewer could be introduced provided the victim testified at the hearing. The victim was four years old at the time of the adjudication hearing and took the stand to testify. The victim was not able to answer questions posed by the prosecutor and was allowed to leave. The defense decided against asking any questions on cross-examination. The recorded forensic interview was later admitted into evidence over the defense's objection that doing so would violate N.C.'s 6th Amendment right to confrontation. N.C. was adjudicated delinquent and subsequently appealed. The Pennsylvania Superior Court found N.C.'s 6th Amendment right was violated, and the commonwealth petitioned for review by the Pennsylvania Supreme Court.

### **Rationale:**

When out of court testimonial evidence is at issue, a defendant has a 6th Amendment right to cross examine the witness about that evidence. The evidence can be admitted only when the witness is available and testifies, or when it is determined the witness is unavailable and the defendant had A prior opportunity to cross-examine that witness. Here, the victim's statements in the recorded forensic interview were considered testimonial, and N.C. had the right to confront the victim about that evidence. While the victim was present at the adjudication hearing and took the stand, she did not verbally respond to questions, and the court reasoned she could not be considered available for purposes of the 6th Amendment. Further, the court noted the decision not to cross-examine the victim at the hearing was not a factor because it would not have provided N.C. a meaningful opportunity for effective cross-examination given the circumstances.

**In the Interest of D.C.D.**

Date of Decision: December 15, 2014

Cite: 2014 WL 7089267

**Holding:**

Reversed and reinstated decree terminating father's rights. The language or purpose of Section 6351(f)(9) of the Juvenile Act does not forbid the granting of a petition to terminate parental rights, under Section 2511 of the Adoption Act, as a consequence of the agency's failure to provide reasonable efforts to a parent.

**Facts and Procedural Posture:**

Father was incarcerated prior to the child's birth and placement with a minimum release date of July 2018, and maximum date of October 2026. Clinton County Children and Youth filed a petition to terminate father's parental rights in May 2012. The trial court denied the agency's petition, finding the father attempted to establish a relationship with the child by seeking visits, sending gifts and communicating regularly with the caseworker. The trial court noted that the agency failed to assist father with reunification efforts and warned the agency they risked a finding of no reasonable efforts if they did not work towards reunification. The trial court initially denied the agency's termination petition for mother as well, but later terminated her rights in a separate appeal.

The agency filed a second petition to terminate father's parental rights under Section 2511 (a) (2) and (b) of the Adoption Act in April 2013. At the hearing, the agency presented evidence that father's only contacts with the child consisted of one video conference, two in-person visits after court hearings and one in-person visit in April 2013. The trial court found the April visit was for the sole purpose of demonstrating a lack of bond at the hearing, and the lack of contact was in direct opposition of the visitation order. Despite this finding and father's efforts to establish a relationship, the trial court terminated father's rights, reasoning that father's incapacity to parent could not be remedied until at least his minimum release date when the child was seven years old and spent her life in foster care.

Father appealed and the Pennsylvania Superior Court reversed the original decision, holding termination was impermissible when an agency failed to make reasonable efforts. The agency sought and was granted review by the Pennsylvania Supreme Court.

**Rationale:**

The Pennsylvania Superior Court erred in its statutory analysis of Section 2511(a)(2) and (b) of the Adoption Act by impermissibly adding reasonable efforts as a requirement for termination. The court explained that Section 2511 of the Adoption Act does not reference Section 6351(f)(9) of the Juvenile Act. While Section 6351(f)(9) exempts agencies from filing termination petitions under certain circumstances, it does not prevent a petition from being filed and subsequently granted because the agency failed to provide reasonable efforts. Here, the agency demonstrated that father's long-term incarceration was an incapacity that could not be remedied until the child was at least seven years old, and reunification was not realistic nor in the child's best interest and therefore termination was proper.

The court did make clear there are ramifications for the agency if reasonable efforts are not provided, stating: "the remedy for an agency's failure to provide services is not to punish an innocent child, by delaying her permanency through denying termination, but instead to conclude on the record that the agency has failed to make reasonable efforts, which imposes a financial penalty on the agency of thousands if not tens of thousands of dollars under federal law."

**Concurring Opinion:**

The majority's discussion of potential financial penalties that may be imposed against agencies for failing to provide reasonable efforts is beyond the scope of the issue at hand and should be considered dictum.

**In the Interest of J.B.**

Date of Decision: December 29, 2014  
Cite: 2014 WL 7369785

**Holding:**

The registration requirements of the Sex Offender Registration and Notification Act (SORNA) violate juvenile offenders' due process rights by assuming an irrebuttable presumption that all juvenile offenders pose a high risk of recidivism.

**Facts and Procedural Posture:**

Seven juveniles were adjudicated delinquent for specific sexual offenses before SORNA was enacted and were under the continued supervision of the York County Juvenile Court. The continued supervision subjected them to lifetime registration after SORNA was enacted. All seven juveniles filed motions for *nunc pro tunc* relief asserting the statutory provision requiring lifetime registration was unconstitutional. The York County Juvenile Court held the lifetime registration unconstitutional as violating the ex post facto clause, protections against cruel and unusual punishments, and due process rights through the use of an irrebuttable presumption. The commonwealth appealed to the Pennsylvania Supreme Court.

**Rationale:**

The court reiterated that reputation is a fundamental interest under the Pennsylvania Constitution and protected by the due process clause. The key to due process is notice and a meaningful opportunity to be heard. If a hearing excludes consideration of an essential element of the decision, it does not equate with due process. The court further reasoned that irrebuttable presumptions violate due process where the presumption is not universally true and a reasonable alternative means of ascertaining that presumed fact is available.

Here, the law's automatic registration requirement was based on the irrebuttable presumption that offenders pose a high risk of committing additional sexual offenses. However, while research shows adults may have a high recidivism rate, the same is not true for juveniles. The law does not provide for a hearing to consider a juvenile's likelihood of recidivism and left juveniles without a meaningful opportunity to challenge a presumption that violated due process. Further, the court addressed that individualized assessments of the juvenile's propensity to re-offend by the Sex Offender Assessment Board (SOAB) and a hearing to contest that assessment is a reasonable alternative available to afford due process.

**Dissenting Opinion:**

The law's primary purpose is to protect the public, and an offender's right to reputation should not take precedence over the victim. The law appropriately provides for a juvenile's constitutional rights because registration is only for those offenders 14 and older who committed one of four offenses recognized as violent crimes and allows for registration to be terminated after 25 years by taking the offender's individual behavior into account.

# Pennsylvania Superior Court

**In Re: K.H.B.**

Date of Decision: December 23, 2014  
Cite: 2014 PA Super 284

**Holding:**

Trial court's denial of termination of parental rights petition reversed, where trial court incorrectly applied Section 2511(b) of the Adoption Act based on pathological bond between the child and parents and erred by requiring an agreement for post-adoption contact.

**Facts and Procedural Posture:**

Allegheny County Office of Children, Youth and Families filed petitions to terminate parental rights for mother and father in November 2013. The trial court found the agency proved grounds existed for both parents under Section 2511(a)(5) of the Adoption Act, but further found the agency did not meet its burden under Section 2511(b). In denying the petitions, the trial court relied on testimony from a psychologist, who opined that severing the child's bond with her parents would have a long-term impact on the child. This opinion was based on the child's placement with paternal aunt, the strained family relationship and the aunt's decision not to allow post-adoption contact.

**Rationale:**

Relying on Pennsylvania Supreme Court precedent, the court reasoned that the trial court erred by relying on the existence of a bond between the child and her parents rather than analyzing the type of bond and the impact to the child of prolonging an unhealthy and pathological bond. The record supported that the parents' own unhealthy relationship interfered with their ability to provide a stable home environment and meet the child's basic needs in the near future. The court concluded that the child formed a healthy attachment with paternal aunt, and termination would best serve her needs and welfare.

The court further addressed that it was an error to deny termination because paternal aunt did not agree to a post-adoption contact agreement. The provisions for termination of parental rights and adoption are separate chapters within the Adoption Act and therefore require different analysis. An agreement for continued contact is not an element for termination under section 2511, and section 2731 makes clear that post-adoption contact is optional.

**Concurring Opinion:**

While the present case does not warrant termination of parental rights to be conditioned on a post adoption contact agreement, the statutory provisions of the Adoption Act do not prevent a trial court from doing so if it is in the child's best interest.