

# May 2021

## Legal Report

### SWAN Legal Services Initiative

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## SUPERIOR COURT OF PENNSYLVANIA

**In the Interest of: S.S., A Minor v. Appeal of: D.S., Father**     **Date of Decision:** May 17, 2021**Citation:** 2021 PA Super 101

**Holding:** The Superior Court vacated the decree involuntarily terminating Father's parental rights to Child and remanded the matter to the trial court for a new hearing.

**Facts and Procedural Posture:** Father is child's adoptive father and biological grandfather. Child's biological mother, A.S., is father's biological daughter. Father adopted child in April 2017, following the termination of A.S.'s parental rights. Father is divorced and adopted child as a single parent. In May of 2017, the Allegheny County Office of Children, Youth and Families ("CYF") received a referral regarding the family, after father disciplined child by striking her on the legs and buttocks with a flyswatter, inflicting abrasions. In June of 2017, father was arrested and pleaded guilty to endangering the welfare of children and harassment, receiving a sentence of five years of probation. CYF obtained an emergency custody authorization and formally placed child with foster parents. The child was subsequently deemed dependent by the court. CYF also conducted a child abuse investigation, resulting in a founded report against father due to an incident where he shaved child's head. Father's reunification goals were to cooperate with CYF, complete a parenting program and attend supervised visits with the child. Father complied and completed a parenting program. CYF referred father for visits and family counseling through Three Rivers Adoptions Council ("TRAC") and father attended visits consistently.

The trial court ended services at TRAC in May of 2018, for unknown reasons; CYF made referrals to several other potential service providers. However, none of those providers were able to facilitate visits between father and child successfully. Father made himself available for visits, but child refused to attend. Father's last visit with the child occurred in June of 2018, although he spoke with her via telephone twice after such date. On September 9, 2019, CYF filed a petition to terminate the parental rights of father. A hearing regarding the termination petition was held on August 21, 2020. On September 23, 2020, the trial court entered a decree terminating father's parental rights and Father subsequently appealed.

**Issues:**

1. Did the trial court abuse its discretion and/or err as a matter of law in granting the petition to involuntarily terminate Father's parental rights pursuant to 23 Pa.C.S.A. §2511 (a)(2),(5), and (8)?
2. Did the trial court abuse its discretion and/or err as a matter of law concluding that CYF met its burden of providing by clear and convincing evidence that termination of Father's parental rights would best serve the needs and welfare of the child pursuant to 23 Pa. C.S. A. §2511 (b)?

**Rationale:** The Court first addressed Father's argument that he remedied the conditions leading to the child's removal from his care, and that he did all that he reasonably could to achieve reunification. Father argues foster parents thwarted his reunification efforts by alienating the child from him.

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The Court reviewed the evidence presented at the termination hearing and saw that the record reflected that the trial court rejected the testimony of Father's expert witness but relied on CYF's witness who did not testify at the termination hearing and whose report was not admitted into evidence at the termination hearing. Rather, the record reflected that CFY's witness's report was admitted during the child's dependency hearing but the trial court did not admit her report into the record at any point during the termination proceedings and that the parties did not agree to "incorporate" the dependency record into the termination proceedings. Father was not provided notice that the trial court might consider CYF's witness's report when rendering its decision, as she was not listed as a potential witness on any of the pre-trial statements, and her name was never mentioned during the termination hearing. The Court found the trial court's *sua sponte*<sup>1</sup> consideration of evidence outside the record is fatal to its termination decree. Termination proceedings often occur simultaneously with dependency proceedings, but these two types of proceedings remain distinct, with their own docket numbers, records, and divisions within the Court of Common Pleas. The Court concluded that the trial court's error was not harmless<sup>2</sup>."

**C.L. v. M.P.**

**Date of Decision:** May 26, 2021

**Citation:** 2021 PA Super 107

**Holding:** Superior Court concluded that the trial court erred in allowing Guardian ad Litem (GAL) access to Mother's mental health records from the previous three years and for her to provide access to her mental health treatment. Case remanded.

**Facts and Procedural Posture:** Mother filed an appeal from the orders that appointed a guardian ad litem (GAL) and provided the GAL access to her mental health records from the last three years.

In August 2019, Father filed a petition for custody and a petition for emergency special relief alleging in both petitions that Mother was acting erratic and had hostile outbursts toward him and in front of the child. Father alleged that Mother had an extensive mental health history and has refused to seek further treatment. Father's petition for emergency special relief was granted *ex parte*<sup>3</sup> and he received an order granting him temporary sole physical and legal custody of the child. In October 2019, the court appointed a GAL due to the high conflict in the family and the sensitive nature of the allegations. The order appointing the GAL used a form order that contained language allowing the GAL to access both parties' psychological or psychiatric charts, including evaluations, progress notes, test evaluations, and discharge summaries.

Mother petitioned for reconsideration of the emergency special relief order citing the Mental Health Procedures Act (MPHA), the psychologist-patient privilege and relevant case law. Following oral argument, the court limited the GAL's access to three years of both

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<sup>1</sup> *Sua sponte*: Used to indicate that a court has taken notice of an issue on its own motion without prompting or suggestion from either party.

<sup>2</sup> Finding harmlessness in a termination of parental rights case requires the court to conclude that the evidentiary error could not have had any impact upon the trial court's decision.

<sup>3</sup> *Ex parte*-done by, for, or on the application of one party alone.

parties' mental health records and ordered non-disclosure of such records, tailoring the order to the testimony of the case. The parents were also directed to submit to mental health evaluations and/or testing through one of two different providers pursuant to Pa. R.C.P. 1915.8. The trial court later issued an order in compliance with Pa.R.C.P. 1915.18 which limited the parties' access to the evaluator's file without authorization from the court.

### Issues:

1. Whether participation in a custody action results in a waiver of protection by the Mental Health Procedures Act (MHPA), 23 Pa.C.S. § 5334.
2. Whether the Custody Act provides for the least intrusive means of a sufficient mental-health evaluation of the parent or whether the trial court may order a limited disclosure of the records.
3. Whether the trial court erred in disclosing confidential mental health records to the GAL.

**Rationale:** First, the Court considered whether participation in a custody action constitutes an implicit waiver of a party's confidentiality privilege under MHPA. The Court looked to existing case law for guidance. The Court found prior cases demonstrated that, absent explicit waiver of the MHPA confidentiality privilege, a party's confidential mental health records are not subject to disclosure. This is especially true in custody cases, where "less intrusive means" existed to determine the effect of a parent's mental health upon a child's best interests. This remained true even where one or both of the parties' mental health is placed at issue during the custody dispute.

The next issue addressed was whether the trial court erred in ordering Mother to disclose her mental health records to the GAL. The trial court concluded that Section 111 of the MHPA conflicted with the role of the GAL as set forth in Section 5334 of the Child Custody Act and the relevant Rules of Pennsylvania Civil Procedure. The Court reasoned that both the Pennsylvania Rules of Civil Procedure and the Domestic Relations Code permit courts to appoint a GAL in a custody action. Pursuant to Section 5334(b)(2) of the Child Custody Act, the GAL shall be given access to relevant court records, reports of examination of the parents or other custodian of the child and medical, psychological and school records. Further, the GAL must make specific recommendations in a written report to the court relating to the best interests of the child, including any services necessary to address the child's needs and safety. 23 Pa.C.S. § 5334(b)(6).

The Superior Court disagreed with the trial court, finding that the GAL statute conflicted with the confidentiality protections of the MHPA. Section 5334 of the Custody Act authorizes the GAL to access "reports of examination of the parents." The Court, relying on prior decisions emphasizing the importance of confidentiality in mental health treatment, and the trial court's authority to obtain the same information through a Rule 1915.8 mental examination, found that it is clear that "reports of examination" are not meant to include a parent's confidential mental health records. The Court further stated that the provisions relating to "medical, psychological and school records" refer to the records of the child, not the parents. See Pa.C.S. § 5334(b)(2); see also Pa.R.C.P. 1915.11-2.

Lastly, the Court considered whether the Custody Act provides for the "least intrusive means" of a sufficient mental health evaluation of the parent, or whether the trial court may order a limited

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disclosure of the party's mental health records. In its Rule 1925(a) opinion, the trial court reasoned that, although it ordered Mother to disclose portions of her mental health records, it did so "in a manner that respects both parents' concerns about the disclosure of their mental health history." The Superior Court held that it is the disclosure itself – not the scope of the disclosure or the alleged necessity of the information contained in the records – that vitiates a party's statutory right to confidentiality under the MHPA.

**In the Int. of: E.C., A Minor Appeal of: J.A.C., Father**

**Date of Decision:** May 6, 2021

**Citation:** 2021 PA Super 88

**Holding:** The Superior Court affirmed the trial court's decision that permanency review orders are interlocutory and unappealable. Father's appeal was quashed.

**Facts and Procedural Posture:** On August 3, 2018, the Children were adjudicated dependent and subsequently placed in foster care.

The court established reunification as the Children's permanency goal, with adoption as the concurrent goal. The court ordered, in part, that the parents enroll in and successfully complete five different noted parenting classes. The court further ordered Father to submit to random drug testing, and both parents to successfully complete individual counseling to address their domestic violence and drug and alcohol issues.

Permanency hearings were held regularly. At these many permanency hearings, Father's level of compliance with his permanency plan varied with "in moderate compliance" and "making progress." In June 2020, orders provided the parents with "no less than weekly supervised with the frequency and level of supervision to be altered at the discretion of the Agency. The Agency will develop a 60-day transition plan to commence as soon as possible." The court scheduled the next permanency review hearing for September 10, 2020.

On August 18, 2020, Father filed a petition to return physical custody. He alleged that the sixty days had elapsed and physical custody had not been returned to the natural parents. He requested the court return physical custody of the Children to him and Mother.

The court addressed father's petition at the September 10, 2020 permanency review hearing. At that time, the court voiced its continuing concerns regarding the parents' unaddressed issues with marijuana use and domestic violence and maintained and the Children remain in foster placement. A review permanency hearing was scheduled for December 2020. Father subsequently appealed.

**Issue:** Whether the Juvenile Court erred/abused its discretion in determining that physical custody of the minor children should not be returned to the natural parents.

### ***Did you Know?***

**Interlocutory** is a legal term which can refer to an order, sentence, decree, or judgment, given in an intermediate stage between the commencement and conclusion of a cause of action, used to provide a temporary or provisional decision on an issue. Thus, an interlocutory order is not final and is not subject to immediate appeal.

**Quash** is a legal term meaning to vacate, void or nullify.

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**Rationale:** Prior to addressing Father’s issue that the children should be returned to him and Mother, the court first analyzed whether the Permanency Order was appealable. In doing so, the court stated that the ruling on a decision as to whether or not children should be returned home to a parent cannot be a final order subject to appeal. To allow such an appeal would allow appeals following every permanency review hearing where reunification is the goal.

The Court next addressed whether the permanency review orders were collateral orders<sup>4</sup> under Pa.R.A.P. 31 (b). The Court noted that the Supreme Court has directed that Rule 313 be interpreted narrowly so as not to swallow the general rule that only final orders are appealable as of right. To invoke the collateral order doctrine, each of the three prongs identified in the rule’s definition must be clearly satisfied. A review of the record clearly showed that the permanency review orders from which Father appealed do not deny a goal change, and the goal of reunification with the concurrent goal of adoption remained unchanged. Because of this, Father may make the same request to return his children to him at each and every hearing yet to come. Thus, Father’s claims would be irreparably lost if postponed.

## PENNSYLVANIA COURT OF COMMON PLEAS

**A.R., v. Department of Human Services**

**Date of Decision:** May 7, 2021

**Citation:** 481 CD 2020

**Holding:** The Court of Common Pleas affirmed the Bureau of Hearings and Appeals’ (BHA) decision that Luzerne County Children and Youth Services (CYS) met its burden of proof and the Administrative Law Judge (ALJ) did not err in denying A.R.’s expungement appeal.

**Facts and Procedural Posture:** A.R. petitioned the court for review of the BHA’s April 2020 order adopting the ALJ’s recommendation denying A.R.’s request to expunge her indicated report of child abuse from the ChildLine & Abuse Registry (ChildLine Registry). A.R. is minor M.C.’s (Minor) older sister. In the fall of 2018, A.R., and her boyfriend, J.K., lived with Minor and her Mother (Mother) in mother’s house. On July 31, 2019, CYS received a referral that A.R. and J.K. gave Minor alcohol and sexually abused her in the fall of 2018, when Minor was 14 years old. CYS conducted an investigation with the assistance of the local police. Minor participated in a Child Advocacy Center interview, during which she disclosed that A.R. and J.K. had given her alcohol and engaged in oral and vaginal intercourse with her. CYS filed an indicated report of child abuse against A.R. and J.K. as perpetrators of sexual child abuse against Minor.

On December 28, 2019, A.R. filed an expungement appeal and requested a hearing because she disagreed with the indicated report. A hearing was held on March 2, 2020, before the ALJ, at

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<sup>4</sup> Rule 313. Collateral Orders.

(a) General rule.—An appeal may be taken as of right from a collateral order of a trial court or other government unit.

(b) Definition.—A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.



which the Minor, a CYS intake caseworker, Police Department Sergeant and A.R. testified. On April 22, 2020, the ALJ issued a recommendation that the BHA deny A.R.'s expungement appeal. A.R. appealed to this Court.

**Issue:** Whether the ALJ's recommendation, adopted by the BHA, was supported by substantial evidence, where the ALJ found the minor child's testimony credible and A.R.'s testimony not credible.

**Rationale:** The Court addressed A.R.'s argument that the A.L.J. abused his discretion by finding that Minor's testimony was credible, and her testimony was not. The Court stated that the law is well settled that credibility determinations in expungements proceedings are made by the fact finder and are not subject to appellate review. In the instant case, the A.L.J. was faced with a "she said/she said" situation and credited the testimony of the Minor over A.R. The record reflected that the Minor testified in a clear, consistent manner and was explicit in detailing the sexual abuse. Minor's testimony was supported by the statements she previously made as reported by the other witnesses, such as the CYS caseworker and the police sergeant. The Court noted that there were no inconsistencies in her testimony and her testimony was not contradicted by specific testimony from any other witnesses. Therefore, her testimony was deemed credible while A.R. provided nothing more than general denials, self-serving statements and no evidence to undermine Minor's testimony.

## SPOTLIGHT CASES AND LEGISLATION

### B.S.G. v. D.M.C.

**Date of Decision:** May 27, 2021

**Citation:** 2021 PA Super 110

On September 21, 2020, a custody order awarded Father and Mother shared legal and physical custody of their minor child. The order included language that Mother would retain exclusive authority to decide the child's school, pediatrician, and therapist. On appeal, the Court addressed Father's argument that the court may not give one parent power to override parental disagreements without undoing the shared custody construct. The Court reviewed the evidence presented at the custody hearing and found that Mother demonstrated a better record than Father in prioritizing the child's educational interests. The Court further noted that the best interests of the child may require that such choices be made more expeditiously than repeatedly petitioning the court and, as such, the court selected mother as the final arbiter because she has shown good faith and acceptable judgment on the education issue for the child. The Court deemed Father's argument as meritless.

**D.A., BY AND THROUGH his parents****Date of Decision:** May 13, 2021**D.A., and W.A., v. Penn Hills Public School District****Cite:** 2021 WL 1929287

The District Court for the Western District of Pennsylvania granted D.A.'s motion for summary judgment, where D.A.'s parents allege a violation of his rights under Title II under the American with Disabilities Act, 42 U.S.C. §12132, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. D.A. has several medical conditions that, without accommodation, make it impossible for him to use the transportation services that the School District provides to all students in the district, no matter if they are enrolled in public or private school. Parents contend that the School District failed to provide D.A. with equal access to its transportation services by refusing his request for reasonable accommodation of specialized door-to-door transportation.

**AMENDMENT TO RULES OF JUVENILE COURT PROCEDURE:**

On May 26, 2021, the Supreme Court of Pennsylvania issued an order amending Rule 407 of the Rules of Juvenile Court Procedure. The amendment includes a provision concerning requirements pursuant to the Sex Offender Registration and Notification Act (SORNA), 42 Pa.C.S. §§ 9799.10 - 9799.42, for a sexually violent delinquent child (SVDC) committed for involuntary treatment. The Committee further recommends revision of the colloquy to make language concerning appellate rights after an admission consistent with Rule 512(C). The amendment will become effective on October 1, 2021. For more information please see:

<https://www.pabulletin.com/secure/data/vol51/51-23/884.html>