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Legal Report

SWAN Legal Services Initiative

A monthly publication from the SWAN Legal Training Team

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PENNSYLVANIA SUPERIOR COURT

In the Interest of Z.N.F.

Date of Decision: June 7, 2019

Cite: 2889 EDA 2018

Holding:

The child advocate acted as both guardian *ad litem* and legal counsel and satisfied the legal requirements for dual-role representation where she ascertained the child's preferred outcome in an age appropriate manner and no apparent conflict was discovered.

Facts and Procedural Posture:

In February of 2017, Philadelphia Department of Human Services ("DHS") filed petitions seeking involuntary termination of Mother's parental rights. The Trial Court granted termination pursuant to 23 Pa.C.S.A. §2511(a)(1), (2), (5), (8) and (b). Mother appealed. In May of 2018, the Superior Court vacated the decrees and remanded the matter to the trial court to determine what role the attorney, referred to in the record as child advocate, served during the termination proceeding. The Superior Court further directed the trial court to determine whether a conflict existed between the children's best interests and legal interests, and if so, to determine whether a new termination proceeding would be required to ensure the child's legal interests were represented. Upon remand, a hearing was held during which the child advocate testified to the following facts: at the time of the initial termination proceeding, the children were three (3) and five (5), that while she "had not seen the children" prior to the initial proceeding, she had met with them upon remand when the children had obtained the ages of five (5) and seven (7), and that the children "did not indicate that they wanted to go anywhere other than where they were." The child advocate admitted on cross examination that she did not ask the children outright whether they wanted to be adopted due to their age and perceived level of understanding. The trial court determined that the child advocate had served in a dual-role capacity, no conflict existed between the children's best interests and legal interests and therefore, a new termination proceeding was not necessary. The original decrees granting involuntary termination of Mother's parental rights were re-entered on September 11, 2018. Mother appealed, arguing the taking of testimony from the child advocate was in error where she was acting as an attorney and a litigant at the same time, and where her testimony regarding the child's desires was taken almost eighteen (18) months following the original proceedings.

Issue:

Whether the child advocate was acting as guardian *ad litem*, legal counsel, or both; if both, whether a conflict existed, and if so, whether a new involuntary termination proceeding is necessary.

Rationale:

In In re: Adoption of L.B.M., the Pennsylvania Supreme Court held that the Adoption Act requires that a child who is the subject of a contested involuntary termination proceeding has a right to appointed counsel who discerns and advocates for the child's legal interests, further defined as the child's preferred outcome. 161 A.3d 172 (Pa. 2017). The Court also found guidance in In re: T.S., which held that for a young child who cannot express their wishes the attorney-

guardian *ad litem* must “advise the court of the child's wishes to the extent that they can be ascertained and present to the court whatever evidence exists to support the child's wishes.” 192 A.3d 1080 (2018). In the instant case, the child’s counsel advanced the child’s desires to remain with her aunt despite not using the term “adoption” specifically in conversation with the child. The Court reasoned that there is no legal authority that provides a child's position on “adoption” is the requisite inquiry in determining his or her legal interests in a contested involuntary termination proceeding, and therefore, Mother’s argument rejecting that the child was unable to understand the concept of adoption in reliance upon T.S. was misplaced. The Supreme Court’s statement, in dicta, that “children as young as five or six years of age ... having opinions which are entitled to weight in legal proceedings concerning their custody” was in regards to custody proceedings. Rather, the Court in this case held that trial court’s findings that the child’s wishes regarding adoption did not exist or could not be ascertained due to the child's immaturity “was not a legal fiction but comported with the reality that the participants in the proceedings could not with absolute certainty discern the wishes and wants of such a young child.” The decree involuntarily terminating Mother’s parental rights to the child was affirmed.

In re: Q.R.D.

Date of Decision: June 25, 2019

Cite: 150 MDA 2019

Holding:

In a private case, where a child’s preferred outcome is not ascertainable at the time of the hearing, no conflict between legal and best interests exists; therefore, representation of a child’s best interests at a proceeding for involuntary termination of parental rights satisfies the mandate of appointment of counsel.

Facts and Procedural Posture:

In November of 2017, when child was four years old, Stepfather filed a private petition seeking involuntary termination of Father’s parental rights as to child pursuant to 23 Pa.C.S.A. §2511(a) (1). A hearing on the petition was held. Father conceded that despite the existence of a court-ordered custody agreement, he did not have contact with the child during the six (6) months immediately preceding the filing of the petition. Father offered numerous explanations demonstrating Mother’s efforts to prevent said contact, but also admitted that he had done nothing to challenge Mother’s efforts or enforce the custody agreement since a contempt action in 2014. During the hearing, the child was represented by court appointed counsel. Counsel did not present evidence at the hearing related to the child’s preferred outcome. Following the hearing, the trial court entered an order granting Stepfather’s petition and terminating Father’s parental rights. Counsel for the child notified the court that she would be retiring; new counsel for the child was appointed. Father appealed the trial court’s order terminating his parental rights. On appeal, pursuant to In re: K.J.H., the Superior Court addressed whether representation of the child met the legal standard of 23 Pa.C.S.A. §2313(a) and determined that the trial court record was “devoid of evidence” regarding the child’s preference” and therefore, found no basis upon which to conclude the child had been effectively represented. The Superior Court vacated the decree and remanded the matter to the trial court to determine whether a conflict existed

between the child's best interests and legal interests. On remand, the new attorney for the child testified that the child's preferred outcome was unable to express his desired interest, as the five (5) year-old-child was immature for his age, showed no recognition of Father's name and no memory related to Father. The trial court determined that as the child's interests were unable to be ascertained, effective representation by the previous attorney had been provided. A subsequent order was issued granting involuntary termination of Father's parental rights; Father appealed.

Issues:

This report will cover issue one; more information on issues two and three can be found in the opinion.

1. Whether the requirement that legal counsel be appointed to represent the child in a contested involuntary termination of parental rights hearings was satisfied where the court appointed an attorney-guardian *ad litem* who represented the child's best interests but failed to present evidence as to the child's legal interests;
2. Whether the trial court properly considered the whole history and individual circumstances of the case and did not mechanically apply the six-month statutory provision set forth in §2511(a)(1); and
3. Whether the trial court's determination that termination would serve the child's best interest was an abuse of discretion.

Rationale:

The Adoption Act mandates that counsel be appointed to represent the child in a contested involuntary termination proceeding. 23 Pa.C.S.A. §2313(a). The Superior Court relied upon the Supreme Court's holding in *In re: T.S.*, that "during contested termination of parental rights proceedings, where there is no conflict between a child's legal and best interests, an attorney-guardian *ad litem* representing the child's best interests can also represent the child's legal interests." *In re: T.S.*, 192 A.3d 1080 (Pa. 2018). *T.S.* also noted that if the legal interests, further defined as the child's preferred outcome, are unable to be ascertained due to young age, there can be no conflict between the child's legal interests and best interests. *Id.* at 1092. The Court further relied upon *T.S.* for the proposition that under these circumstances, where an attorney-GAL is representing a child and advocating for the child's best interests, §2313(a) does not require the appointment of another lawyer to "advance the child's unknowable preference." *Id.* In this case, testimony of the child's second attorney provided that the child's preferred outcome was unascertainable at the time of the hearing as Child was immature for his age, did not understand the legal proceedings, did not remember who her Father was or recognize his name, and did not have a preferred outcome. As the witness was deemed credible and the record supported this testimony, the Superior Court declined to interfere in the trial court's credibility determination and ultimately affirmed.

LEGISLATION SPOTLIGHT

Order Amending Rules of Appellate Procedure

On June 24, 2019, the Pennsylvania Supreme Court issued an Order amending Rules 905 (Filing Notice of Appeal), 1922 (Transcription of Notes of Testimony), 1935 (Opinion in Support of Order), and 1931 (Transmission of the Record) of the Rules of Appellate Procedure. These amendments were necessary to alleviate both potential and actual waiver concerns in situations where a party, ordered to file a statement of errors complained of on appeal pursuant to Rule 1925, was unable to accurately do so (despite the party's timely and proper request for its preparation) because a transcript had not been prepared. The amendments and their full text can be found [here](#).

PA: Act 56 of 2018/HB 1419: "Clean Slate" Bill

Pennsylvania's "Clean Slate Bill," [Act 56 of 2018](#), became effective June 28, 2019. Governor Wolf signed this bill into law on June 28, 2018. This bill affords only "limited access" to records of: second and third degree misdemeanors, misdemeanors punishable by two years or less in prison, summary convictions, and charges not resulting in convictions. These records should be automatically shielded from public view when individuals have been free from conviction of offenses punishable by a year or more in prison and have completed all court-ordered obligations for 10 years. If they have not been automatically shielded, or have been shielded in error, the individual may file an Act 5 petition for limited access. Individuals convicted of the certain offenses are not eligible for Clean Slate. These include: crimes involving danger to persons, crimes against families, firearm offenses, and cruelty to animals.

The "Clean Slate Limited Access" provisions of this law, amending 18 Pa.C.S.A. §9122.2, allow that certain entities may still access the records that are shielded from public view. These entities are: Law Enforcement (including, but not limited to Police, District Attorneys and/or the Courts); employers who either use FBI background checks and/or who are otherwise required to review and consider an applicant's criminal record under federal law; and the Supreme Court in its capacity to govern the practice, procedure and conduct of all courts, the admission to the bar, the practice of law, the administration of all courts and supervision of all officers of the judicial branch. County Children and Youth Agencies and/or Pennsylvania DHS may also request the information in the performance of duties relating to children and youth under relevant law. Convictions and records "sealed" under "Clean Slate Limited Access" may not be considered "convictions" in the conventional sense, such as they should not prevent the employment or housing of a person as may have been done under Pennsylvania or Federal law to the extent permitted by Federal Law. It is important to note that unlike expungements, convictions and records "sealed" under "Clean Slate Limited Access" *are not* removed or destroyed.

Did you know?

"Expunge" is defined in [18 Pa. Cons. Stat. § 9102](#) as:

- (1) To remove information so that there is no trace or indication that such information existed;
- (2) To eliminate all identifiers which may be used to trace the identity of an individual, allowing remaining data to be used for statistical purposes; or
- (3) Maintenance of certain information required or authorized under the provisions of section 9122 (c) (relating to expungement), when an individual has successfully completed the conditions of any pretrial or post-trial diversion or probation program.

More information on Clean Slate can be found here: <http://www.pacourts.us/learn/learn-about-the-judicial-system/clean-slate-expungement-and-limited-access>.

PA: Act 49 of 2018/HB 159: Burden of Proof Necessary to Establish Need to Treatment Supervision and Rehabilitation of a Juvenile

On June 28, 2018, Governor Wolf signed HB 159 into law as [Act 49 of 2018](#), which in part, established the burden of proof necessary in an adjudication to establish the need of treatment supervision and rehabilitation as a preponderance of the evidence. This law amended 42 Pa.C.S.A. §6341; prior to Act 49, the Juvenile Act did not specify the burden of proof for necessary to establish the need of treatment supervision and rehabilitation. The burden of proof necessary to establish that a juvenile committed the delinquent acts alleged in the petition remains beyond a reasonable doubt. This Act also amended the definition of “Delinquent act” in 42 Pa.C.S.A. §6302 to include “...the failure of a child to comply with a lawful sentence imposed for a summary offense” and the procedures outlined in §6304.1 related to juvenile commission of summary offenses. Act 49 and its amendments to the Juvenile Act become **effective on August 28, 2019**.

PA: Act 12 of 2019/HB 33: Ending Pennsylvania’s General Assistance Cash Benefit Program

On June 28, 2019, Governor Wolf signed into law [Act 12 of 2019](#) (HB 33), ending the general assistance cash benefit program. This state-only funded program paid a cash benefit to individuals who did not qualify for Temporary Assistance for Needy Families (TANF) or Supplemental Security Income (SSI). Under the provisions of Act 80 of 2012, the general assistance cash benefit program was to end on August 1, 2012; however, because Act 80 was recently invalidated by the Pennsylvania Supreme Court on procedural grounds in Washington v. Department of Public Welfare, 188 A.3d 1135 (Pa.2018), re-enactment of legislation ending the program was legally and procedurally necessary, as the cost of this program had not been included in the state budget. The program will officially end on August 1, 2019; no General Assistance case assistance will be dispersed after July 31, 2019.

PA: Act 14 of 2019/HB 856: Reinstating the Extension of PLC and Adoption Assistance Subsidies to Children from 18-21 years of age

On June 28, 2019, Governor Wolf signed [Act 14 of 2019](#) (HB 856) into law. This law reinstated the extension of Permanent Legal Custodian (PLC) and Adoption Assistance subsidies to children from 18 to 21 years of age. These subsidies were originally provided through the Subsidized Legal Custodianship Program (codified in Act 80 of 2012). As Act 80 of 2012 was recently invalidated by the Pennsylvania Supreme Court on procedural grounds in Washington v. Department of Public Welfare, 188 A.3d 1135 (Pa.2018), reinstatement of the program and its provisions as well as reenactment of the sections addressing the PLC subsidy and reimbursement, definitions and Kinship Care program was necessary in order to continue eligibility for receipt of Title IV-E funds. The **effective date** of this legislation is **retroactive to July 1, 2012** (the effective date of Act 80 of 2012).

PA: Act 16 of 2019 (HB 1615) Fostering Independence through Education Act

On June 28, 2019, Governor Wolf signed [Act 16 of 2019](#) into law. The “Fostering Independence through Education Act”, located in Article XXVI-K, provides tuition waivers at all Pennsylvania colleges and universities (public, private and state-related), community colleges, and the Thaddeus Stevens College of Technology, after all other aid has been applied. Eligibility for this waiver requires that the youth is a current resident of the Commonwealth, and is eligible for the [Pennsylvania State Chafee Grant Program](#). This would include both youth in foster care and/or

youth adopted, closed to permanent legal custodianship, or discharged (“aged-out”) from foster care at age 16 or older. The waiver would apply for up to five (5) years, whether or not consecutive, of college and cover students for either five (5) years or up to the age of 26, whichever comes first, providing they remain a PA resident and remain eligible for the Pennsylvania Chafee Education and Training Grant Program. *Tuition waivers will begin starting the Fall 2020 semester.* The Act also creates points of contact at these institutions to connect eligible students to related services, providing outreach to educate students about their eligibility and available supports, and data collection and reporting to aid in improving retention and ensuring student success.

In addition, this Act amended the definition of “Compulsory School Age” in §1326 to include those children age **six** (formerly eight) **to age eighteen** (formerly seventeen). While the act is effective September 26, 2019, this change will not go into effect until the 2020-2021 school year, as per a note added to the annotated statute. The Act also added a provision permitting schools to provide students not eligible for participation in the school food program and owing more than \$50 a school year for meals until the balance is paid or a payment plan has been established to reduce the unpaid balance and delineating that provision of alternative meals shall not “constitute public indemnification or stigmatization of a student.” Article XIV-B establishes the “Innovation Schools Program,” designed to study and evaluate innovative approaches to economically disadvantaged schools, “including workforce development programs, mentoring services, before and after school programs, prevention services and social wrap-around services.” Definitions related to this new program are provided for in §1401(B). These sections of the Act go into effect on September 26, 2019. This Act also requires colleges and universities to review and adopt policy on sexual harassment and violence as well as implement an online reporting system by June 28, 2020.

Did you know?

An “economically disadvantaged school” is defined as any school within this Commonwealth at which at least 75% of the students attending the school in the immediately preceding school year received a scholarship pursuant to this article. §2002-B.

PA: Act 17 of 2019 (SB 127): Reauthorization of 911 Law

On June 28, 2019, Governor Wolf signed [Act 17 of 2019](#) into law reauthorizing Pennsylvania’s 911 law, which was set to expire June 30, 2019. The reauthorization extends the law until June 30, 2021.

PA: Legislation to Support Victims

On June 28, 2019, Governor Wolf also signed several other Acts supporting and providing additional rights and protections of victims of crime into law, including:

- [Act 21 of 2019](#) (HB 315) Criminalizing female genital mutilation by classifying it a Felony of the First Degree
- [Act 23 of 2019](#) (HB 502) Amending the Crime Victims Act to allow a victim to be present in any criminal proceeding unless a court determination that the victim’s own testimony would be materially altered
- [Act 24 of 2019](#) (HB 504) Expanding the “Rape Shield Law” to cover instances of allegations of prior victimizations as well as expanding the number of crimes subject to protections under the “Rape Shield Law” to include human trafficking, incest, endangering the welfare of children (if the conduct involved sexual contact with the child), corruption of minors, sexual

abuse of children, and sexual exploitation of children

- [Act 29 of 2019](#) (SB 399) Updating the Sexual Assault Testing and Evidence Collection Act, including requiring the Pennsylvania State Police (PSP) to create procedures for anonymous victims
- [Act 30 of 2019](#) (SB 469) Establishing procedures protecting victims and witnesses with intellectual disabilities and/or autism spectrum disorder including in-camera testimony and questioning
- [Act 31 of 2019](#) (SB 479) Expanding the list of crimes for which the Tender Years exception to hearsay (which applies to an out-of-court statement made by a child under 12) can be used.

2019 Trafficking in Persons Report Released

On June 21, 2019, the United States Department of State released the [2019 Trafficking in Persons Report](#). This report serves as a comprehensive assessment as to what governments around the world are doing to combat the crime of human trafficking. This report reflects government efforts undertaken from April 1, 2018 through March 31, 2019.