



# SWAN Legal Services Initiative

## August Legal Report

VOLUME 5, ISSUE 2

2018

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## PENNSYLVANIA SUPREME COURT

### **In re T.S., E.S., Minors, Appeal of T.H.**

Date of Decision: August 22, 2018

Cite: 2018 WL 4001825

### **Holdings:**

1. The Supreme Court held that a child’s statutory right to appointed counsel under §2313(a) of the Adoption Act is not subject to waiver.
2. The Supreme Court held that §2313(a) of the Adoption Act is satisfied where the court has appointed a guardian ad litem (GAL) to represent the child’s best interest and the child’s legal interests (preferred outcome) cannot be ascertained due to the child being pre-verbal or non-communicating.

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

The children were born in June of 2013 and August of 2014, respectively. While Mother was pregnant with E.S, she admitted to using marijuana and tested positive for THC. Allegheny County Children Youth and Families (CYF) became involved with the family shortly after E.S. was born. CYF allowed the children to remain in the home and provided services for Mother, however, Mother smoked marijuana in the presence of the children, failed to monitor the children, and failed to undertake basic parenting tasks (such as changing diapers and feeding). In July 2015, CYF took emergency custody of the children after making an unannounced visit to the home and finding Mother under the influence of drugs and alcohol. KidsVoice was subsequently appointed to represent the children’s best interest and legal interest. In late 2016, CYF filed a petition to terminate Mother’s parental rights, which was heard on February 3, 2017. At the termination hearing, KidsVoice represented the children, and the trial court did not appoint independent counsel to represent the children’s legal interests. During the termination proceedings, the trial court heard testimony regarding Mother’s non-compliance with her mental health and substance abuse treatment, her inability to manage the children’s needs during visits, the children’s indifference towards Mother at visits, and that the children were thriving in foster care. After hearing all of the testimony, the trial court entered an order terminating Mother’s parental rights pursuant to 23 Pa.C.S. §§ 2511(a)(2),(5),(8) and 2511(b) of the Adoption Act. Mother appealed to the Superior Court, and while her appeal was pending, the Supreme Court decided In re Adoption of L.B.M. 161, A. 3d 172 (Pa. 2017), which prompted Mother to raise the argument that the children’s legal interest should have been represented by separate counsel. A three-judge panel of the Superior Court affirmed the trial court’s decision, as Mother did not assert that a conflict existed between the children’s best interest and legal interest. Mother then appealed to the Supreme Court.

**Issues:**

1. Did Mother waive the appointment of separate counsel issue by not asserting it until her appeal?
2. Did the trial court err by failing to appoint separate counsel to represent the children's legal interest?

**Rationale:**

*Majority: Chief Justice Saylor, Justice Baer, Justice Todd, and Justice Mundy*

In addressing the first issue, the Supreme Court noted that the statutory right to counsel under §2313(a) belongs to the child and not the parent. The Court further stated that children cannot raise their right to counsel for themselves; therefore the failure by any party to request separate counsel for the children cannot constitute waiver.

In addressing the second issue, the Court rejected the arguments of Mother's counsel who claimed that in cases of non-communicative children, there should be a presumption that the child is opposed to termination, which would therefore create an automatic conflict anytime that a GAL believes that termination is in the best interest of the child. In making their ruling, the Court first looked to its decision in In re Adoption of L.B.M., in which the majority held that "where a child's best interest and legal interests do not diverge in a termination proceeding," a GAL appointed to represent the child's best interest may also represent the child's legal interests. The Court further assessed that the majority in the In re Adoption of L.B.M. decision "indicated that where a child is too young to express a preference, it would be appropriate for the GAL to represent the child's best and legal interests simultaneously." The Court also looked to §6311 of the Juvenile Act, which allows for a GAL to represent a child's best interest and legal interest, and specified that a GAL "must advise the court of the child's wishes to the extent that they can be ascertained," which the Court took to create an implication that if the child's wishes cannot be ascertained, then the GAL has no duty to advise the court of such wishes. As such, the Majority held that if the preferred outcome of a child is not ascertainable because a child is very young or pre-verbal, then there is no conflict between the child's best interest and legal interest that would require the appointment of separate counsel under §2313(a).

*Concurring Opinion: Justice Dougherty*

Justice Dougherty joined Sections I and II of the majority opinion and concurred with the result, but wrote a concurring opinion in order to address the distinction between this case and In re Adoption of L.B.M. In his concurring opinion, Justice Dougherty noted that the key distinction between this case and In re Adoption of L.B.M., is that in L.B.M., the child's GAL initiated the termination of parental rights, while the verbal eight year old child vacillated between voicing a desire to be adopted and not. The situation of a child who can articulate his or her preferences raises a question as to how the child's preferences may be better advanced if separate legal counsel was appointed. However, in the present case, the children are too young to have formed a preference, therefore, there is no conflict of interest if a GAL represents the child's best and legal interests.

*Concurring and Dissenting Opinion: Justice Donohue*

Justice Donohue agreed with the Majority's decision regarding the issue of waiver, and disagreed with the rest of the opinion. The primary basis for her dissent stems from the idea that a child in a termination hearing has an interest in maintaining the parental relationship. In making this assessment, Justice Donohue looked at Santosky v. Kramer, 455 U.S. 745 (1982), which she interpreted to advance that: "we cannot presume in this regard that the child is adverse to the parent's position," and that children have a legal interest in maintaining their natural relationship (parent/child relationship). She further asserted that the Majority created a presumption that non-communicative children are in favor of termination, which she believes is contrary to Santosky. As such, Justice Donohue concludes that there should be a presumption that the child's preference is to maintain the parent/child relationship, unless the child expresses a contrary position, and that absent such an expression, the child's legal interest should be represented by separate counsel.

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*Dissenting Opinion: Justice Wecht*

The primary basis for Justice Wecht's dissent is based upon a plain reading of §2313(a). According to Justice Wecht, a plain reading of the statute requires that an attorney be appointed to represent the child's legal interests. Justice Wecht expressed that this is "neither a guideline nor a suggestion" and that allowing a GAL to represent both the best interest and legal interests for a child creates role confusion which can force the attorney to take conflicting positions. As such, Justice Wecht deduced that a GAL cannot represent both interests at a termination proceeding without being in violation of §2313(a).

## PENNSYLVANIA SUPERIOR COURT

**M.L.S. v. T.H.S.**

Date of Decision: August 29, 2018

Cite: 302 WDA 2018

**Holding:**

The Superior Court affirmed an order granting joint legal custody to the child's Stepfather, where the Stepfather stood *in loco parentis* to the child, despite the fact that Stepfather did not reside with the child.

**Facts and Procedural Posture:**

This is a custody case involving a child who was not adjudicated dependent. Mother was previously married, and the child was born in December 2005 to Mother and her late husband (Father). Sometime later, the child's Father passed away and Mother married Stepfather. In July 2013, A.S. was born to Mother and Stepfather and sometime later, the parties sought a divorce. For the past 15 years Mother has lived in Western Pennsylvania while Stepfather has served as an active duty service member and was stationed in Virginia, Maryland, and North Carolina. Stepfather visited Mother and the children for four to five weeks per year, when he was on leave from the military. On May 2, 2017, Stepfather filed a complaint seeking custody of the child, which Mother moved to dismiss, claiming that Stepfather lacked standing. After an evidentiary hearing, the trial court issued its order on September 6, 2017, denying Mother's motion and subsequently entered a final custody order on February 20, 2018 that granted Stepfather partial physical custody of the child. Mother appealed.

**Issue:**

1. Did the trial court commit an error of law by ruling that Stepfather stood *in loco parentis* to the child?

**Rationale:**

In its analysis, the Superior Court looked to 23 Pa. C.S.A. §5324, which grants standing to pursue a custody claim to persons "who stand in loco parentis to the child." The Court then quoted the M.J.S. v. B.B., 172 A. 3d 651, 6565 (Pa. Super 2017) decision in assessing that there are "two components to in loco parentis standing: (1) the assumption of parental status and (2) the discharge of parental duties." The Court then assessed the facts of the case and found that Stepfather talked to the child every other day, would frequently travel to Western Pennsylvania to spend time with the child, attended parent teacher conferences and communicated with the child's teacher at other important times, would read the child bedtime stories, helped the child with homework, played video games with the child, and taught the child about male grooming. The Court also found it compelling that Mother had not objected to the Stepfather listing the child as his dependent, which allowed the child to receive medical and dental benefits as a part of Stepfather's benefit package. The Court acknowledged that while Stepfather did not live in a family setting with the Mother and Child, that this was merely one factor to consider and that "it is not a dispositive factor by itself." The Court determined that Stepfather served in place of the child's biological Father and that Mother accepted the benefits of having Stepfather in the child's life, as well as the risk of Stepfather seeking custody. As such, the Court ruled that the trial court properly found that Stepfather had standing to pursue his custody claim.

**G.A.P. v .J.M.W. v. S.J. & R.J.**

Date of Decision: August 15, 2018  
Cite: 1694 WDA 2017

**Holding:**

The Superior Court reversed an order denying Paternal Grandparents standing to pursue custody of their Grandchild and held that, despite the child's current custody arrangement, the Custody Act grants standing to grandparents to file for custody of their grandchildren when their grandchildren are substantially at risk due to parental behavior.

**Facts and Procedural Posture:**

This is a custody case involving a child who was not adjudicated dependent. The child lived with his Maternal Great-Grandparents on and off throughout his life, and continuously since 2015. Mother and Father have a history of drug abuse and Father has a criminal history. On May 2, 2016, Father filed a custody complaint and on July 26, 2016, Mother and Father entered a Custody Consent Order granting shared legal custody to both parents and primary physical custody to Mother, with Father having partial physical custody. On August 1, 2016, Maternal Great-Grandparents filed a Petition for Emergency Custody, alleging that the child resided with them since October of 2015, and that the child was not safe with Father due to inappropriate sexual acts between the child and Father. The trial court granted the Emergency Custody Petition and awarded sole custody to the Maternal Great-Grandparents and suspended Father's partial physical custody. On August 15, 2016, the trial court granted Maternal Great-Grandparents' Petition to Intervene, upheld the order granting them physical custody of the Child, and awarded Mother supervised physical custody. On December 19, 2016, Maternal Great-Grandparents and Father entered a Custody Consent Order awarding shared legal custody to the Maternal Great-Grandparents and Father, and primary physical custody to Maternal Great Grandparents with supervised physical custody to Father. On May 2, 2017, Maternal Great-Grandparents filed a Petition for Special Relief claiming that Father had relapsed his drug use, and requesting that Father be limited to supervised visits. On May 5, 2017, the trial court ordered that Father have supervised visits and scheduled a hearing. On June 29, 2017, Paternal Grandparents filed a Petition to Intervene requesting partial physical custody of the Child, claiming that they had standing to pursue custody under 23 Pa.C.S.A. §5324(3)(iii)(B), as "the child is substantially at risk due to parental abuse, neglect, drug or alcohol abuse, or incapacity." On July 5, 2017, Maternal Great-Grandparents filed Preliminary Objections claiming that the Paternal Grandparents do not have standing to pursue custody as the Child is in their care and is not currently at risk. On October 10, 2017, the trial court sustained Maternal Great-Grandparents objections and dismissed Paternal Grandparents petition. Paternal Grandparents appealed.

**Issue:**

1. Did the trial court err by denying Paternal Grandparents standing to pursue custody of their Grandchild?

**Rationale:**

The Court began its analysis by looking at §§1921 & 1922 of the Statutory Construction Act, which insists that courts not only look to the plain language of a statute, but also that courts assume that the General Assembly intended a result that is in the public interests. The Court then conducted a plain reading of 5324(3)(iii)(B) of the Child Custody Act, and noted that the statute refers to risks "due to parental abuse, neglect, drug or alcohol abuse," and that this statute does not make an exception due to the current custody situation of the child. To further emphasize this point, the Court looked at Martinez v. Baxter, 725 A.2d 775, 778 (Pa. Super. 1999), in which the Court held that grandparents had standing to pursue custody, despite the fact that the child had been adjudicated dependent and was in the custody of the state. The rationale presented in Martinez v. Baxter is that even though the child is not immediately facing safety concerns, it does not negate grandparents' standing to pursue custody, as it is still possible for the child to be reunified with a parent, as parental rights have not been terminated or relinquished. The Court further concluded that affirming the trial court's decision would be against the public interests as it would create a race to custody by which the grandparent who files for custody second could be divested of their right to custody simply because someone else

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filed before them. As such, the Court reversed the trial court's order and instructed the trial court to consider the custody factors in making the determination of who should have custody of the child.

*Concurring Opinion: Judge Bowes*

Judge Bowes issued a concurring opinion because, while she agreed with the outcome of the majority's decision, she was not in agreement with the rationale used to reach the outcome. In Judge Bowes' opinion §5324(3)(iii)(B) requires a present and actual risk of harm as opposed to potential harm that may occur as a result of Father retaining his parental rights. Judge Bowes further asserted that the Child is no longer at substantial risk required under §5324(3)(iii)(B), as the risk has subsided since the Child is safely residing with the Maternal Great-Grandparents. Judge Bowes also disagreed with the Majority's assertion that affirming the trial court's order would create a race for custody, but rather, that it would ensure that a Child is removed from a harmful situation at the earliest possible time. While Judge Bowes dissented with the Majority's rationale, she concurred with the outcome, as she determined that the Paternal Grandparents would have standing under the recently enacted (July 2018), §5324(4), as the Paternal Grandparents are willing to assume responsibility for the Child, they have had a sustained, substantial and sincere interest in the welfare of the Child, and neither parent has care or control of the Child. As such, Justice Bowes determined that the trial court's order should have been reversed under the basis of the Paternal Grandparents having standing under §5324(4).

## AMENDMENTS AND RULE CHANGES

### **AMENDMENTS TO RULES OF CIVIL PROCEDURE:**

On August 9, 2018, the Supreme Court issued an order amending Rule 1915.11-1, and adopting Rules 1915.22, and 1915.23 of the Pennsylvania Rules of Civil Procedure. These rule changes are in regards to the use of parenting coordinators in custody matters, and are set to take effect on March 1, 2019. The order and the amendments can be viewed at the link provided below.

<http://www.pacourts.us/assets/opinions/Supreme/out/Order%2010365532640942499.pdf?cb=1>

<http://www.pacourts.us/assets/opinions/Supreme/out/Attachment%202010365532640942566.pdf?cb=1>

### **ORDER VACATING PROHIBITION OF POLITICAL ACTIVITY BY COURT EMPLOYEES:**

On August 8, 2018, the Supreme Court of Pennsylvania issued an order vacating a previously issued order that prohibited political activity by court employees. This order shall be effective on September 17, 2018 and can be viewed in its entirety at the link provided below.

<http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Entered%202010365313940901583.pdf?cb=1>

### **PROPOSED CHANGES TO RULES REGARDING SERVICE:**

On August 18, 2018, The Civil Procedural Rules Committee proposed the rescission of Rule 401(c), and amendments to Rules 430, 1018.1, and 1064 of the Pennsylvania Rules of Civil Procedure. These proposed rule changes are in regards to service and are intended to clarify the procedure for service and to modernize the practice of providing service. The proposed amendments can be viewed at the links provided below.

<https://www.pabulletin.com/secure/data/vol48/48-33/1259.html>

<https://www.pabulletin.com/secure/data/vol48/48-33/1258.html>