



# SWAN Legal Services Initiative

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## PENNSYLVANIA SUPERIOR COURT

### **In the Interest of: T.J.J.M., a Minor, Appeal of C.M.**

Date of Decision: June 13, 2018

Cite: 2810 EDA 2017

### **Holdings:**

1. The Superior Court vacated an order changing the Child's permanency goal to adoption where the Father had participated in supervised visits, secured full time employment, maintained contact with the agency, and was working to obtain housing.
2. The Superior Court vacated an order involuntarily terminating Father's parental rights where the totality of evidence did not warrant termination under 2511(a)(1) & 2511(a)(2).

### **Facts and Procedural Posture:**

The Child was born prematurely in July of 2016 with cocaine, opiates, and benzodiazepines in her system. Around the time the Child was born, Mother and Father's apartment had sustained damage due to a flood. The Child remained hospitalized for approximately three months and, upon discharge, Father did not have housing. In October of 2016, the Child was placed in the care of the Department of Human Services (DHS) and was adjudicated dependent. Father was given Single Case Plan (SCP) goals of attending supervised visitation and participating in a parenting and housing program. Father attended three supervised visits in October of 2016 and was later incarcerated for a probation violation. Father was incarcerated for two months and, upon his release, was required to reside in a self-help program for 90 days. Father had contacted his Community Umbrella Agency (CUA) Caseworker to explain that he had attained employment and that he was on a probationary period at his place of employment for an unspecified amount of time. Father only attended two supervised visits in 2017 due to his work schedule, the restrictions from the self-help program, and lack of transportation. In order to accommodate Father's work schedule, the CUA scheduled a Saturday visit for Father. However, the visit was canceled because the Foster Parents were unavailable. No further efforts were made to accommodate Father's schedule. In regards to the parenting and housing, the CUA referred Father to the Achieving Reunification Center (ARC). Although Father attended the first meeting, he was later discharged due to non-participation, because ARC was unable to accommodate Father's work schedule. In April of 2017, DHS filed a petition for a goal change and for the involuntary termination of Father's parental rights. On August 4, 2017, the court entered an order terminating the Father's parental rights pursuant to 23 Pa.C.S. §§ 2511(a)(1),(2),(5),(8) and 2511(b) of the Adoption Act as well as a permanency review order, changing the Child's permanency goal to adoption. Father appealed.

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**Issues:**

1. Did the trial court abuse its discretion by changing the Child's placement goal to adoption?
2. Did the trial court commit a reversible error when by terminating Father's parental rights under 23 Pa.C.S. §§ 2511(a)(1),(2),(5),(8) and 2511(b) of the Adoption Act?

**Rationale:**

In its opinion, the Superior Court noted that §6351 of the Juvenile Act requires courts to determine at permanency review hearings "the likely date by which the placement goal for the child might be achieved." In determining whether a goal change should take place, "the burden is on the child welfare agency to prove the change in goal would be in the child's best interest." In re D.P., 972 A.2d 1221, 1227 (Pa. Super. 2009). During the dependency proceedings, three permanency review orders (March 2017, June 2017, and August 2017) were issued. The first two orders did not include any information regarding the likely date by which the permanency goal might be achieved. The second and third permanency review orders did not include a finding as to Father's compliance. The Court took issue with the fact that the trial court ordered a goal change at the ten month mark when no date for achievement of the permanency goal had ever been set in a court order. The Court also determined that the evidence did not support changing the permanency goal, as Father had participated in supervised visits, secured full time employment, attempted to resolve conflicts between his work schedule and the visitation schedule, maintained contact with the CUA caseworker, was working to obtain housing, and contacted ARC in an effort to resolve the conflict between his work schedule and the parenting and housing classes. The Court also noted that the Child is not in a pre-adoptive placement and that the Foster Parents are limited in their ability to bring the child to visits with Father. After considering all of the evidence, the Court ruled that the trial court abused its discretion in issuing the goal change order, as the evidence did not support the goal change.

As to the termination of parental rights order, the Court first dispatched with sections (a)(5) & (a)(8) of the termination order. The Superior Court determined that the trial court erred to the extent that it terminated Father's parental rights pursuant to subsections (5) & (a)(8), as DHS sought termination during the hearing only pursuant to subsections(1) & (a)(2), and the trial court granted termination on the record in open court under subsections(1) & (2) only. In regards to 23 Pa.C.S. §§ 2511 (a)(1), the trial court terminated the Father's rights on this ground based upon their finding that "Father failed to demonstrate that he was capable of being a single parent and depended on Mother." Father presented at the termination hearing that he relied upon Mother to provide him with updates on the Child's medical condition and overall wellbeing, but father also testified that until the termination hearing he believed that Mother was also working towards reunification. The Superior Court held that the trial court erred by not considering Father's explanation behind his reliance on Mother and by "mechanically applying the six-month statutory provision under 23 Pa.C.S. §§ 2511 (a)(1)" as the totality of the circumstances clearly does not warrant termination.

In regards to 23 Pa.C.S. §§ 2511 (a)(2), Father contended that if he were offered a consistent visitation schedule and other reunification services that did not conflict with his work schedule, he would be able to complete them. The Superior Court found that this testimony did not demonstrate that Father's parental incapacity cannot or will not be remedied, as is required under 23 Pa.C.S. §§ 2511 (a)(2). The Superior Court also distinguished this case from the In the Interest of D.C.D., 105 A.3d 662 (Pa. 2014) case, in that DHS did not provide Father with an opportunity to participate in visitation or in parenting and housing classes. As such, the Superior Court found that the trial court abused its discretion in terminating Father's parental rights under 23 Pa.C.S. §§ 2511 (a)(2). The Superior Court did not perform an analysis under 23 Pa.C.S. § 2511 (b) as the trial court abused its discretion under 23 Pa.C.S. § 2511 (a).

**In re: J’K.M.**

Date of Decision: June 26, 2018

Cite: 1390 WDA 2017

**Holding:**

The Superior Court reversed an order denying Mother’s motion for appointment of a separate guardian ad litem (GAL), where the Child’s legal interests conflicted with the Child’s best interest during dependency proceedings.

**Facts and Procedural Posture:**

The Child is a dependent 16-year-old youth who has a history of severe asthma that required medical supervision. On a number of occasions, Mother and Child neglected to ensure that the Child was taking her medications, which resulted in the Child being hospitalized repeatedly. Child and Mother also failed to attend follow up appointments that were scheduled after the Child was discharged from the hospital. During a permanency review hearing in June of 2017, the caseworker testified regarding the Child’s health concerns, that the Child’s Father had passed away due to asthma complications, and that the Child often stays with friends or her boyfriend as opposed to residing in the home with Mother. During the hearing, the Child testified that she wanted to remain with her Mother, as she did not like residing in foster homes where she was required to follow a structured schedule with meals, bed time, and school attendance. After testimony was presented, the GAL stated that the Child had clearly expressed her desire to remain with her Mother and that the Child had stated the reasons for this position. After making these assertions, the GAL then proceeded to express that as the GAL, he felt that it was in the Child’s best interest to be removed from Mother’s home. At this point, Mother’s counsel objected and asked for the appointment of a separate GAL. Subsequent to this, counsel for Mother filed a Motion for the Appointment for Separate Guardian Ad Litem, and a hearing was held on the motion. After hearing arguments from all parties, the trial court denied the motion and Mother filed an appeal.

**Issue:**

1. Does a conflict of interest arise where a Child expresses his/her preferred outcome and the GAL advocates for a different outcome?

**Rationale:**

In its analysis, the Court looked to the comment of Pennsylvania Rule of Juvenile Court Procedure (Pa. R.J.C.P.) Rule 1154, which states that if there is a conflict of interest between the duties of the GAL to advocate for the best interest of the Child and to advocate for the Child’s legal interest, the GAL may “move the court for appointment as legal counsel and assignment of a separate guardian ad litem.” The Court went on to assess that §6311 of the Juvenile Act allows for GAL’s to represent both the Child’s best interest as well as his/her legal interest, but that difficulty occurs when these two interests are in conflict. The Court then turned its analysis to the In re Adoption of L.B.M., 161 A.3d 172 (Pa. 2017) case, where the Pennsylvania Supreme Court ruled that a Child’s GAL may “serve as child’s counsel when the GAL’s dual role does not create a conflict of interest,” but that when there is a divergence between the child’s wishes and the GAL’s recommendation, a conflict of interest occurs for the GAL. As such, the Court ruled that in this instance, the GAL should have requested the trial court appoint a separate GAL, and that the trial court abused its discretion by denying Mother’s motion for appointment of a separate guardian ad litem (GAL), and by failing to appoint a separate GAL.

## PENNSYLVANIA COMMONWEALTH COURT

### **Support Center for Child Advocates v. DHS**

Date of Decision: June 7, 2018  
Cite: 723 C.D. 2017

#### **Holding:**

The Commonwealth Court affirmed the Bureau of Hearings and Appeals (BHA) denial of a Motion to Acknowledge Party Status filed by the Child's Guardian Ad Litem, where the Child's interests in an expunction hearing are being represented by the County Agency.

#### **Issues:**

1. Whether the BHA's Order is a collateral order pursuant to Pa.R.A.P. Rule 313?
2. Whether the BHA abused its discretion by denying the Motion to Acknowledge Party Status?

#### **Facts and Procedural Posture:**

On January 12, 2012 the Support Center for Child Advocates was appointed as the Guardian Ad Litem (GAL) to represent the Child's interest in criminal and civil proceedings relating to abuse suffered by the Child. The Child's Father is the indicated perpetrator in a report based on allegations that he raped the Child. Father is seeking to have the indicated report expunged and on February 14, 2017, the GAL submitted a letter to the BHA requesting acknowledgment of party status. On February 24, 2017, the Administrative Law Judge (ALJ) issued a Rule to Show Cause as to why the Child's GAL should not be added as a party to the proceedings. Neither Father nor DHS objected to the GAL's motion, nor did they respond to the Rule to Show Cause. On May 3, 2017, the GAL filed a Motion to Acknowledge Party Status, which the ALJ denied on May 11, 2017, stating that the GAL did not meet the standards to intervene under the General Rules of Administrative Practice and Procedure (GRAPP) Rule 35.28. On June, 7, 2017, the GAL appealed to the Commonwealth Court.

#### **Rationale:**

Upon determining that the denial of the Motion was an appealable collateral order under Pa.R.A.P. 313 the Court assessed whether the Motion satisfies the requirements for parties to intervene. The particular rule at issue is GRAPP 35.28(a)(2), as the GAL did not claim a right to intervene that is "conferred by statute" nor did he claim that "his participation is in the public interest." 35.28(a)(2) requires that the interest be "directly affected and which is not adequately represented by existing parties" Id. At 8. The Court quoted Dauphin Cty. Social Support Servs. For Children & Youth Servs. V. Dept of Public Welfare, 543 A.2d 607 (Pa. Cmwlth.1988), which held that "the interest of children in expunction hearings are protected at the administrative hearing because the interest of the Children are the same as DHS" Id. At 9. As the Child's interest are the same as the County Agency's, Rule 35.28(a)(2) would not apply, as the Child's interest are being adequately represented.

## FEDERAL LEGISLATION

### **AFFORDING CONGRESS AN OPPORTUNITY TO ADDRESS FAMILY SEPARATION.**

This executive order was signed on June 20, 2018, and emphasizes that while aliens who enter or attempt to enter the country illegally are subject to a fine or imprisonment, it is the policy of the administration to "maintain family unity" by "detaining alien families together where appropriate and consistent with law and available resources." The executive order defines an alien family as non-citizens who are not authorized to remain in the United States who "entered this country with an alien child or alien children" and who are "detained." The term alien child is defined as "any person not a citizen or national of the United States" who has not been authorized to remain in the United States, who is "under the age of 18," and who entered the United States with someone who has a "legal parent-child relationship" with the alien child and was detained. The executive order requires that the Secretary of Homeland Security to the extent possible by law "maintain

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custody of alien families during the pendency of any criminal improper entry or immigration proceedings.” The Secretary has also been mandated not to detain family members together if there are “concerns that detention of an alien child with the child’s parents would pose a risk to the child’s welfare.” The Executive Order tasks the Secretary of Defense is with providing or constructing facilities for housing alien families. The Executive Order also creates an obligation for the Attorney General to prioritize the adjudication of cases involving detained families. For further information, please view the link provided below.

<https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>

## PENNSYLVANIA LEGISLATION

### **Act 54 of 2018**

On June 28, 2018, Act 54 of 2018 was enacted to make amendments to Pennsylvania’s Child Protective Services Law (CPSL). The most impactful of these is the amendment made to 23 Pa. C.S.A. §6386 (A) (relating to the notification of a plan of safe care for children under one). Healthcare providers are to give notice to the Department of Human Services if the provider determines “based on standards of professional practice,” that a child is born affected by “substance use or withdrawal symptoms” resulting from “prenatal drug exposure” or “fetal alcohol spectrum disorder.” A new section, 23 Pa. C.S.A. §6386 (A.1), was created to state that the aforementioned notifications from healthcare providers will not constitute a child abuse report. 23 Pa. C.S.A. §6386 (B.1) was also amended to add the requirement that screening tools be used to identify children born affected by prenatal drug exposure or fetal alcohol disorder. 23 Pa. C.S.A. §6386 (B.1) requires that a safe care plan be developed by a multi-disciplinary team prior to the child’s discharge from the healthcare facility, and that the family is engaged in identify the need for treatment to address substance use and physical or behavioral health conditions that may affect the development and well-being of the child. These provisions are set to take effect on October 1, 2018.

An addition to 23 Pa. C.S.A. §6332(c) (relating to a statewide toll free number to report child abuse) is among the other pertinent amendments covered in this bill. This amendment requires that posters containing the statewide toll-free number for suspected child abuse be posted in high traffic areas in all K-12 schools. 23 Pa. C.S.A. §6337 (relating to expunction of unfounded reports) was also amended to require that General Protective Service Reports that are determined to be valid by the County Agency be maintained for 10 years or until the youngest child identified in the most recent general protective services report attains 23 years of age, whichever occurs first. These provisions are set to take effect in 60 days (regarding the amendment to 23 Pa. C.S.A. §6332(c)) and 365 days (regarding the amendment to 23 Pa. C.S.A. §6337) respectively.

For more information, view the link provided below.

<http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2017&sind=0&body=H&type=B&bn=1232>

### **Act 76 of 2018**

On June 29, 2018, Act 76 of 2018 was enacted to amend the Social Workers, Marriage and Family Therapists and Professional Counselors Act. The purpose of the amendment is to provide further definitions (including a definition for the term “diagnosis”) to create a provision for reciprocity on an emergency basis, to include the unlicensed independent practice of clinical social work to the list of unlawful practices, and to list the civil penalties for engaging in the unlicensed practice of clinical social work. For more information, view the link provided below.

<http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2017&sind=0&body=S&type=B&bn=0530>

## AMENDMENTS AND RULE CHANGES

### **AMENDMENTS AND ADDITIONS TO PA RULES OF JUVENILE COURT PROCEDURE:**

Recently, Rule 415 (delinquency) was created and amendments to Rules 601 (delinquency), 1601, and 1608 of the Rules of Juvenile Court Procedure are set to take effect on October 1, 2018. Rule 1601 was changed to add language that requires that notice be provided whenever a party seeks to change a permanency goal from reunification. The rationale behind this rule change is to “ensure that parties, counsel, and interested persons have notice of the purpose of the hearing and are able to prepare for and attend the hearing.” Rule 415 was adopted to add the procedure by which the ruling on an offense or an order of adjudication can be challenged as being against the weight of evidence. Rule 620 was changed to reflect the addition of Rule 415. For more information, please view the links provided below.

Link for Rules 1601 and 1608: <http://www.pacourts.us/assets/opinions/Supreme/out/Attachment%20%2010354820037659236.pdf?cb=1>

Links to Rules 415 and 601: <http://www.pacourts.us/assets/opinions/Supreme/out/Attachment%20%2010355556137794141.pdf?cb=1>

### **AMENDMENTS TO PA RULES OF ORPHANS COURT PROCEDURE:**

Effective July 1, 2018, Rules 1.99, 2.1, 2.4, 2.7, 2.8, 2.10, 3.3—3.6, 3.9—3.11, 3.14, 7.2—7.4 and 8.2 of the Pennsylvania Rules of Orphans Court Procedure shall be amended. These rules were changed to omit the phrase “Case Records of the Appellate and Trial Courts” in favor of the term “Case Records.” For more information please see the links provided below.

Links to Amendments to Rules 1.99, 2.1, 2.4, 2.7, 2.8, 2.10, 3.3—3.6, 3.9—3.11, 3.14, 7.2—7.4 and 8.2

<http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Entered%20%2010356664138013716.pdf?cb=1>

<http://www.pacourts.us/assets/opinions/Supreme/out/Attachment%20%2010356664138013731.pdf?cb=1>

### **AMENDMENTS TO PA RULES OF APPELLATE PROCEDURE:**

Effective July 1, 2018, Rules 123, 127, 552, 910, 911, 1116, 2152, 2156, 2171 and 2544 of the Pennsylvania Rules of Appellate Procedure will be amended to omit the phrase “Case Records of the Appellate and Trial Courts” in place of the term “Case Records.” For more information view the links provided below.

<http://www.pacourts.us/assets/opinions/Supreme/out/Attachment%20%2010356667838014034.pdf?cb=1>

### **AMENDMENTS TO PA RULES OF CIVIL PROCEDURE BEFORE MAGESTRATE:**

On June 1, 2018, the Supreme Court of Pennsylvania issued an order adopting Rule 217 and amending Rule 803 and the Official Notes to Rules 304, 503, 1205, and 1206 of the Rules of Civil Procedure Before Magisterial District Judges. These changes are set to take effect Nov 1, 2018, and the purpose of these rules is to ensure that filings in Magisterial District Courts comply with the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania. For more information, view the links provided below.

<http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Entered%20%2010356658938013130.pdf?cb=1>

<http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Enteredattach%20%2010356658938013090.pdf?cb=1>