

# March 2020

# Legal Report

## SWAN Legal Services Initiative

*A monthly publication from the SWAN Legal Training Team*

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Shallenberger v. Allegheny County

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In Re: Adoption of A.W.

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Spotlight

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## U.S. DISTRICT COURT- HIGHLIGHT

### Shallenberger v. Allegheny County

The District Court for the Western District of Pennsylvania denied Mother's motions for preliminary injunction and emergency preliminary injunction, where Mother claimed her constitutional rights were violated when the state court held a termination proceeding without notifying her. Despite expressing its sympathy, the court cited to both the *Rooker-Feldman* doctrine and *Younger* principles in determining it lacked jurisdiction over this matter, as it would require the court to improperly examine the state court's decision.



### *Did you know?*

The Rooker-Feldman doctrine is one that deprives federal courts of subject-matter jurisdiction when "(1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court's judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 166 (3d Cir. 2010)

The Younger abstention doctrine "reflects a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Wattie-Bey v. Attorney General's Office*, 424 F. App'x 95, 96 (3d Cir. 2011) (quoting *Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d 1195, 1199 (3d Cir. 1992)).

## SUPERIOR COURT OF PENNSYLVANIA

In the Interest of: S.C.

**Date of Decision:** March 3, 2020

**Cite:** 2020 PA Super 53

**Holding:** The trial court did not abuse its discretion in concluding that DHS had introduced clear and convincing evidence sufficient to find that Mother had committed child abuse of S.C., where Mother allowed the child to stay with her stepfather despite prior allegations of abuse.

**Facts and Procedural Posture:** In April 2018, Philadelphia Department of Human Services (DHS) received a CPS report that S.C. had been sexually molested by her stepfather. An investigation determined that the child lived with her stepfather, where they slept in the same room and shared a bed. Further, text messages were located that suggested the two were having sex, although the child denied any abuse was occurring. A safety plan was put in place that required the child and her siblings to be in Mother's care and restricted contact between the children and Stepfather. DHS received another report in September 2018 alleging the children were again living at Stepfather's home, prompting DHS to file a dependency petition. A hearing was scheduled. In the meantime, Stepfather entered a guilty plea to unlawful contact with a minor and was sentenced to three years of incarceration. An adjudicatory hearing was later held where the court adjudicated the child dependent and found Mother had committed child abuse by omission. Mother appealed.

**Issue:** Did the trial court err in finding evidence to support a finding of child abuse?

**Rationale:** To justify a finding of child abuse under Section 6303(b.1) of the CPSL, a court must determine, among other possibilities, that clear and convincing evidence supports a finding that a child was sexually abused, or put at risk of such abuse, through any failure to act. See *In the*

*Interest of N.B.-A.*, --- A.3d. ---, 2020 WL 354978 (Pa. 2020, filed January 22, 2020). Mother argued that the basis for the abuse was limited to the sexually explicit text messages, and that there was no evidence that she was aware of the messages prior to the investigation. In considering Mother's argument, the court reviewed *N.B.-A.*, a recent Supreme Court decision regarding child abuse by omission. The Superior Court found that this case was unlike *N.B.-A.* in that Mother was aware of the risk Stepfather posed to the child and consciously disregarded that risk by returning the child to his care, creating a reasonable likelihood the abuse would continue. As such, the court found the trial court appropriately considered the entire history of the case in concluding Mother's inactions constituted child abuse.

**In the Interest of: M.Y.C.**

**Date of Decision:** March 13, 2020  
**Cite:** 2020 PA Super 61

**Holding:** Mother's due process right to the care, custody, and control of her child were not violated when the trial court granted a delay in hearing and permitted the agency to amend the dependency petition. Further, the trial court did not err in adjudicating the child dependent when the trial court found the child's testimony of ongoing abuse to be credible.

**Facts and Procedural Posture:** In July 2019, Jefferson County Children and Youth Services (CYS) received a ChildLine report that M.Y.C. was living with and was often left alone with Mother's paramour, a registered sex offender. Upon investigation, Mother provided a court order from Clearfield County stating that Mother's paramour was to be removed from the registry. However, the paramour had an additional registerable conviction in another county that was under review. CYC filed an application for emergency protective custody, and a shelter care hearing was held. At the hearing, the GAL stated on behalf of the child that she would "waive" the ten-day adjudicatory hearing requirement, and a hearing was scheduled 30 days later. In the meantime, CYC filed a dependency petition alleging that the child was without proper parental care or control due to Mother allowing a registered sex offender to reside in the home and spend unsupervised time with the child.

On August 8, 2019, CYC received a second ChildLine report alleging that Mother had been engaging in physical and emotional abuse of the child. CYC then filed a second dependency petition, this time alleging that the child was without proper parental care or control in that she had been a victim of abuse. The petition also stated that CYC had received notice that Mother's paramour had been fully removed from the child abuse registry. Mother filed a Motion to Dismiss the petitions. At the dependency hearing, CYC made an oral motion to amend the first petition with the second, stating that they would no longer seek dependency on the basis alleged in the first petition. The trial court granted CYC's motion and denied Mother's. Testimony at the hearing was provided by a CYC caseworker, two witnesses called by Mother, and the child herself, who testified to specific accounts of abuse causing her to be afraid of Mother. At the conclusion of the hearing, the court found that the child was without proper parental care or control under provisions of the Juvenile Act and the CPSL. Mother appealed.

**Issues:**

1. Did the trial court err in scheduling the dependency hearing 30 days after the Child was placed in shelter care, thus violating Mother's substantive due process right to the care, custody, and control of her child?
2. Was Mother's substantive due process right to the care, custody and control of her child violated by allowing CYS to initiate a dependency proceeding on an invalid factual basis without first seeking leave from the trial court?
3. Did the trial court err in finding that Child was dependent as supported by clear and convincing evidence?

**Rationale:** In regards to Mother's first issue, the Juvenile Act requires that a dependency hearing take place within ten days of emergency protective custody. The statute also provides limited exceptions to this requirement, one of which includes any "delay caused by any continuance granted at the request of the child or his attorney." The Superior Court noted that the plain language of the statute does not require that such delay be the result of any specific factual finding other than it being the child's request. Because the delay of the hearing was due to the Child's request, the court found that the request conformed to the requirement. While the Juvenile Act provides that delays shall not exceed ten days, it allows the court to continue for successive ten-day intervals. Here, the trial court erred in delaying the hearing for 30 days. However, the court would have been permitted to grant successive 10-day continuances. Further, following the delay, a full evidentiary hearing was held, providing Mother an opportunity to contest the allegations before the court made the findings to support an adjudication of dependency. As such, the 30-day delay did not rise to the level of a due process violation.

The court next considered Mother's second issue. A review of the record showed that, although the paramour should have been removed from the registry prior to CYS's involvement with the family, the agency exercised due diligence in determining he was an active registrant at the time they filed for protective custody and removed the child from the home. Further, when CYS learned that Mother's paramour had officially been removed from the registry, it no longer sought dependency on that basis. Based on these facts, the court found that CYS acted in accordance with the statute by seeking emergency protective custody of the child and filing the first dependency petition based on its investigation and knowledge at the time. Further, the trial court was within its discretion to allow CYS to amend the dependency petition based on the allegations that were reported after the shelter care hearing. Although Mother was deprived of custody of the child in the meantime, the court noted that neither emergency protective custody nor an adjudication of dependency is a *per se* violation of Mother's due process rights. Mother was provided with notice and the opportunity to defend herself against the allegations in all proceedings. Further, the provisions of the Juvenile Act and CPSL related to those proceedings provided sufficient process to protect Mother's rights. As such, there was no due process violation.

Finally, in regards to Mother's third issue, the court noted that the trial court found the child's testimony regarding the alleged abuse, pertaining to prolonged physical and mental distress, to be credible and is therefore bound by that determination on appeal. Further testimony indicated that Mother was uncooperative with CYS and unwilling to work on her relationship with her child. Based on the totality of the circumstances, the court found that the adjudication of dependency was supported by clear and convincing evidence that Mother's actions put her child at risk, and that she lacked parental care and control.

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**In Re: R.A.M.N.**

**Date of Decision:** March 5, 2020

**Cite:** 2020 PA Super 49

**Holding:** The Superior Court affirmed the trial court's denial of the agency's petitions to terminate the parental rights of Mother, which were based on allegations that Mother remains a safety threat to her children due to her failure to explain the cause of fatal injuries to another child several years earlier.

**Facts and Procedural Posture:** Mother had three children, one of whom died in 2013 due to a traumatic head injury occurring while in the care of Mother and/or her former paramour. The remaining two siblings were adjudicated dependent and placed in care. Mother was later adjudicated as a perpetrator by omission. In 2018, Luzerne County Children and Youth Services (CYS) filed petitions to involuntarily terminate Mother's parental rights pursuant to 23 Pa.C.S. § 2511 (a)(8), as well as goal change petitions. At the hearing, the CYS caseworker testified that Mother was compliant with her reunification requirements but remains a safety threat in that she cannot or will not explain how the fatal injuries to her child occurred. A medical expert testified that the child had pre-existing injuries prior to her death but was able to opine that the head injury likely occurred while Mother was at work. Following the testimony offered, Mother moved for a directed verdict. The court granted this, denied CYS's petitions, and directed that the children be returned to Mother's care at the close of the academic year. CYS appealed.

**Issue:** Did the trial court err in granting Mother's directed verdict and denying CYS's petitions to terminate parental rights?

**Rationale:** The court identified that under 23 Pa.C.S. § 2511 (a)(8), the only issue is whether or not the reasons for placement continue to exist. In reviewing the record, the Court concluded that the agency's case rested entirely upon the fact that Mother was unable to offer a plausible explanation for the deceased child's injuries. The court further noted that the agency's reason for placement was Mother's failure to protect her children, not her lack of explanation for the injuries. Further, had she had a plausible explanation for the injury, she would not have been identified as a perpetrator by omission in the first place, making CYS's position one that is "impossible to satisfy." The record indicated that that the agency's case appears to be centered on its distrust of Mother rather than any evidence that Mother will fail to protect the children. As such, the court found that the trial court did not err in denying CYS's petitions, as Mother is neither a present nor imminent danger to her children.

**In Re: C.B.**

**Date of Decision:** March 13, 2020  
**Cite:** 2020 PA Super 59

**Holding:** The trial court did not err in denying the agency's petition for involuntary termination of parental rights, as Mother's pending criminal charges alone were not enough to support termination. Order affirmed.

**Facts and Procedural Posture:** In 2017, C.B. was hospitalized after a specific incident of abuse for which Father admitted to and was charged. Mother was charged with recklessly endangering another person and endangering the welfare of the child for her failure to seek medical treatment following the incident. The child was adjudicated dependent and placed with her paternal grandmother following release from the hospital. In November 2018, Blair County Children, Youth and Families (CYF) filed a petition for termination of parental rights, and several evidentiary hearings were subsequently held. Testimony indicated that Mother had been compliant with her service objectives but did not have stable housing or employment and remained in contact with Father. It was also revealed that Mother's criminal charges were pending at the time the petition was filed, which put restrictions on her visitation and caused a barrier to reunification. However, the criminal charges were resolved prior to the closure of the evidentiary hearings. In September 2019, the trial court denied CYF's petition. CYF promptly appealed.

**Issue:** Whether the orphans' court erred in concluding that the CYF did not meet its burden of proof by clear and convincing evidence to terminate Mother's parental rights pursuant to 23 Pa.C.S. § 2511 (a)(5)(8) and (b).

**Rationale:** The Superior Court identified that, under 23 Pa.C.S. § 2511 (a)(5) and (8), the Appellant was required to demonstrate that the conditions that led to the removal and placement continued to exist at the time the petition was filed. The court began its analysis by reviewing the allegations against Mother. In doing so, the court determined that, although housing conditions, employment concerns, and her continued contact with Father might support termination of parental rights, they are not the factors that led to the child's removal and thus do not support termination under Sections 2511 (a)(5) or (a)(8). The court next looked at the final allegation, the pending criminal charges, and determined that it did, in fact, relate to the cause of placement. However, the Superior Court also found that the pendency of Mother's criminal charges and resulting restrictions on visitation were "akin to the circumstances and limitations of an incarcerated parent." In citing existing caselaw, the court found that, like incarceration, the pendency of criminal charges cannot, by themselves, automatically support termination. Here, although there were pending charges, Mother complied with requirements for reunification and maintained a relationship with the child to the best of her ability. Thus, the court affirmed the trial court's order without prejudice, allowing CYF to re-seek termination of parental rights given the resolution of Mother's criminal charges.



**In the Interest of: D.N.G.****Date of Decision:** March 13, 2020**Cite:** 2020 PA Super 62

**Holding:** The Superior Court reversed orders involuntarily terminating Mother's parental rights where the child was deprived of his statutory right to counsel.

**Facts and Procedural Posture:** Philadelphia Department of Human Services (DHS) became involved with the family in 2014. In 2016, D.N.G. was adjudicated dependent based on truancy and Mother's inability to provide care and supervision. Mother complied with the permanency plan intermittently until DHS filed petitions to terminate Mother's parental rights and change the permanency goal to adoption in March 2018. The GAL continued to represent D.N.G.'s best interests in the termination proceeding, but legal counsel was appointed as well. At the hearing, the legal counsel informed the court that the 11-year-old child opposed adoption and desired to return to Mother's care. However, no further evidence was presented to support this. The GAL and Mother argued against termination. Despite this, the court granted DHS's petitions to change the goal and to terminate Mother's parental rights. Mother appealed.

**Issues:** Whether the court erred in granting the petition to terminate parental rights where the child wished to return home and was inadequately assisted by legal counsel.

**Rationale:** Under *23 Pa.C.S. 2313(a)*, appointment of legal counsel is required in contested involuntary termination proceedings. The Superior Court found that mere appointment of legal counsel is not enough to satisfy this requirement. Rather, the legal counsel has an obligation to engage in client-directed advocacy with regard to the child's preferred outcome. In this case, the legal counsel spoke with the child and reported the child's preferences to the court. However, he failed to promote his client's position in that he did not present any evidence, did not call any witnesses, and did not cross-examine any of DHS's witnesses relative to his client's wishes. The court noted that, most importantly, he failed to present the legal argument that his client would be 12 years old by the time an adoption would occur and would refuse to consent, thus leaving him an orphan. As such, the court found the child was deprived of his statutory right to counsel. The court vacated the termination decrees and remanded for a new termination hearing consistent with the court's opinion.

**In Re: Adoption of A.W.****Date of Decision:** March 24, 2020**Cite:** 2020 PA Super 68

**Holding:** The trial court did not err in granting petitions for involuntary termination of parental rights where Mother's voluntary relinquishment was contingent upon a post-adoption contact agreement.

**Facts and Procedural Posture:** In January 2019, Northumberland County Children and Youth Service Agency filed petitions for involuntary termination of parental rights. A hearing was held in May 2019, where it was determined that both parents had executed voluntary

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relinquishments. One week later, the agency learned that Mother's consent was conditioned upon a post-adoption contact agreement and filed a motion for a re-hearing on the termination of parental rights. A new hearing was held in June. At that time, the court found that the Mother's consent was not, in fact, voluntary and proceeded with an involuntary termination hearing. At the conclusion of the hearing, the court granted the agency's petitions to involuntarily terminate parental rights. Mother appealed.

**Issue:** Whether the orphans' court erred in determining Mother did not enter a voluntary relinquishment and by voiding the voluntary relinquishment and thereon proceeding immediately to a hearing on involuntarily terminating her parental rights?

**Rationale:** The court began its analysis by reviewing the two procedures to voluntarily relinquish parental rights as provided by the Adoption Act. In doing so, it noted that neither process was followed. Specifically, Mother did not file a petition to relinquish her parental rights pursuant to Section 2501 and 2502, nor did the agency petition the court to confirm Mother's consent pursuant to Section 2504. Because of this, the only petitions that were pending before the court were the involuntary termination petitions filed in January 2019.

The court next reviewed the provisions of the Adoption Act governing post-adoption contact, noting that the law does not include a provision allowing a parent to condition his or her relinquishment on the adoptive parents' continuing contact. The court further explained that exceptions to the Act cannot be judicially created. Although the court noted that Mother was not pressured into relinquishing her rights, the trial court found that the consent was contingent on continuing contact. As such, the trial court did not abuse its discretion in finding that Mother's relinquishment was not made voluntarily, thus properly proceeding with the agency's involuntary termination petitions.

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**B.A.W. N/K/A B.A.C. v T.L.W., III**

**Date of Decision:** March 3, 2020  
**Cite:** 2020 PA Super 46

**Holding:** In this private custody matter, the Superior Court vacated and remanded the trial court's order holding Father in contempt for failure to pay a court-imposed fee and imposing a sanction of incarceration.

**Facts and Procedural Posture:** Father filed a *pro se* petition to modify custody in October 2018. A hearing was held before a hearing officer, and it was recommended that the parties undergo a custody evaluation where Father was to pay one third of the cost. The trial court agreed with the hearing officer's recommendations and ordered Father pay one third of \$3500 to the custody evaluator. Father failed to pay despite being granted several extensions. In May 2019, the trial court issued a rule to show cause why Father should not be held in contempt for failure to pay. A rule to show cause hearing was held by the custody hearing officer. Following the hearing, where Father remained *pro se*, the hearing officer found Father's failure to pay had been "willful" and issued a proposed order holding Father in contempt. It further provided that he could "purge the contempt" by paying the evaluator by the end of the month. However, if he

*Cont'd.*



failed to do so, he must report to the county prison. The trial court adopted the proposed order in its entirety. Father appealed.

**Issues:**

1. Did the trial court commit an error of law and violate Father's right to due process when it found him in contempt without holding a hearing and delegated its authority to a hearing officer?
2. Did the trial court commit an error of law when it failed to appoint counsel for Father once it determined Father faced incarceration for contempt?

(Note: Two other issues were raised but were not addressed by the appellate court, therefore they are not included in this summary.)

**Rationale:** In regards to the first issue, the Superior Court reviewed the governing law. In custody and visitation actions, the Pennsylvania Rules of Civil Procedure distinguish the duties of a hearing officer from those of the trial court. Specifically, Rule 1915.12 provides that only the trial court may find a respondent in contempt. Moreover, well-settled caselaw has emphasized that only the trial court has the authority to impose the sanction of imprisonment for contempt. The court thus found that the trial court misapplied the law and erred by not conducting its own evidentiary hearing on the matter.

The Superior Court next addressed Father's second issue. Father argued that he was entitled to appointed counsel when the trial court ordered incarceration, and cited to several cases to support this position. Specifically, in *Commonwealth v. Diaz*, 191 A.3d 850 (Pa. Super. 2018), the court found that "upon the trial court's determination at the civil hearing that there is a likelihood of imprisonment for contempt and that the defendant is indigent, the court must appoint counsel and permit counsel to confer with and advocate on behalf of the defendant at a subsequent hearing." Here, the trial court held that Father would be imprisoned if he failed to pay, thereby imposing incarceration as a sanction and creating a clear likelihood of imprisonment. As such, in accordance with *Diaz*, the trial court should have then ascertained whether he was entitled to court-appointed counsel. The Superior Court vacated the trial court's order and remanded the matter for further proceedings.

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**In Re: Adoption of M.C.F.**

**Date of Decision:** March 30, 2020

**Cite:** 2020 PA Super 78

**Holding:** In this private termination matter, the court denied counsel's permission to withdraw and remanded the matter for further action, where it was determined that Father's appeal was not wholly frivolous.

**Facts and Procedural Posture:** Mother and Father are divorced with two children. Mother and the children live with Mother's fiancé, and Father had not been involved in the children's lives since February 2017. Mother filed petitions to involuntarily terminate Father's parental rights so that her fiancé could adopt them. The orphans' court granted Mother's petitions. Father appealed. Father's counsel then filed a petition to withdraw from the appeal, along with a supporting the *Anders* brief.

**Rationale:** In regards to withdrawal, the court identified certain requirements that must be met according to *Anders v. California*, 386 U.S. 738 (1967). Specifically, counsel must:

- (1) provide a summary of the procedural history and facts, with citations to the record;
- (2) refer to anything in the record that counsel believes arguably supports the appeal;
- (3) set forth counsel's conclusion that the appeal is frivolous; and
- (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Further, the court also must "conduct an independent review of the record to discern if there are any additional, non-frivolous issues overlooked by counsel." *Id.*

The court found that counsel complied with the technical requirements as required. However, a review of the record indicated that Mother was not married when she filed the termination petitions and, thus, may not have demonstrated if valid adoptions were anticipated. As such, the court found that Father's appeal was not so lacking in merit that counsel should be permitted to withdraw. The court then denied the counsel's petition to withdraw and remanded the case for the counsel to file an advocate's brief.

## SPOTLIGHT

In *McKean County Juvenile Probation v. Newman*, the Superior court considered whether the trial court erred in holding adoptive parents fully responsible for the cost of their child's delinquency placement. Upon review, the court found that the hearing officer and trial court erred in its application of the support guidelines. In doing so, the parents were ordered to pay nearly four times the amount called for under the guidelines, and wrongly characterized the payments as "arrear." As such, the trial court's orders were vacated and remanded with further instructions.

More information can be found at *2020 PA Super 48*.