

# January 2019

## Legal Report

### SWAN Legal Services Initiative

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## PENNSYLVANIA SUPERIOR COURT

**In the Interest of S.L., a Minor**

Date of Decision: January 8, 2019

Cite: 3384 EDA 2017

**Holding:**

The Trial Court erred in denying Mother the opportunity to present evidence to rebut the presumption that she was a perpetrator of child abuse.

**Facts and Procedural Posture:**

In February of 2017, Philadelphia Department of Human Services (“DHS”) received a child protective services (“CPS”) report regarding S.L. The report indicated that Mother had taken S.L. to the emergency room at the Children’s Hospital of Philadelphia (CHOP) and informed hospital staff that approximately one week before, she had heard S.L.’s back making a “cracking” noise, and that in the week following, S.L. had been agitated and would only sleep on her side. S.L. was subsequently admitted to the hospital when testing revealed she had suffered six fractured ribs (consisting of 12 distinct bone fractures in various stages of healing) and a fresh fracture on her right proximal tibia (shin). The injuries were considered to be non-accidental. Both Mother and Father denied harming S.L., but neither could explain how the injuries had occurred. Subsequent communications initiated by Mother with the Doctor revealed that Mother was “concerned about Father’s reactions and behaviors” following discovery of their daughter’s injuries, including but not limited to Father’s opposition with her decision to take S.L. to the hospital and Father’s suggestion that they “just blame it on the family dog.” Mother also requested that the hospital not allow Father unsupervised contact with the child while she remained in their care.

The CPS report was indicated for physical abuse, naming both Mother and Father as perpetrators. An Order for Protective Custody was obtained, and a Petition seeking an Adjudication of Dependency, requesting a finding of aggravated circumstances and relief from reunification efforts, was filed. The trial court adjudicated S.L. dependent on March 1, 2017; contested permanency review hearings were held on July 19, 2017 and September 20, 2017 to determine whether child abuse had occurred. Following the presentation of DHS’s case, the trial court denied Mother’s attempt to present the testimony of several witnesses, including that of the court-appointed psychologist, as independent evidence to rebut the presumption that she was a perpetrator of child abuse. At the conclusion of the hearing, the trial court made a finding of child abuse naming both Mother and Father as perpetrators of the abuse, as well as a finding of aggravated circumstances as to both Mother and Father and agency relief from reunification efforts with both. The trial court did not hold nor schedule a permanency review hearing to be held within thirty (30) days. Mother appealed.

**Issue:**

Whether the trial court's denial of Mother's presentation of witness testimony to rebut *prima facie* evidence that Mother was a perpetrator of child abuse violated Mother's right to Due Process.

**Rationale:**

The Superior Court began its analysis by reviewing the legal standard set forth in the Pennsylvania Child Protective Services Law (CPSL) specific to parental culpability where the identity of the perpetrator of abuse is unknown. 23 Pa.C.S. §6381(d) states that "evidence that a child has suffered child abuse . . . shall be *prima facie* evidence of child abuse by the parent or other person responsible for the welfare of the child."

The Court noted that this is a rebuttable presumption in which a parent or caregiver presumed to have perpetrated child abuse is entitled to present evidence to rebut said presumption. Specifically, the Court looked to the Pennsylvania Supreme Court's decision in *In re L.Z.*, and noted that the *prima facie* evidence of abuse described above "is sufficient to establish that the parent or responsible person perpetrated the abuse unless the parent or responsible person rebuts the presumption. *The parent of responsible person may present evidence demonstrating that they did not inflict the abuse...* The evaluation of the validity of the presumption would then rest with the trial court[.]" 111 A.3d 1164, 1176 (Pa. 2015) (emphasis added).

**Definitions**

*Prima facie* evidence: "[s]uch evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient."

*Black's Law Dictionary* 825 (6th ed. abridged 1991).

The Superior Court determined that the trial court's refusal to hear prospective witnesses to rebut this presumption on the basis that said testimony was "unnecessary" and "irrelevant" was in error. One of the stated purposes of the Juvenile Act is to ensure due process, and in-court presentation of evidence is a fundamental component the fair hearing requirement of due process. Therefore, Mother was entitled to present evidence to rebut the presumption that she was the perpetrator of child abuse. The trial court would then weigh the credibility and persuasiveness of the witnesses and evidence in the record to make its ultimate determination. The denial of this opportunity did not satisfy due process. The order was vacated and the matter remanded for a new hearing to afford Mother the opportunity to present competent evidence to rebut the presumption that she was the perpetrator of child abuse.

**In re: C.M.K., a Minor**

Date of Decision: January 24, 2019

Cite: 402 WDA 2018

**Holding:**

The trial court committed an abuse of discretion when it denied a termination of parental rights solely based upon a finding of insufficient evidence as to one issue of parental incapacity to the exclusion of all other evidence in the record.

**Facts and Procedural Posture:**

C.M.K. was removed from the care of her Mother following reports to the Allegheny County Office of Children, Youth and Families (CYF) that Mother had left her with an inappropriate caregiver. CYF had a history with the family due to issues with substance abuse, domestic violence and the inability of Mother to properly and safely care for C.M.K.'s older half-sister. C.M.K. was to be returned to Mother following the shelter care hearing, however, both Mother and Father tested positive for alcohol following the hearing. C.M.K. was later returned to Mother's care only to be removed once again the next month. C.M.K. was placed in a pre-adoptive home with her half-sister. During this time, Father was incarcerated on charges received following an assault on Mother.

Sixteen months later, CYF filed petitions seeking involuntary termination of both Mother and Father's rights. After two days of testimony, including that of multiple psychologists, outpatient therapists, social workers, a teacher, and Mother and Father, the trial court denied both petitions.

Five months later, CYF re-filed the petitions seeking involuntary termination of the parental rights of both Mother and Father. CYF sought termination of Father's parental rights on the basis of §2511(a)(2), specifically arguing that Father's inconsistency and inability to fully comply with his family service plan, drug screening, and family therapy amount to a parental incapacity that cannot or would not be remedied. Following three days of testimony in which the trial court admitted into evidence the transcripts of the prior termination hearings, the trial court again entered an order denying CYF's petition as to Father. Specifically, the court determined that CYF's evidence had "again, fell short of establishing that Father cannot or will not remedy this concern" regarding his history of domestic violence. Since the trial court determined that CYF had not demonstrated clear and convincing evidence of grounds for termination under §2511(a), the court did not make any findings pursuant to §2511(b). CYF appealed, arguing that Father's overall inconsistency and inability to fully comply with his family service plan, drug screening, and family therapy amount to parental incapacity that cannot be remedied.

**Issue:**

Whether the trial court's focus on the issue of domestic violence as the "critical issued that needed to be addressed" was misplaced when additional conditions demonstrating parental incapacity continued to exist.

**Rationale:**

23 Pa.C.S. §2511(a)(2) provides, in relevant part, that the rights of a parent may be terminated when the repeated and continued incapacity of the parent has caused the child to be without essential parental care, control or subsistence necessary, and the conditions and causes of the incapacity cannot or will not be remedied by the parent. 23 Pa.C.S. §2511(a)(2).

The Superior Court determined that the trial court's findings of fact under this section were not supported by the record. The causes of Father's parental incapacity continued to persist approximately three and a half years after the adjudication of his daughter's dependency. Father was ordered to participate in treatment for drug and alcohol addiction and to submit to random screenings; to participate in treatment and therapy for domestic violence and anger management; and to regularly visit with the child. Contrary to the trial court's findings, Father recently failed to appear for drug screens and tested positive for cocaine, and Father's participation in family therapy was inconsistent at best.

The Superior Court determined that the orphans' court erred in finding that this ground was not proven by clear and convincing evidence and in placing sole focus on the issue of domestic violence to the exclusion of the full. Consequently, the Superior Court further determined that the trial court's failure to consider evidence and make any required findings under §2511(b) was in error. The Superior Court vacated the order denying termination and remanded for further proceedings.

## PENNSYLVANIA COMMONWEALTH COURT

**Luzerne County CYS v. DHS**

Date of Decision: January 28, 2019

Cite: 444 CD 2018

**Holding:**

Commonwealth Court found that the denial of a continuance sought by the Agency due to the absence of key witnesses was an abuse of discretion due to the serious nature of harm allegedly suffered by the child and the need to protect him from further abuse.

**Facts and Procedural Posture:**

Mother filed for expungement of reports naming her as a perpetrator of child abuse against her biological son. An expungement hearing was held. Mother failed to attend, the Child was deemed unavailable to testify, and only one of three Luzerne County Children and Youth Services (hereinafter referred to as the "Agency") subpoenaed witnesses appeared. The Agency asserted that the absent witnesses were necessary for their case, provided the reasons given by the witnesses for their current inability to attend the scheduled hearing, and requested the record remain open and a continuance be granted to obtain their testimony. Specifically, the Agency

asserted that testimony by the Child's therapist was essential as corroborative evidence of the Child's out-of-court statements to an Agency caseworker concerning the abuse. The Administrative Law Judge (ALJ) offered permission for the witnesses to testify by telephone; Agency Counsel stated he did not believe they could testify telephonically. The continuance request was taken under advisement and later denied for lack of good cause. Additionally, the ALJ recommended that Mother's appeal be sustained, as the Agency had not met its burden due to the record's lack of any non-hearsay evidence of the alleged abuse. The Bureau of Hearings and Appeals (BHA) adopted the recommended adjudication by the ALJ in its entirety. The Agency petitioned for review by the Commonwealth Court.

**Issue:**

Whether the BHA abused its discretion in affirming the ALJ's denial of the Agency's motion for a continuance, in effect prejudicing the Agency who was unable to present corroborating witness testimony and evidence?

**Rationale:**

The General Rules of Administrative Practice and Procedure regarding extensions of time allows for a continuance of a hearing to be requested by oral motion before the presiding officer. 1 Pa. Code §31.15(b). The refusal of a continuance rests in the discretion of the court or administrative agency to which the request is made; exercise of said discretion will not be reviewed absent clear abuse. Abuse of discretion occurs if, in reaching a conclusion, the law is overridden, misapplied, or the judgment exercised is manifestly unreasonable. In analyzing the refusal of a request for continuance, the reviewing court must examine the circumstances surrounding said denial.

The Pennsylvania Supreme Court has recognized that the Commonwealth's interests in preventing child abuse and protecting abused children from further injury is fostered by maintenance of records of perpetrators of child abuse. In this case, the ALJ found the testimony of the Agency caseworker regarding the sexual abuse of the ten-year-old child by forcing him to watch pornographic videos and infliction of serious mental injury (resulting in a diagnosis of post-traumatic stress disorder, bipolar disorder, and oppositional defiance disorder) through terrorizing the child credible. The ALJ also correctly determined that without corroboration, he could not rely on the evidence to base findings of fact. The decision to deny a continuance that would have allowed the Agency an opportunity to enforce its subpoenas and bring forth its corroborating witnesses was both an unreasonable and a misapplication of the law, and was thus, an abuse of discretion. Reversed and remanded for further proceedings.



## SPOTLIGHT

**Federal Spotlight: Waiver of HHS Regulation 45 CFR §75.300(C) Religious Freedom Restoration Act**

On January 23, 2019, the Department of Health and Human Services (HHS) issued correspondence giving special permission to a federally funded Protestant foster care agency in South Carolina amounting to a waiver of current federal prohibitions against discrimination in the recruitment of foster and adoptive parents and the placement of children and youth through use of the Religious Freedom Restoration Act. The full text of the correspondence can be found [here](#).

**S.1862: Trafficking Victims Protection Reauthorization Act of 2000**

On Wednesday, January 9<sup>th</sup>, 2019, the President of the United States signed into law [S.1862](#), the “Trafficking Victims Protection Reauthorization Act” (TVPRA), which amends the “Trafficking Victims Protection Act” (TVPA) by, among other things, modifying the criteria used for determining whether counties are meeting minimum standards for eliminating human trafficking.

**PA Rules of Criminal Procedure: Adoption of Rules And Revision of Comments to Rules to Incorporate Act 138 of 2016**

On December 21, 2018, the Pennsylvania Supreme Court adopted new [Rule 490.1](#) (Procedure for Obtaining Expungement of Truancy Cases; Expungement Order) to provide procedures for the expungement of summary truancy cases as provided for by Act 138 of 2016. Act 138 of 2016 (hereafter "the Act") amended truancy protocols in Pennsylvania. The Act, in 24 P.S. §13-1333.3, provides that a child convicted of the summary offense of truancy may request a court to expunge his/her record if certain conditions are met. The addition of R. 490.1 incorporates the “streamlined” procedures that address this particular form of expungement in the same manner of organization as Pa.R.Crim.P. 490 governing general summary expungements.

On the same date, the Court revised the [Comments](#) to Rules 430, 455 and 459 of the Pennsylvania Rules of Criminal Procedure to correct statutory references contained therein affected by Act 138 of 2016. Specifically, the Comments in their previous form referred to certain provisions in the Public School Act that have been changed by Act 138 of 2016 (24 P.S. § 13-1333(B)(2) *repealed* by Act 138 and now contained in 24 P.S. § 13-1333.3(f)(2)). Additionally, the Comments in their previous form described the consequences of a failure to respond to the 10-day notice in these cases as permitting the issuing authority to "allege the defendant dependent."

The Act removed this provision and now states that in such an event, the defendant may be referred to a probation officer for possible commencement of dependency proceedings. Finally, the Comments previously referred to defendants being charged who had "attained the age of 13 but is not yet 17." This has been changed by the Act as well and, as provided in 24 P.S. § 13-1333.1, a defendant may not be charged if under the age of 15. The language in these Comments therefore has been revised to reflect these changes as well as the provision in 24 P.S. § 13-133.3(f) (2) that provides for the adoption of a local policy for such referrals. The new Rule and revised comments are effective May 1, 2019.

### **PA Rules of Civil Procedure: Amendment to Rules 1007, 1018, 1033 And 2252 and Adoption of Rule 2005**

On January 24<sup>th</sup>, 2019, the Pennsylvania Supreme Court issued an [Order](#) amending Rules [1007](#), [1018](#), [1033 and 2252](#) and adopting [Rule 2005](#) of the Pennsylvania Rules of Civil Procedure. Rule 2005 governs the naming of unknown, or John/Jane Doe, defendants in a complaint. Previously, the Rules of Civil Procedure were silent as to the use of Doe defendants in litigation; however, case law demonstrated that the naming of Doe defendants had occurred. Rule 2005 is intended to fill this gap by standardizing the procedure in which to assert a cause of action against a Doe defendant where the action has been filed within the limitations period and the defendant has been adequately described in the complaint to demonstrate that it was *that defendant* against whom the action was asserted. The amendments to Rules 1007, 1018, 1033 and 2252 are all procedurally related to the adoption of Rule 2005. The amendments and new rule are effective April 1, 2019.

### **National Judicial Opioid Task Force Online Resource Center**

The National Judicial Opioid Task Force recently launched a [resource center](#) to address the ongoing opioid epidemic featuring dozens of facts sheets, videos, and other resources for judges and the general public regarding the opioid crisis and substance abuse disorders including treatment and services; special populations, including children and veterans; and collaborative efforts and data sharing among law enforcement medical professionals and the judicial branch. The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) formed the National Judicial Opioid Task Force (NJOTF) to examine current efforts and find solutions to address the opioid epidemic.