

# SWAN Legal Services Initiative



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### Legal Training Team

#### Division Manager

Rachel Meaker, Esq.

#### Training Specialists

Alyssa Cowan, Esq.

Ilene Dubin, Esq.

Lauren Peters, Esq.

Alyssa H. Holstay,  
Esq.

Contact the team:  
[lsiwarmline@diakon-swan.org](mailto:lsiwarmline@diakon-swan.org)

471 JPLwick Drive  
P.O. Box 4560  
Harrisburg, PA 17111

[www.diakon-swan.org](http://www.diakon-swan.org)

### PENNSYLVANIA SUPERIOR COURT

#### In the Interest of C.K., a Minor

Date of Decision: June 5, 2017  
Cite: 1467 WDA 2016

#### Holding:

Trial Court did not abuse its discretion in determining that CYF failed to make reasonable efforts to finalize the permanency plan where the actions/inactions of CYF resulted in the delay of service provision, and miscommunications to providers regarding services.

#### Facts and Procedural Posture:

Mother's minor children (C.K. and N.L.) were adjudicated dependent on September 29, 2014, as a result of intimate partner violence to which the children were exposed. The children were removed from the home and returned numerous times. Approximately one year after the children's third removal from Mother's home, a series of updated psychological evaluations were conducted regarding both Mother and the children. With regards to the children, in the psychologist's expert opinion, progress had been made through counseling and stability with their foster family in dealing with "extensive anxieties and emotional insecurities stemming from their past exposure to domestic violence and substance abuse difficulties on the part of their parents." The expert opined that Mother, however, had developed "very little insight" into necessary changes, and as such, recommended that Allegheny County Office of Children, Youth and Families (hereinafter referred to as "CYF") refer Mother for family therapy sessions with children to afford her every opportunity to succeed in her desire to reunify with her children. Following a November 2015 permanency review hearing in which the evaluation was admitted into evidence, the trial court ordered "CYF to explore inclusion of Mother in Children's therapy, and facilitate Mother's participation if indicated by therapist." In February of 2016, at the next review hearing, the trial court noted that despite the psychologist's recommendation and the Court's directive, the worker did not make the referral until about 3 weeks prior to the hearing, and ordered CYF to implement family therapy for Mother and the children. On March 22, 2016, Mother filed a motion to the court seeking enforcement of the court's order directing CYF to implement family therapy, requesting the following: (1) that CYF be held in contempt for its failure to arrange the therapy, (2) a finding that the agency had failed to exercise reasonable efforts dating back to the date of the expert evaluation, and (3) the court toll the timeframes under ASFA from the date of the evaluation until the date that therapy would begin. The trial court denied Mother's motion, but ordered that the reasonable efforts issue was to be preserved for the next permanency review hearing. On April 29, 2016, Mother filed a second motion to enforce the court order, alleging that the therapy that CYF had arranged was inadequate due to the therapist being unaware that she was to provide trauma therapy. On May 3, 2016, the trial court granted Mother's motion, and ordered CYF to carry out the recommendations made in the 2015 evaluation, including appropriate trauma based therapy, as directed by the court's subsequent orders.

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**(In the Interest of C.K., a Minor, cont'd.)**

At the May 25, 2016 permanency review hearing, the CYF caseworker explained that when the initial service provider agreed to perform the therapy, they were under a false impression of its purpose. When they learned what they would need to provide, they indicated that they could not provide trauma-based services. The CYF worker testified that she then consulted the psychologist, who reiterated the same provider he named in the evaluation, who could provide trauma-based services. On August 6, 2016, a therapist from that provider testified that she was not provided with the evaluation or the dependency court orders, and that her understanding was that she was to address permanency-related issues and to help Mother and Father interact with the children concerning the trauma the children had experienced. At the conclusion of the hearing, the trial court found that "CYF did not offer an adequate explanation for its initial failure to follow through on [the psychologist's] recommendation, for the multiple delays in pursuing services, or for the inaccurate communication about the needed therapy..." and that while it did "not believe that CYF's missteps in this matter were intentional... the court cannot and does not consider CYF's conduct to have been reasonable." CYF appealed.

**Issue:**

Whether the trial court properly found that CYF failed to make reasonable efforts to achieving the permanency goal of reunification?

**Rationale:**

The Superior Court began its analysis by examining the relevant portions of The Juvenile Act, including the requirement that the court conduct regular permanency review hearings to review the permanency plan of the child, and determine whether reasonable efforts were made to finalize the permanency plan in effect. Our Pennsylvania Supreme Court described the purpose behind the reasonable efforts requirement enacted in ASFA and related statutes as a means to address the problems of foster care drift by tying services to effect safe reunification to eligibility for federal foster care maintenance payment reimbursement. See *In re: D.C.D.*, 105 A.3d 662, 676 (Pa. 2014).

The Superior Court noted that while neither federal nor Pennsylvania law defines "reasonable efforts," the Office of Children and Families in the Courts, through the *Pennsylvania Dependency Benchbook* directs courts to use common sense and judicial discretion, and includes the definitions "fit and appropriate to the end in view" and "not expecting or demanding more than is possible or achievable; fairly good but not excellent; large enough but not excessive; acceptable and according to common sense or normal practices." *Pennsylvania Dependency Benchbook*, §19.9.1, at 19-33 (2014). Additionally, because the focus of the Juvenile Act is on the dependent child, as opposed to the parents, any services for the parents must directly promote the best interests of the child. Our Courts have stated that the agency is not expected to do the impossible and is not a "guarantor of success of the efforts to help parents assume their parental duties." *In re A.L.D.*, 797 A.2d 326, 340 (Pa. Super. 2002) citing *In re J.W.*, 578 A.2d 952, 959 (Pa. Super. 1990).

The Superior Court acknowledged that while some delays are unavoidable and outside of the control of the agency, in this case part of the cause for delay was CYF's failure to accurately communicate the purpose of the service to its provider. Furthermore, CYF offered no explanation as to why it took two motions filed by Mother to get the agency to consult with mental health professionals to determine the most appropriate provider, and to communicate the full background information necessary for the therapist to focus on the appropriate issues.

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**(In the Interest of C.K., a Minor, cont'd.)**

The Court recognized the pressure and large workload placed on agency caseworkers, but unequivocally indicated “it is crucial that child welfare agencies monitor their cases and follow up diligently to ensure that services are implemented in accordance with their families’ needs and court orders”, and stressed that “[S]imply making the referral is not enough.” The Court also observed that in the case at hand, while the focus of family therapy was to assist Mother in her understanding of the impact of her domestic violence experience upon the children, there was no doubt that the beneficiaries of Mother’s understanding would be the children.

The Superior Court also addressed the argument presented on appeal by the Guardian *ad litem*, who contended that Mother cancelled the first family therapy appointment due to unspecified reasons and did not participate in the children’s individual therapy despite being court ordered to do so, when participation in the children’s individual therapy was “as consequential to the children’s health, well-being, and best interests as any family therapy referral.” They reasoned that while the Guardian *ad litem*’s argument may be correct, barring a judicial finding that a service would be futile because a parent refuses to attend or is incapable of benefiting from the service, shortcomings of the parents do not excuse the agency from making reasonable efforts. The Court affirmed that the agency’s duty to make reasonable efforts to finalize the permanency plan is independent of the parents’ duty to accept such efforts.

In summary, the Court reasoned that,

Assisting parents with achieving the Juvenile Act’s goal of family unity in a timely fashion ultimately benefits children, as it will result either in a successful safe reunification or a clearer picture of the parents’ inability to remedy the conditions causing the child to be out of their care, requiring movement towards an alternate permanency goal. .... Thus, it is imperative that the agency not serve as an additional roadblock to parents’ progress. This is particularly the case because parental rights may be terminated even if the agency fails to make reasonable efforts to reunify the family. *See In re D.C.D.*, 105 A.3d at 675 (Pa. 2014).

**In the Interest of D.F., a Minor**

Date of Decision: June 7, 2017

Cite: 163 WDA 2017

**Holding:**

Trial Court did not abuse its discretion in denying Mother’s request for a continuance. Its decision to proceed with an involuntary termination hearing in Mother’s absence where the request for a continuance was a hearsay statement not supported by evidence and was properly balanced with Mother’s refusal to attend previous hearings and communicate with her counsel and/or the agency prior to the proceeding.

**Facts:**

D.F., Mother’s minor child, came into contact with Indiana County Children and Youth Services (hereinafter referred to as “CYS”) upon her birth following communication from the local hospital Mother’s uncooperative behavior with hospital personnel and her prior history with CYS. CYS obtained protective custody of D.F. following Mother’s admission to the caseworker of prescription drug use during pregnancy, her refusal to submit to a drug screen, and the discovery of THC in the child’s umbilical cord. D.F. was adjudicated dependent with a primary goal of reunification. Mother’s service objectives included completion of a parenting assessment, drug and alcohol assessments, psychological and parental capacity evaluations, and to follow all recommendations from the service providers. Mother attended the first permanency review hearing, but did not attend the next two. Mother completed her parenting class and attended some drug and alcohol treatment, but her overall compliance with the Family Service Plan was inconsistent. Twelve months after the adjudication of dependency, CYS filed a petition seeking involuntary termination of Mother’s parental rights.

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**(In the Interest of D.F., a Minor, cont'd.)**

At the hearing, Mother's counsel informed the court that Maternal Grandmother had contacted counsel the day before to request a continuance on Mother's behalf due to Mother's allergies. Counsel further informed the court that numerous attempts to contact Mother after receiving this request were unsuccessful, that Mother had stopped communicating with counsel, and the contact number for Mother had been disconnected. Counsel for Mother confirmed that Mother received notice of the hearing, and that she and Mother had discussed the upcoming hearing several times in the weeks prior. CYS added that they had sent a car to Mother's house to transport her to the termination hearing, however, the driver had knocked on Mother's door for twenty minutes and no one answered. The trial court denied the motion for the continuance, and the hearing proceeded.

Termination of Mother's parental rights was granted pursuant to 23 Pa.C.S.A. §2511(a)(1), (2), (5), (8) and (b) following testimony that Mother had been inconsistent at best with mental health services, drug and alcohol treatment, drug testing and visitation. Mother attended only thirty two out of seventy six scheduled visits, and while it was acknowledged that she had "moments of progress" towards this objective, her consistency never lasted more than four weeks. A psychologist conducted a bonding assessment and concluded that while the child responded well to Mother's affection, he had no significant bond with Mother, and as such, severing the relationship would not harm him. Furthermore, the child was securely attached to his pre-adoptive mother, who provided for all of his emotional, physical, and medical needs. Following issuance of the trial court's order terminating her parental rights, Mother appealed.

**Issue(s):**

1. Whether the trial court abused its discretion in denying Mother's request for a continuance and its decision to proceed with an involuntary termination of parental rights proceeding in Mother's absence;
2. Whether the evidence presented was sufficient to support involuntary termination of Mother's parental rights under §2511(a)?

**Rationale:**

The Superior Court first noted that neither the Adoption Act nor the cases interpreting it require that a parent must be present in order for a court to grant a petition to terminate parental rights. The Act merely requires that "at least ten days' notice be given to the parent...of a minor whose right are to be terminated..." 23 Pa.C.S.A. §2513(b). Once a court is satisfied that a parent has received notice of the hearing, then it is entirely within the trial court's discretion to make a ruling on a request for continuance based on the evidence presented. The court must balance the evidence submitted in support of and against the motion, including but not limited to a parent's participation (or lack thereof) in prior proceedings and appointments important to the welfare of the child. As it was undisputed that Mother had received notice of the proceeding, the Court then reasoned that maternal grandmother's statement to Mother's Counsel was not only inadmissible as hearsay, but was wholly insufficient, without additional information, to support Mother's request for a continuance. Additionally, the Superior Court confirmed that the trial court appropriately balanced this request with Mother's refusal to attend prior hearings, her lack of response to her Counsel in the week prior and the morning of the hearing, and CYS's unsuccessful efforts to retrieve Mother from her home for the court hearing. The Court was satisfied that the denial of the request was neither "manifestly unreasonable" nor the result of "partiality, prejudice, bias, or ill will". In re J.K., 825 A.2d 1277, 1280 (Pa. Super. 2003).

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**(In the Interest of D.F., a Minor, cont'd.)**

The Superior Court analyzed the sufficiency of the evidence under 23 Pa.C.S.A. §2511(a)(2), and noted that upon review, “[t]he pertinent inquiry is not the degree of success a parent may have had in reaching the child, but whether, under the circumstances, the parent has utilized all available resources to preserve the parent-child relationship.” In re Shives, 525 A.2d 801, 803 (Pa. Super. 1987). In this case, Mother had not utilized all available resources, and had “failed to exert the required resistance to the obstacles she arguably puts in her own way”; thus, she was unable to remedy the conditions which brought the child into care and it did not appear likely that she would overcome these obstacles in the near future. In addition to the evidence presented with regards to Mothers inconsistent/lack of progress toward any of her service plan objectives, Mother failed to do what needed to be done to establish a parent-child relationship with D.F., and as expert testimony supported a finding that termination would not negatively impact the child, who was strongly bonded with the pre-adoptive mother, the record supported a finding under §2511(b) that termination would best serve the needs and welfare of the child.

**In re: D.L.B., Minor Child**

Date of Decision: June 15, 2017

Cite: 186 WDA 2017

**Holding:**

The Superior Court affirmed the termination of Father’s parental rights where Father never had custody of the child and had virtually no contact or involvement in the minor child’s life, Father’s maintained a lengthy criminal history, and was repeatedly incarcerated due to parole violations.

**Facts and Procedural Posture:**

D.L.B. was placed in foster care six days after being discharged from the hospital after exhibiting symptoms of prenatal drug use by Mother. The trial court adjudicated D.L.B. dependent in May of 2016, and set Family Service Plan objectives for Father, who was incarcerated and did not express a desire to be a permanent resource. Goals included to comply with the terms and conditions of his parole upon release, refrain from the use or possession of controlled substances, and to attain and maintain stable housing and employment. Upon Father’s release from prison, Father attended supervised visits with D.L.B. for approximately three months, but often showed up late and demonstrated poor parenting skills. At the September 2016 Permanency Review hearing, testimony was presented that in the three months from his release, Father had repeatedly failed to report to Cambria County Parole and Probation office or to respond to messages left by his parole officer. As a result, Father was in violation of the terms of his parole and at risk of being detained and re-incarcerated for up to thirty months. Additionally, Father was not engaging in his drug and alcohol treatment as directed, and had tested positive on two occasions for both THC and Suboxone, for which he did not have a prescription. In December of 2016, Blair County Office of Children, Youth and Families (hereinafter referred to as “CYF”) filed a petition seeking involuntary termination of Father’s parental rights. A few days later, Father was re-incarcerated due to violations of his parole, with a maximum release date of September 2018. A seven-month permanency review hearing was held following Father’s re-incarceration, during which the trial court determined that Father was not actively involved in drug and alcohol treatment or mental health counseling, nor had he maintained contact with his children nor any of his service providers. A hearing was held in January of 2017 on CYF’s petition seeking involuntary termination of Father’s parental rights, during which the trial court granted CYF’s request to incorporate the testimony from the December 2016 permanency review hearing into the record. At the conclusion of the hearing, the trial court entered an order involuntarily terminating Father’s parental rights pursuant to 23 Pa.C.S.A. §2511(a)(1), (2), (5) and (b). Father appealed.

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**(In re: D.L.B., Minor Child, cont'd.)**

**Issue(s):**

1. Whether the evidence was sufficient to support termination on grounds of abandonment;
2. Whether the evidence was sufficient to support termination on grounds of incapacity; and
3. Whether 23 Pa.C.S.A §2511(A)(5) applies to parent who was incarcerated at the time of removal of his child?

**Rationale:**

The Superior Court noted that they need only agree with the trial court as to any one subsection of §2511(a), in addition to §2511(b) to affirm a termination of parental rights. They therefore did not reach the questions regarding abandonment or 23 Pa.C.S.A §2511(A)(5) , and only chose to analyze the trial court's decision to terminate under §2511(a)(2) (incapacity) and (b). The Court began by noting that in order to terminate parental rights according to this subsection, the following three elements must be met;

- (1) repeated and continued incapacity, abuse, neglect or refusal;
- (2) such incapacity, abuse, neglect or refusal has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being; and
- (3) the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied. 23 Pa.C.S.A. §2511(a)(2).

The Superior Court determined that there was ample evidence to justify termination of Father's parental rights under this subsection. The child had been in a pre-adoptive foster home for the duration of her life, Father never had custody of the child, and but for a few supervised visits, Father had virtually no contact or involvement in the child's life. Additionally, Father's lengthy criminal history, his incarceration at the time of the child's birth and re-incarceration due to violating conditions of his parole shortly after his initial release supported a finding of repeated incapacity due to Father's failure to exhibit a concrete desire or ability to remedy the problems that led to his child's placement. Father also failed to cooperate with services provided by CYF, did not actively participate in drug and alcohol treatment, did not complete mental health counseling, and failed to establish stability in his life with regard to either housing or employment. Moreover, there was very little evidence that Father ever attempted to establish a parental relationship with the child while he was incarcerated. Therefore, the Superior Court affirmed that the evidence was sufficient to support termination under §2511(a)(2). The Superior Court then turned its analysis to §2511(b) and concluded that termination under this section best served the needs and welfare of the child as the child. As the analysis conducted by the trial court was supported by the evidence in the record, the termination of Father's parental rights was affirmed.

The Superior Court noted that in his reply brief, Father requested the matter be remanded to the trial court for appointment of legal counsel, citing the Pennsylvania Supreme Court's recent decision in In re L.B.M. and arguing that the guardian *ad litem* (GAL) in this case represented the child at all times as GAL and not as legal counsel. The Superior Court concluded that the child's best and legal interests were never in conflict, and were extremely well represented by counsel and therefore declined to grant Father's request for remand and denied CYF's motion to strike as moot.

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**(In re: D.L.B., Minor Child, cont'd.)**

In doing so, they reasoned as follows,

Justice Wecht would hold that the interests are distinct and require separate representation. While Justice Wecht, joined by Justices Donohue and Dougherty, sought to so hold, four members of the court, Chief Justice Saylor and Justices Baer, Todd and Mundy disagreed in different concurring and dissenting opinions with that part of the lead opinion's holding. Specifically, while the other justices agreed that the appointment of counsel for the child is required in all TPR cases and that his failure to do so by the trial court is a structural error; they did not join that part of Justice Wecht's opinion which sought to hold that the GAL may never serve as counsel for the child. Rather, such separate representation would be required only if the child's best interests and legal interests were somehow in conflict.

**In re: Adoption of C.A.S.**

Date of Decision: June 21, 2017

Cite: 102 WDA 2017

**Holding:**

The trial court erred in finding that Father waived his right to counsel when his failure to take the appropriate action to obtain legal assistance was due, at least in part, to conflicting and inaccurate instructions on how to do so.

**Facts:**

Father and Mother separated approximately one and a half years after the minor child's birth. At the time of the filing of the private petition seeking involuntary termination of Father's parental rights, Mother and her paramour, J.O., had been residing together for approximately two years. Father appeared pro se at the hearing on Mother and J.O.'s petition to terminate his parental rights, and requested a continuance in order to obtain counsel. The trial court conducted inquiries of both Father and Mother's counsel regarding the notice received/provided related to Father's right to counsel. Counsel for Mother indicated that he had mailed a series of documents to Father, including a "letter indicating that he's receiving paperwork relative to his rights as a parent, he has a right to a free attorney and to contact the Register of Wills if he should desire one." Father acknowledged receipt of the documents referenced by Counsel for Mother, and explained that he had contacted Laurel Legal Services in order to obtain counsel; however, they declined assistance because they told him that they don't provide representation in custody matters. The trial court reviewed the relevant documentation, and ultimately denied Father's request for a continuance upon a finding that Father had waived his right to counsel because he did not contact the appropriate office in order to attempt to obtain legal representation. The hearing on Mother and J.O.'s petition seeking involuntary termination of Father's parental rights convened, following which the trial court entered an order terminating Father's parental rights.

**Issue:**

Whether the trial court erred in concluding that Father, who had only a seventh grade education, waived his right to counsel by way of failure to contact the appropriate office for application thereof, and proceeded with a hearing that resulted in termination of Father's parental rights?

**Rationale:**

The Superior Court began by noting that parents in involuntary termination proceedings have a constitutionally-protected right to counsel; appointment of counsel for these proceedings is not, however, automatic, but the court must advise parents of their right to petition for counsel. *In re X.J.*, 105 A.3d 1, 4 (Pa. Super. 2014). Trial Courts must ensure that parents are advised of their right to counsel and are provided with clear instructions on how to petition for counsel. A parent waives his or her right to counsel if he or she is provided with clear instructions on how to petition for counsel, but fails to take action.

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**(In re: Adoption of C.A.S., cont'd.)**

In this case, while the letter from Counsel for Mother instructed Father that he should request counsel by filling out the enclosed *in forma pauperis* statement and delivering it to the Clerk of Orphans' Court and Register of Wills for Cambria County, the notice of the hearing for involuntary termination of parent rights, the notice required by Act 101 of 2010, and the acknowledgment of notice of voluntary agreement law all instructed Father that he should obtain legal assistance by contacting Laurel Legal Services. The Superior Court determined that of the five sets of instructions that Father had received from Counsel for Mother, three of them instructed Father to request legal assistance from Laurel Legal Services. The Court concluded that it appeared that Father may have been misled by the conflicting and inaccurate instructions, and thus, it could not find that he had waived his right to counsel. The order terminating Father's parental rights was vacated, and the matter remanded to the trial court for a new termination hearing, prior to which the trial court shall make a determination as to whether Father continued to qualify for court-appointed counsel, and appoint counsel for Father if necessary.

**In the Interest of J.M., a Minor**

Date of Decision: June 27, 2017  
Cite: 2515 EDA 2016

**Holdings:**

1. The Juvenile Act provides for allegations of aggravated circumstances only in connection with the filing of a dependency petition, and not as a freestanding basis for relief; therefore, the family court does not have the authority to make a finding of aggravated circumstances absent a finding of dependency.
2. Evidence consisting only of an injury that commonly resulted from childhood accidents in conjunction with suspicions as to how the injury occurred and who was responsible for said injury did not constitute clear and convincing evidence sufficient to support a trial court finding that the child was a victim of abuse or that Mother was the perpetrator of abuse.

**Facts:**

Mother and Father had shared custody of J.M., their minor child, and maintained a regular schedule for when J.M. would be in care of Mother, and when in care of Father. Despite the shared custody schedule, during the week prior to J.M.'s injury (which is the crux of this case), Mother failed to appear at the scheduled custody exchange point to present the child for both of Father's weekday visits. Father filed a police report to evidence Mother's failed appearances. Three days later, Maternal Grandmother took the child to the St. Mary Medical Center where he was diagnosed with a fractured right wrist, for which there was no clear explanation. In subsequent related dependency proceedings, Mother testified that the injury to the child occurred while he was in the care of Maternal Grandmother, however, she sought at other times to blame the injury on Paternal Grandmother, with whom she had a tumultuous relationship. J.M. was discharged from the Medical Center with a splint, and his discharge instructions stated "Your child has a broken bone (fracture) in the forearm (radius or ulna bone). This is a very common fracture in children." Approximately two days later, Mother found the child in distress in his playpen and took him to the Emergency Department of the Children's Hospital of Philadelphia ("CHOP"). Dr. Stephanie Ann Deutsch consulted on the case for CHOP's Suspected Child Abuse and Neglect team and reported that an injury of this type is a "common accidental injury in a developmentally normal ambulatory child...so the most common mechanism would be a child falling and trying to break the fall by falling on an outstretched arm." Dr. Deutsch later testified when asked whether intentional injury could be ruled out as a cause in a case like this that it could not. Subsequently the City of Philadelphia's Department of Human Services ("DHS") received a Child Protective Services (CPS) report about J.M.'s fracture.

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**(In the Interest of J.M., a Minor, cont'd.)**

The DHS Investigative caseworker interviewed Mother, Father, Maternal Grandmother, and Paternal Grandmother (all of whom were caregivers to the child at the time the injury would have occurred) regarding the cause of the child's fracture. Mother initially related that she did not know how the injury occurred, but later claimed that it had occurred while the child was in the care of Paternal Grandmother. The caseworker did not believe Mother's story to be credible as it was not corroborated by evidence such as police reports, text messages and emails regarding custody of the child that week. The evidence did corroborate Father's version of events, leading the caseworker to believe that the child was most likely in the care of either Mother or Maternal Grandmother at the time of the injury. Both Mother and Maternal Grandmother were indicated on the basis of egregious lack of supervision resulting in an unexplained fracture.

As a result, DHS filed an application for protective custody and obtained protective custody of the child. Following a shelter care hearing, the court entered an order placing J.M. in a foster home. DHS then filed a petition seeking an adjudication of dependency which alleged the existence of abuse or neglect, but did not allege the existence of aggravated circumstances. DHS subsequently transferred the child and family to Bethanna Community Umbrella Agency ("CUA"), and the child was assigned a new caseworker. On May 19, 2016, the court held a combined adjudication hearing and child abuse hearing, in which the initial DHS Investigative Caseworker, Dr. Deutsch, and Father testified. At the conclusion of this hearing the court removed the child from foster care, reunified him with Father and granted custody to Father. The hearing resumed on July 25, 2016, and the CUA caseworker testified that the child was doing well in the home of Father, seemed very bonded with Father and the paternal side of the family, that Mother was "fully compliant," and that visits with Mother were "appropriate." Mother also testified, and again stated that the child was not in her care at the time of his injury, but was in the care of Maternal Grandmother. At the conclusion of the hearing, the court stated that "...the testimony went back and forth. Sometimes it was clear; sometimes it was as muddy as the Mississippi can be, and Mother's testimony is inherently not believable... Mother's unbelievable testimony further indicates that she's attempting to conceal what happened to the child while in her care, and she is responsible for the injuries to the child while in her care." The court then entered two written orders; the "Order of Adjudication – Child Not Dependent" in which the child was found not to be a dependent child and the petition for dependency was dismissed with legal and physical custody being transferred to Father; and an "Aggravated Circumstances Order," in which the court found that "clear and convincing evidence has been presented to establish that the alleged aggravated circumstances exist as to Mother," and that the child "has been the victim of physical abuse resulting in serious bodily injury...proven as to Mother." This order also contained a paragraph entitled "Additional Findings" that read, "The Court hereby finds that the above named child is a victim of abuse as defined at 23 Pa.C.S.A. §6303, in that Court finds Child Abuse against Mother." Mother appealed; it is this second order that is at the heart of the issues of said appeal.

**Issue(s):**

1. Whether the family court is authorized to make a finding of aggravated circumstances absent a finding of dependency; and
2. Whether evidence consisting only of an injury that commonly resulted from childhood accidents in conjunction with a Mother who insisted she did not know how the injury occurred and conflicting testimony about who had custody of the child at the time of the injury was sufficient to support a finding of abuse by clear and convincing evidence?

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**(In the Interest of J.M., a Minor, cont'd.)**

**Rationale:**

The Superior Court first reviewed whether the family court is permitted to make a finding of aggravated circumstances absent a finding of dependency. In doing so, the Court noted that this is an issue of first impression. The Court began its review by examining the purpose and applicability of the Juvenile Act, and noted that the language of the Act itself denotes applicability to “only those children who come within [its] provisions” and not all children. 42 Pa.C.S.A. §6301(b)(1.1); Commonwealth v. Davis, 479 A.2d 1041, 1045 (Pa. Super. 1984). Mother argues that the trial court acted outside of its authority in making a finding of aggravated circumstances absent a finding of dependency, citing 42 Pa.C.S.A. §6341(c.1), which states, “If the county agency or the child’s attorney alleges the existence of aggravated circumstances **and the court determines that the child is dependent**, the court shall also determine if aggravated circumstances exist.” In response, DHS argued that there is “nothing in the Juvenile Act that prohibits the Court from making such a finding where the facts meet the definition within the Act.” The Superior Court agreed with Mother, and in doing so reasoned that the plain language of the Juvenile Act provides that a court may make a finding of aggravated circumstances only if it finds that a child is dependent; the statute contains no provision authorizing findings on aggravated circumstances if no finding of dependency is made. The Superior Court also noted that The Rules of Juvenile Court Procedure governing dependency proceedings are consistent with this interpretation, as the official comment to Rule 1705 states, “the court is to find a child dependent before determining if aggravated circumstances exist.” See 42 Pa.C.S.A. §6341(c.1), Pa.R.J.C.P. 1705(A) cmt. Moreover, the Court noted, at the time the Supreme Court promulgated the Juvenile Procedure Rules, it published an Explanatory Report that made this same point. The Superior Court concluded that as the trial court had no authority to enter an order finding aggravated circumstances once it determined the child was not dependent, its order making a finding of aggravated circumstances must be reversed.

The Superior Court then turned to whether or not the evidence presented in this case was sufficient to support the additional finding that the child was a victim of child abuse perpetrated by Mother under Section 6303 of the Child Protective Services Law (CPSL) by the requisite “clear and convincing evidence” standard. The Court stressed that although they had vacated the finding of aggravated circumstances (because it was not authorized by the Juvenile Act), that decision did not automatically vacate the finding of abuse, as the trial court was authorized to make a separate finding of abuse under the CPSL. The Court then reviewed the requirements to meet the “clear and convincing evidence” standard, including:

That the witnesses must be found to be credible; that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order; and that their testimony is so clear, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. It is not necessary that the evidence be uncontradicted provided it carries a clear conviction to the mind or carries a clear conviction of its truth. In re Novosielski, 992 A.2d 89, 107 (Pa. 2010).

The Superior Court likened the evidence presented in the instant case to that of In re Read, in which the Superior Court reversed a trial court’s finding of abuse wherein the treating physician had testified that he could not definitively state whether the injuries were caused by abuse or by an accident and the parents, who had immediately sought medical care for the children, had no explanation for the injuries. In re Read, 693 A.2d 607, 610-11 (Pa. Super. 1997). The Court in Read explained that the testimony failed to support a conclusion that the injuries were non-accidental, and noted that the only conclusive fact was that the children suffered bone fractures; the Court stressed in reversing the finding of abuse that innuendo and suspicion alone are not enough to compel a finding of child abuse.

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**(In the Interest of J.M., a Minor, cont'd.)**

The Superior Court also analogized the instant case with In re C.R.S., wherein the child's treating physician testified that he could not definitively diagnose whether the trauma suffered by the child was accidental or non-accidental, and four additional expert physicians who reviewed the child's medical records agreed. In re C.R.S., 696 A.2d 840, 843-44 (Pa. Super. 1997). The Superior Court in In re C.R.S. disagreed with the trial court's inference that the medical testimony established that the child was abused by clear and convincing evidence and reversed the finding. *Id.* at 846. The Superior Court noted that in comparing both Read and C.R.S., they recognized that these cases predate the amendments which expanded the definition of "child abuse" under the CPSL, and noted that they do not consider these cases as controlling with respect to the current definition of "child abuse." Rather, they are used solely to illustrate application of the clear and convincing evidence standard in child abuse cases.

The Superior Court expressed that similar to both Read and C.R.S., there was no evidence in the instant matter, medical or otherwise, clearly showing that the child was abused, or suggesting that this fracture was more likely to have been caused by abuse than by an accident. The Superior Court observed that in light of the inconsistencies in the record, as well as its observations of Mother and the resulting credibility determinations made by the trial court, the trial court concluded that Mother was "attempting to conceal what happened to the child while in her care and she is responsible for the injuries to the child while in her care." The Superior Court recognized that while they are bound by the findings of the family court, they are "aware of no case that has ever held that such evidence is sufficient to prove child abuse under a standard requiring clear and convincing proof." They then reviewed a number of cases wherein findings of abuse were supported by clear and convincing evidence, and noted the differences between these cases and the facts of the instant matter. In many of the cases, unequivocal medical evidence was presented that the child's injury could not have been accidental; whereas in the instant case the medical expert testified that the injury was a type that commonly results from childhood accidents involving children of that age, and rendered no opinion that the child was abused. Additionally, in many of those cases, there was evidence presented reflecting a history of abuse; in the instant case, there is no such history. The Superior Court also opined that the trial court itself had recognized that the testimony in the case was not clear, but was "as muddy as the Mississippi can be." Based on its analysis, the Superior Court held that the record in the instant matter lacked sufficient proof to enable a finding that the child was a victim of child abuse, and the finding of abuse was also reversed.

**In the Matter of the Adoption of M.A.B.**

Date of Decision: June 29, 2017  
Cite: 1720 WDA 2016

**Holding:**

Despite Father's significant progress in attaining goals which would permit reunification to proceed, his refusal to put his children's needs ahead of those of Mother and leave Mother continued to put the children at risk; thus circumstances and conditions which led to the children's removal continued to exist, justifying termination as to Mother under §2511(a)(2) and as to Father under (a)(8); remand was necessary for further findings a to §2511(b).

**Facts and Procedural Posture:**

Mother and Father became involved with Venango County Children, Youth and Family Services (hereinafter referred to as "Venango CYS") in June of 2013 and again in October of 2013 after Child-Line received reports of inappropriate discipline of the children. Both cases were closed upon further investigation as either invalid or unfounded. Father became incarcerated in September of 2013 due to violations of his parole; at that time, Paternal Grandmother agreed to help Mother care for the children. In February of 2014, Paternal Grandmother contacted Venango CYS requesting assistance, as Mother had been admitted to an inpatient mental health facility and Paternal Grandmother was unable to care for the children. Following the filing of an emergency motion for shelter care, the children were placed in foster care.

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**(In the Matter of the Adoption of M.A.B., cont'd.)**

In March of 2014, Mother moved to Erie, where she continued to receive outpatient mental health treatment. That same month, the trial court adjudicated the children dependent with concurrent permanency goals of reunification and adoption, and ordered continued placement in foster care. The issues supporting dependency were Mother's mental health status, substance abuse, poor housing conditions, and Father's continued incarceration. In July of 2014, jurisdiction was transferred to Erie County and the Erie County Office of Children and Youth (hereinafter referred to as "Erie OCY") and the children were moved to a second foster home. Psychiatric evaluations were conducted as to both Mother and Father. Mother's evaluation noted a diagnosis of bipolar disorder and opioid dependency, and Father's was diagnosed with bipolar disorder and alcohol dependency in remission. A permanency review order issued in August of 2014, determined that Mother and Father had both moderately complied with the permanency plan established in Venango County and had made moderate progress towards alleviating the conditions that led to placement. The trial court directed both Mother and Father to continue working on their drug and alcohol and mental health goals, including urinalysis, participate in an approved parenting program and demonstrate ability to meet the needs of the children, and to obtain and maintain safe housing. At subsequent permanency review hearings it was determined that Mother was noncompliant with her drug and alcohol services, required urinalysis, and mental health treatment. Father demonstrated more compliance, including attending a 12-step program, counseling and parenting classes, attending all visits, and maintaining a full time job, though he failed to comply with random drug screenings. Additionally, Mother and Father, obtained housing together.

In January of 2015, Erie OCY transferred the children, then ages four and five, to their third foster home. At the March 2015 permanency review hearing, it was established that Mother was non-compliant with her drug and alcohol treatment, had a number of "no show positives" for urinalysis testing, and was not participating in her mental health treatment. While Mother had previously been attending visits with her children, visitation was suspended based on the "no show positive" urine screenings, as Erie OCY could not ensure Mother's sobriety and the children's safety. Father's visits with the children, however, had been going well, and Erie OCY reported that Father was both patient and appropriate in managing the children, and also had additional phone contact with the children. Erie OCY reported that they advised Father that if Mother continued her non-compliance and Father continued to reside with her, his reunification with the children was in jeopardy. Father informed the court that he was aware of this issue and the impact it could have on reunification with his children. A subsequent permanency review hearing was held in June of 2015, during which Erie OCY requested a permanency goal change to adoption. In support of their request, they cited the children's approximately sixteen months of placement, Mother's two random urinalysis screenings in which she tested positive for Suboxone (without providing Erie OCY information regarding a prescription), an incident in which Father permitted Mother contact with the children during one of his unsupervised visits, Mother's continued non-compliance with mental health treatment and her continued substance abuse, and Father's failure to obtain a residence separate and apart from Mother. The dependency court granted the goal change and directed Erie OCY to file the petitions for termination.

In January of 2016 and March of 2016, hearings on Erie OCY's petitions for termination were held. Testimony was offered by an Erie OCY Casework Supervisor as to multiple communications with Father regarding the suggestion he explore alternative living arrangements so as to not jeopardize his opportunity for reunification with the children. Father admitted that he was aware of Mother's non-compliance back in March of 2015 and the likelihood that he would have to separate from her in order to reunify with his children. The foster mother, and the children's special education teacher offered additional testimony regarding the children, and provided that in the past year, both children have stabilized developmentally, both had been toilet trained, both were now developmentally age-appropriate in their speech and education, and regressive behavioral issues had ceased following decrease and cessation in visits with their biological parents.

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**(In the Matter of the Adoption of M.A.B., cont'd.)**

The trial court declined to terminate parental rights as to both Mother and Father, stating that Erie OCY had not met their burden, as they failed to provide specific evidence with regard to Father's ability to meet the children's special needs and Mother's ability to avail herself of services to meet the children's needs. Both Erie OCY and the children's Guardian *ad litem* appealed.

**Issue:**

Whether the trial court committed an abuse of discretion and/or error of law in its denial of termination of the parental rights of both Mother and Father where the children had been in care for approximately sixteen months and the circumstances that led to the children's placement continued to exist?

**Rationale:**

The Superior Court determined that the denial of termination of parental rights as to both Mother and Father under §2511(a)(2) and (8) was an abuse of discretion, as Erie OCY had met its burden to support termination of the parental rights of both parents. They began by noting that the standard of review involving termination of parental rights is "limited to determining whether the order of the trial court is supported by competent evidence, and whether the trial court gave adequate consideration to the effect of such a decree on the welfare of the child." In re I.J., 972 A.2d 5, 8 (Pa. Super. 2009). They additionally noted that "the [Orphans'] court in termination proceedings cannot substitute its judgment for that of the juvenile court on the same factual issue." In re J.A.S., 820 A.2d 774, 781 (Pa. Super. 2003).

With respect to Mother, the Superior Court analyzed the sufficiency of the evidence under §2511(a)(2), under which "the petitioner for involuntary termination must prove (1) repeated and continued incapacity, abuse, neglect or refusal; (2) [that] such incapacity, abuse, neglect or refusal caused the child to be without essential parental care, control or subsistence; and (3) [that] the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied." The Superior Court disagreed with the trial court's conclusion that Mother had demonstrated progress in every area, and that there was a reasonable probability that the causes and conditions which led to placement could be remedied, and opined that this was not supported by the record, and ignored the Adoption Act's clear delineation of what must be shown at termination proceedings. To this end, the Superior Court reiterated that the issue at a termination proceeding is not whether the evidence proved that sometime in the future a parent would be able to resolve their issues, but whether at the time of the filing of the termination petition the repeated and continued incapacity caused the children to be without essential parental care and cannot or will not be remedied by the parent. In re B., N.M., 856 A.2d 847, 855 (Pa. Super. 2004); In re K.Z.S., 946 A.2d 753, 760 (Pa. Super. 2008). The Court observed that it was undisputed that the cause of the children's placement in February 2014 was Mother's mental health and substance abuse issues; by the time of the filing of the petition seeking termination, the record reflected that Mother was not in therapy, had gone off of her medication without medical advice/supervision, had failed to show up for court-ordered urinalysis screenings, and failed to provide necessary medical documentation. Additionally, Mother's refusal to address her significant mental health and substance abuse issues led to suspension of her visitation privileges with her children. Based on the totality of the evidence, the trial court's conclusion that Mother had demonstrated progress in every area was not supported by the record, which established that the incapacity or refusal that led to the children's placement continued to exist.

With respect to Father, the Superior Court analyzed the sufficiency of the evidence under §2511(a)(8), in which OCY was required to prove that the children had been removed from the care of the parent for at least twelve months, that the conditions which led to the removal still exists, and that termination would best serve the needs and welfare of the children, noting that this section did not require an evaluation of Father's willingness or ability to remedy the conditions that led to the placement of his children. 23 Pa.C.S.A. §2511(a)(8); See also In re Adoption of R.J.S., 901 A.2d 502, 511-12 (Pa. Super. 2006). The Superior Court again disagreed with the conclusion of the trial court and reasoned that the circumstances which led to the children's removal remained.

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**(In the Matter of the Adoption of M.A.B., cont'd.)**

Namely, Father failed to protect the children from Mother's untreated mental health and substance abuse issues, causing their continued placement throughout 2014 and 2015, as Father continued to reside with Mother putting the children's emotional and physical safety at risk. The Court noted that the application of this section may seem harsh when a parent has made significant progress in attaining goals that would permit reunification to move forward, however, Father's testimony supported that he was aware that Mother's minimal efforts and non-compliance were jeopardizing reunification with his children, and that in order to be reunited with them, he would need to obtain separate housing. The Court additionally noted that it was this same evidence that the dependency court judge utilized to support a change of goal from reunification to adoption in its conclusion that the information constituted clear and convincing evidence under §2511(a)(8) as to Father.

Despite the Superior Court's findings under §2511(a)(2) and (a)(8), ultimately, the case was remanded to the trial court with respect to the evidence presented under §2511(b). They opined that there was little evidence presented at the termination hearing that directly addressed the presence or absence of a bond between the children and their Mother and/or Father. Additionally, the Court noted that while there was some specific testimony on the termination of said bond, this information was ignored by the trial court. Therefore, remand was necessary for the trial court to acknowledge the evidence that was presented and consider said evidence in conjunction with additional factors established through relevant case law.

## **SPOTLIGHT: SUPREME COURT OF PENNSYLVANIA: COMMONWEALTH v. BATTS**

On June 26, 2017, the Pennsylvania Supreme Court unanimously ruled in Commonwealth v. Batts that before a juvenile can be sentenced to life without parole, the state must prove, beyond a reasonable doubt, that the youth is permanently incorrigible. Procedurally, this is the third appeal that the juvenile defendant, Batts, had filed with respect to his sentence. Batts first appealed his life without parole sentence following the United States Supreme Court 2012 decision in Miller v. Alabama (holding automatic life without parole sentences for juveniles unconstitutional). On remand, Batts was resentenced to life without parole. Batts then filed his second appeal in the wake of Montgomery v. Louisiana (holding that Miller applied retroactively and that Miller established a new substantive rule of constitutional law). In this most recent appeal, the Pennsylvania Supreme Court found that Miller and Montgomery establish a presumption against life without parole sentences for juveniles and that the burden is on prosecutors to prove beyond a reasonable doubt that a young person is incapable of rehabilitation before such a sentence is issued. The Court thus reversed and remanded and ordered that Batts must be sentenced a third time. Justice Christine Donahue, who authored the decision, stated that when Batts is re-sentenced he must be provided "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Commonwealth v. Batts, 45 MAP 2016 (Pa. 2017).

## **SPOTLIGHT: US SUPREME COURT: SESSIONS v. MORALES**

The United States Supreme Court granted certiorari in Sessions v. Morales to examine whether or not equal protection guarantees were violated by gender-based distinctions in laws related to acquisition of citizenship by a child born abroad when one parent is a U.S. citizen and the other, a citizen of another nation. The Supreme Court, Justice Ginsburg, held that equal protection guarantees were, in fact, violated by the statutory scheme and the appropriate remedy was to apply the five-year requirement, prospectively, to children born of unwed mothers, rather than to extend benefit of one-year requirement to fathers. Sessions v. Morales, 137 S.Ct. 1678 (U.S. 2017).

## SPOTLIGHT: US SUPREME COURT: PAVAN

Two married same-sex couples, who conceived children through anonymous sperm donation, brought action against the Director of the Arkansas Department of Health, seeking declaration that the provision of an Arkansas statute (which generally required the name of mother's male spouse to appear on the child's birth certificate when a mother conceived the child by means of artificial insemination, but allowed for the omission of the mother's female spouse from her child's birth certificate), violated the Constitution. The Circuit Court granted summary judgment to the couples and ordered the Department to amend birth certificates. The Department appealed. The Supreme Court of Arkansas reversed. The United States Supreme Court granted certiorari, reversed the state court's judgment, and held that the Arkansas statute denied married same-sex couples the access to "the constellation of benefits" that Arkansas linked to marriage, and as such, was unconstitutional to the extent that it treated same-sex couples differently from opposite-sex couples. Pavan v. Smith, 2017 WL 2722472 (U.S. 2017).

## SPOTLIGHT: 3<sup>rd</sup> CIRCUIT: HATFIELD v. BERUBE

The United States District Court for the Western District of Pennsylvania granted Defendants' (Allegheny County Caseworker and Casework Supervisor) Motion for Summary Judgment on Plaintiff's federal claims asserted under 42 U.S.C. § 1983 to redress the alleged violation of her Fourth and Fourteenth Amendment rights arising from events that transpired in connection with the removal of Plaintiff's children from her custody in 2012 and subsequent related dependency proceedings. Hatfield v. Berube, 2017 WL 2559635 (3d Cir. 2017).

## AMENDMENTS TO PENNSYLVANIA RULES OF JUVENILE COURT PROCEDURE 240, 242 AND 1242

Effective July 1, 2017, The Pennsylvania Supreme Court has ordered that Rules 240 (Delinquency: Detention of Juvenile), 242 (Delinquency: Detention Hearing) and 1242 (Dependency: Shelter Care Hearing) be amended to prohibit the waiver of detention and/or shelter care hearings absent stipulations or agreements subject to review and acceptance by the court at said hearing(s). Pa.R.J.C.P. 240, 242 and 1242.

## REVISION OF THE COMMENT TO PA RULE OF EVIDENCE 902

On June 12, 2017, the Pennsylvania Supreme Court issued an order approving revision to the comment of Pennsylvania Rule of Evidence 902 (Self-authenticating Evidence). The revision to the comment now reads as follows:

The admission of a self-authenticating record of a prior conviction also requires sufficient evidence, either direct or circumstantial, to prove that the subject of the record is the same person for whom the record is offered in a proceeding. See, e.g., Commonwealth v. Boyd, 344 A.2d 864 (Pa. 1975).

The Final Report explaining this revision indicates,

The purpose of this revision is to alert readers that certain self-authenticating records may also require proof of identification. Under the Rules of Evidence, certificates evidencing a prior criminal record are self-authenticating under Pa.R.E. 902(4). See also 42 Pa.C.S. § 5328, 42 Pa.C.S. § 6103, and 75 Pa.C.S. § 6501. However, self-authenticating certificates fulfill only part of the requirement for proving a prior criminal conviction. Under case law, the proponent has the burden of proving: 1) a prior conviction is authentic (*i.e.*, with a self-authenticating certificate); and 2) the person against whom it is sought to be admitted is the same person reflected on the certificate. *Commonwealth v. Boyd*, 344 A.2d 864 (Pa. 1975).