SWAN Legal Services Initiative

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PENNSYLVANIA SUPREME COURT

In re: T.S., E.S., Minors

Date of Order: October 26, 2017
Cite: 366 WAL 2017/367 WAL 2017

The Pennsylvania Supreme Court granted the Petition for Allowance of Appeal in the above-captioned matters on the issue of whether the Superior Court erred in failing to require that the court appoint counsel for a child in a contested termination of parental rights hearing as required by 23 Pa.C.S. §2313(a) and In re: L.B.M., 161 A.3d 172 (Pa. 2017).

PENNSYLVANIA SUPERIOR COURT

In re: J.D.H.

Date of Decision: October 2, 2017
Cite: 374 WDA 2017

Holdings:

1. The Anders procedure by which court-appointed counsel may seek to withdraw if he or she concludes that an appeal is wholly frivolous also applies in appeals from goal change orders, even in the absence of a petition seeking and/or decree regarding involuntary termination of parental rights; counsel seeking to withdraw under these circumstances must inform the parent of his or her right to counsel in any subsequent dependency or involuntary termination proceedings, and that if he or she cannot afford counsel, he or she may contact the trial court in order to obtain new counsel.
2. As the fifteen (15) to twenty-two (22) month timeframe set forth in the Juvenile Act is not a prerequisite to a goal change, where the record demonstrated not only a lack of progress but regression in a parents' ability to care for their child, trial court did not abuse its discretion in granting a goal change to adoption after a period of only seven (7) months.

Facts and Procedural Posture:

Following receipt of allegations related to Mother's mental health issues and lack of ability to care for/parent the child, Jefferson County Children and Youth Services ("CYS") filed an application for emergency protective custody of the minor child a few days after his birth. The child was placed in foster care, and remained with the foster family following subsequent issuance of a Shelter Care order and adjudication of Dependency. Approximately seven months later, following a permanency review hearing, the trial court entered an order changing the child's permanency goal from reunification to adoption. The Court based its determination on testimony from the caseworker stating that a goal change would serve the best interests of the child as Mother would not attain the skills necessary to parent the child within a reasonable period of time and requiring further reunification efforts would only serve to delay permanency for the child. Specifically, the caseworker testified that Mother's parenting abilities had

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significantly regressed since the child entered care; Mother struggled to perform basic tasks (such as feeding and changing the child's diaper), and continued to demonstrate an inability to ensure the child' safety. Additionally, the child was well bonded with and thriving in the care of his foster parents, who met all of his needs, and with whom he had resided since several days after his birth. Mother filed a timely notice of appeal along with a concise statement of errors complained of on appeal. Mother's court-appointed counsel subsequently filed an Anders brief and related petition seeking permission to withdraw from representation.

Issues:

1. Whether the Anders procedure may be applied to an appeal from a goal change order only, with no accompanying involuntary termination?
2. Whether the trial court abused its discretion in dispensing with the goal of reunification and granting a goal change to adoption after a period of only seven (7) months of agency involvement?

Rationale:

The Superior Court began by addressing whether or not Mother's court-appointed counsel's filing of an Anders brief and related petition seeking permission to withdraw as counsel was proper *at this juncture*. The Court recognized that while they have routinely applied the Anders procedure to appeals from goal change orders in conjunction with appeals from an involuntary termination decree, in this case there had been no termination of parental rights, nor did the record reveal that there had been a termination petition filed. The Court concluded that while there have been no published decisions applying Anders procedures to an appeal resulting solely from a goal change, such application was permissible. The Superior Court noted that parents have a right to counsel at every stage of a dependency proceeding, but a parent's direction to court-appointed counsel to file an appeal may give rise to conflict if counsel advises them that such appeal would be frivolous. Pursuant to Anders v. California and Commonwealth v. Santiago, this conflict may be resolved by court-appointed counsel seeking to withdraw from representation if he or she concludes that an appeal is wholly frivolous, provided they have demonstrated compliance with certain requirements. Anders v. California, 386 U.S. 738 (1967); Commonwealth v. Santiago, 978 A.2d 349 (Pa. 2009). The Court recognized that allowing counsel to withdraw prior to the entry of an involuntary termination decree presents certain complications unique to dependency and adoption proceedings; namely, the conclusion of representation prior to the conclusion of the dependency case. In order to ensure the parent's continued right to counsel at all stages of a dependency proceedings and honor the Rules of Professional Conduct, the Superior Court imposed the additional requirements that counsel seeking to withdraw at this stage must inform the parent of his or her right to counsel in any subsequent dependency or involuntary termination proceedings, and that if he or she cannot afford counsel, he or she may contact the trial court in order to obtain new counsel. Counsel in this case complied with these additional requirements, as well as the requirements set forth in Anders and Santiago.

The court proceeded to review Mother's assertion that the trial court erred in changing the child's permanency goal after only seven (7) months in care. The Superior Court began its analysis of this issue by reiterating that the fifteen-to-twenty-two month timeframe set forth in the Juvenile Act is an "aspirational target in which to attain permanency;" not a prerequisite to a goal change. In the Interest of L.T., 158 A.3d 1266, 1279 (Pa. Super. 2017), *citing* 42 Pa.C.S.A. §6351(f.1)(9). The Court noted that in this case, not only had Mother demonstrated a lack of progress toward reunification, but had actually regressed in her parenting abilities. Based on the evidence presented, a goal change at this juncture supported the best interests of the child and would serve to prevent the prolonging of timely and stable permanency.

C.G. v. J.H.

Date of Decision: October 11, 2017
Cite: 1733 MDA 2016

Holdings:

1. Same-sex life partners who have not adopted a child are treated as "third parties" for purposes of custody matters.
2. In determining whether a same-sex domestic partner with no biological connection to a child may stand *in loco parentis* the court must be flexible in nature and dependent on the unique facts and credibility determinations of the case.

Facts and Procedural Posture:

J.W.H., a minor child, was born in Florida in 2006 following intrauterine insemination of his biological Mother, J.H., who was living with C.G. as a same-sex couple. After approximately five years, C.G. and J.H. separated, and, J.H. and J.W.H. relocated to Pennsylvania. More than three years later, C.G. instituted a custody action in Centre County seeking shared legal and partial physical custody of J.W.H., averring standing as a "parent," and status as *in loco parentis*. In her petition, C.G. arguing that the child was conceived by mutual consent of the parties with the intent that both would co-parent and act as parents to the child, that both parties had participated in selection of the sperm donor, and that while *in utero*, C.G. served daily as the child's parent by attending pre-natal appointments, participating in the child's birth (including cutting the cord), and "otherwise serving as the child's mother." In response, J.H. filed preliminary objections to C.G.'s standing to seek custody and disputing C.G.'s assertions of parental responsibility, claiming that C.G.'s role was "solely that of girlfriend from the child's birth until November of 2011 when C.G. cheated on J.H." Additionally, J.H. maintained that she has provided almost all of the financial support and made all decisions regarding education, medical care and development for the child. The trial court held a series of hearings on J.H.'s preliminary objections, during which conflicting testimony was offered by sixteen different witnesses related to C.G.'s role in the child's life. At the conclusion of the third hearing on the issue, the trial court sustained J.H.'s preliminary objections and dismissed C.G.'s complaint for custodywithout prejudice. C.G. appealed.

Issues:

1. Whether a non-biological same-sex partner who was involved in the joint conception of a child and "raised" the child for six years has standing as a "parent" under Pennsylvania Child Custody law;
2. Whether a non-biological same-sex partner who was involved in the joint conception of a child and "raised" the child for six years has standing by virtue of *in loco parentis* status to seek custody of a child under Pennsylvania Child Custody law?

Rationale:

The Superior Court began with an analysis of the trial court's determination as to whether or not C.G. was a "parent" for purposes of standing under Pennsylvania Child Custody Law; they concluded that she was not. The Superior Court noted that while the Child Custody Law does not define "parent," our Pennsylvania courts have interpreted "parent" to include only biological parents and adoptive parents; persons other than biological parents and adoptive parents are considered "third parties" for the purposes of custody disputes. Therefore, former life partners, same-sex or otherwise, can be granted standing, if at all, "only as a third party who has stood *in loco parentis* to the biological mother's child." J.A.L. v. E.P.H., 682 A.2d 1314, 1321 (Pa. Super. 1996).

The Superior Court then focused its attention on the trial court's determination that C.G. did not stand *in loco parentis* to J.W.H. The Court began by examining the definition of *in loco parentis*, and noted that this phrase refers to a person who puts oneself in the situation of a lawful parent by assuming parental obligations without legal adoption. They further explained that this status embodies two ideas: the assumption of a parental status, and the discharge of parental duties, which includes meeting the physical, emotional and social needs of the child. This is a fact specific determination that is flexible in nature. The Superior Court additionally observed that this standing issue turns on questions of fact, such that the trial court must resolve the issue by hearing and weighing evidence

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and making credibility determinations to resolve any conflicts in testimony. The Superior Court concluded that is precisely what the trial court did in this case through its careful, thorough and proper consideration and assessment of the evidence presented by both parties. In assessing the specific facts and circumstances of this matter, the trial court looked at evidence such as: J.H. and C.G. shared a home at the time of J.W.H.'s conception and birth, both women were on the deed and together obtained a line of credit to pay for renovations of said home prior to J.W.H.'s birth; the child lived with both parties for nearly six years of his life, referring to C.G. as "Mama Cindy" and to J.H. as "Mom;" and the parties had participated in a commitment ceremony and baby shower, and were present for the child's birth and christening. The court also looked for evidence of "the intent of C.G. to parent the child, particularly in a non-traditional family setting," and found that C.G. was not listed on J.W.H.'s birth certificate, J.W.H, did not bear C.G.'s last name, C.G. was not listed as a parent or sponsor on school documents, was listed as "partner" and not "mother" on medical documents, and had never taken any steps to formalize a co-parenting agreement. The trial court then examined J.W.H.'s physical, emotional and social needs, and determined that the pre-separation conduct of the parties did not support a finding that C.G.s contributions amounted to that of a parent; while C.G. had acted in a caregiver role, C.G. was not consulted regarding educational and/or medical decisions, did not coordinate child care or extracurricular activities, and never assumed the role as a decision-maker for the child. The trial court also determined that C.G. did not assume financial responsibility for the child, as J.H. had paid for all aspects of the conception process and the parties split household expenses, other than items specifically needed for the care of the child, which were purchased separately by J.H. In terms of what the trial court referred to as "perception" evidence, the court found that C.G.'s conduct post-separation conduct supported minimal contact at best, and not that conduct suggestive of a person who assumed parental status and discharged parental duties. In concluding that C.G. did not stand *in loco parentis* to the child to satisfy the standing requirements of the Child Custody law, the trial court concluded that while C.G. had clearly played a role in the child's early life, the role did not rise to that of "standing in the shoes of a parent." The Superior Court noted in affirming that C.G. lacked *in loco parentis* status that this holding rests on the unique facts of this case, which were clearly delineated in the trial court's opinion and supported by the record.

Concurring Opinion:
Justice Musmanno concurred with the Court's opinion but wrote separately to convey concerns regarding the legal standard used at underlying evidentiary hearing, as well as his opinion that "it may be time to re-visit the issue of the appropriate standard and presumptions to be applied in determining standing where a child is born during a same-sex relationship."

In the Interest of H.K.

Date of Decision: October 13, 2017
Cite: 474 WDA 2017

Holding:
Neither The Juvenile Act nor the Rules of Juvenile Court Procedure provide for a right to a rehearing before a Judge following a completed proceeding and recommendation by a Juvenile Court Hearing Officer; therefore, failure to hold a rehearing, absent cause shown, within seven days of receipt of the Juvenile Court Hearing Officer's recommendation did not divest the Juvenile Court of jurisdiction.

Facts and Procedural Posture:
Greene County Children and Youth Services (CYS) filed an application for emergency protective custody of the subject minor child following receipt of a report that the child was being sexually abused by her brother and that her parents were aware of the abuse but doing nothing to stop it. The order for emergency protective custody was granted, and the subject minor child was placed in foster care, where she remained following the court's issuance of a subsequent shelter care order. A hearing on CYS's petition seeking an adjudication of dependency convened on December 27, 2016, with all parties present before a Juvenile Court Hearing Officer (JCHO). Following the hearing, on the same date, the JCHO issued a recommendation that the child be adjudicated dependent and remain in foster care. Also on the same day, counsel for the child's parents filed a "Request for De

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Novo Hearing" requesting a new dependency hearing before a judge, and the Juvenile Court judge accepted the JCHO's recommendation and adjudicated the child dependent. On January 6, 2017, the Greene County President Judge granted the parents' "Request for De Novo Hearing," and scheduled a rehearing on CYS's petition for adjudication of dependency. The hearing began before the trial court on January 30, 2017, and continued on March 2, 2017. On March 2, 2017, counsel for the parents made an oral motion before the court requesting that the petition for adjudication of dependency be dismissed due to a violation of the Rules of Juvenile Court procedure; specifically, counsel alleged that the failure to conduct the rehearing within seven days of receipt of the JCHO's recommendation deprived the court of jurisdiction to issue an adjudication of dependency. The court granted the motion to dismiss on the basis of lack of jurisdiction, and returned the subject minor child to the care of her parents. CYS appealed.

Issue:
Whether the trial court erred in determining a lack of jurisdiction over a dependency matter for failure to conduct a rehearing, absent cause shown, within seven days following receipt of the JCHO's recommendation?

Rationale:
While both The Juvenile Act and the Rules of Juvenile Court Procedure permit a Juvenile Court Hearing Officer (JCHO) to conduct hearings in most dependency matters, all parties in a dependency case have a right to a hearing before the judge. 42 Pa.C.S.A. §6305(b); Pa.R.J.C.P. 1187(B)(1). Parties must be informed of this right prior to commencement of the proceedings before the JCHO and if a party objects to having the matter heard by the JCHO a hearing before a judge must be scheduled immediately. 42 Pa.C.S.A. §6305(b); Pa.R.J.C.P. 1187(B)(1) and (2). If the parties consent to a hearing before a JCHO, the recommendation of the JCHO is subject to approval by a judge. Unless a rehearing is ordered upon cause shown, the findings and recommendations of the JCHO become the findings and recommendations of the court when confirmed in writing by the judge. 42 Pa.C.S.A. §6305(d); Pa.R.J.C.P. 1191, cmt. The Rules of Juvenile Court Procedure set forth the requirements related to challenges to the JCHO's recommendation, as well as the subsequent judicial actions available following the challenge to a JCHO's recommendation. Pa.R.J.CP. 1191 (C) – (D). Importantly, the Superior Court noted that while both The Juvenile Act and the Rules of Juvenile Court Procedure provide that a party "*may*" request a rehearing, and that a court "*may*" order a rehearing upon cause shown, neither provide a party with a *right* to a rehearing. A party seeking to exercise his or her right to a hearing before a judge as opposed to a JCHO must object and seek to exercise that right *prior* to commencement of the proceedings before the JCHO. "Once a party has agreed to proceed before the master, our law does not permit that party to obtain a rehearing simply because he or she is unhappy with the result." Because the parents did not seek to exercise their right to have the matter heard by a judge *prior* to commencement of the hearing, they failed to aver any reasons for their challenge to the JCHO's recommendation, and the Juvenile Court had already issued an order accepting the recommendations of the JCHO, the Superior Court determined that the trial court erred in granting a rehearing. The Superior Court additionally determined that the trial court erred in concluding it lacked jurisdiction over CYS's petition for adjudication of dependency due to failure to hold a rehearing within seven days of the receipt of the JCHO's recommendation. No rule of Juvenile Court Procedure provides that a trial court loses jurisdiction over a dependency matter as a result of procedural error. Procedural errors rarely constitute fatal flaws in child welfare law unless the defect is raised prior to the commencement of the adjudicatory hearing and is prejudicial to the rights of a party. Pa.R.J.C.P. 1126. In this case, neither requirement was met. The order dismissing CYS's petition seeking adjudication of dependency was reversed; the order accepting the JCHO's recommendations and adjudicating the child dependent was reinstated; and the case was remanded with instruction to convene a permanency review hearing as soon as possible to determine whether the child remains dependent and whether removal from the home is warranted.

In re: R.L.

Date of Decision: October 20, 2017
Cite: 860 WAL 2017

Holding:
Father's verbal request to revoke consent to the adoption of his minor child seventy-two days after execution of his Petition for Voluntary Relinquishment did not constitute "timely" revocation under the requirements of §2711(c), and as such, could not be considered on the merits of the revocation.

Facts and Procedural Posture:
R.L., the subject minor child, was placed with Washington County Children and Youth Social Services (the Agency) two days after birth in December 2015. On March 7, 2017, both Mother and Father executed Petitions for Voluntary Relinquishment. On May 18, 2017, the trial court commenced a hearing to confirm consent and terminate the parental right of Mother and Father; at that time, Father verbally informed the trial court (through counsel) that he no longer wanted to terminate his parental rights, and expressed his intention to revoke his consent. The Agency objected and informed the trial court that Father had executed the Petition for Voluntary Relinquishment more than thirty days prior to the hearing and had not provided written notice of his intent to revoke consent as required by relevant law. The trial court dismissed Father's Petition for Voluntary Relinquishment (over agency objection); the Agency appealed.

Issue:
Whether the trial court erred in dismissing Father's Petition for Voluntary Relinquishment of his parental rights to the subject minor child where Father verbally expressed intent to revoke consent outside of the thirty day time period proscribed by law in which he had to do so?

Rationale:
The Superior Court began its review with §2711 of the Adoption Act, which sets forth the legal requirements for a consent to adoption, including the requirements for revocation of consent. They noted that this section unequivocally states that "[t]he revocation of a consent shall be in writing and shall be served upon the agency or adult to whom the child was relinquished." 23 Pa.C.S. §2711(c). Additionally, the Superior Court noted that they have previously held that said consent is irrevocable more than 30 days after its execution, and that the unambiguous language of the statute requires the trial court to consider the timeliness of a written revocation before considering the revocation on its merits. In re Adoption of J.A.S., 939 A.2d 403, 408-409 (Pa. Super. 2007). The Court concluded that the trial court's acceptance of Father's oral notice of intent to revoke his consent more than thirty days after its execution was in error, as said revocation was clearly untimely. The matter was remanded to the trial court with instruction to grant Father's Petition for Voluntary Relinquishment.