



SWAN Legal Services Initiative

February Legal Report

VOLUME 4, ISSUE 7

2018

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PENNSYLVANIA SUPERIOR COURT

In Re: K.J.H.

Date of Decision: February 20, 2018
 Cite: 1226 MDA 2017

Holding:

23 Pa.C.S. §2313 (a) creates a statutory right for a child to have counsel appointed in Orphans Court proceedings, and the Superior Court can review this issue *sua sponte*.

Facts and Procedural Posture:

This is a family law case arising out of Lebanon County which involves a child who was not adjudicated dependent. The Child was born opium dependent in February of 2012. The Child was eventually released from the hospital into Mother's care, where the child remained until Mother was incarcerated due to drug use. Prior to her incarceration, Mother left the Child in Father's care. However, shortly after Father assumed custody of the Child, Father was incarcerated due to his drug use. The Paternal Grandparents then assumed custody of the Child. Since 2012, Mother had not provided financial or emotional support for the Child and had stopped contacting the Child. During her incarceration, Mother had sent three cards/drawings to the Child; however, only one card was sent within six months prior to the filing of the termination petition. Mother contended that she had stopped contacting the Child because she was told by a staff member at the prison that the Paternal Grandparents did not want her contacting them or the Child, and that if she continued to do so Mother would be charged with harassment. None of the cards/drawings that were sent to the Child from Mother were ever given to the Child. Three days prior to Mother's release from prison, the Paternal Grandparent's filed to voluntarily terminate Father's parental rights and to involuntarily terminate the parental rights of Mother. After her release from prison, Mother had attained a job, was attending drug counseling, had been taking an opioid-blocking medication, and had started having visitation with her three other children. On July 11th, 2017, the Trial Court denied the Paternal Grandparent's petition to terminate Mother's parental rights under 23 Pa. C.S.A. §2511(a)(1), due to barriers that the Paternal Grandparent's erected towards Mother having contact with the Child. The Paternal Grandparents appealed.

Issue:

Whether failure to appoint counsel to a child in an Orphan's Court proceeding is an issue that the Superior Court can review *sua sponte*?

(Continued on p. 2)

Rationale:

At the onset of their analysis, the Superior Court determined that the Orphans Court’s failure to appoint counsel is a structural error. In reaching this decision, the court turned to the Pennsylvania Supreme Court’s opinion in In re Adoption of L.B.M., where they defined a structural error as an error “that affects the framework within which the trial proceeds, rather than simply an error in the trial process itself”. In re Adoption of L.B.M., 161 A.3d 172, 183 (Pa. 2017) (quoting Commonwealth v. Martin, 5 A.3d 177, 192 (Pa. 2010)). The Superior Court further stated that while “such error usually stems from deprivation of a constitutional right to counsel,” here, by contrast, the right to counsel is statutory. *Id.* at 183. While the Superior Court acknowledged that there “is no case directly on point,” it previously decided a case, in which it was determined that the Superior Court may address *sua sponte*, the Orphans’ Court’s failure to appoint counsel on behalf of a parent in a TPR Proceeding. In Re X.J., 105 A.3d 1, 4 (Pa. Super. Ct. 2014). Accordingly, the Superior Court found that 23 Pa.C.S.A. §2313 (a) created “a statutory right for a child to have counsel appointed who actively advances his or her interest” and that where an Orphans Court fails to appoint counsel for a child, the Superior Court can and must consider this issue *sua sponte*. In Re Adoption of G.K.T., 75 A.3d 521, 526 (Pa. Super. 2013). As such, the Court vacated the Trial Court’s order and remanded the case back to the Orphans Court.

Dissenting Opinion:

Justice Olson wrote a dissent that took issue with the idea that the Court may raise the issue of lack of counsel under 2313(a) *sua sponte*, as the parties failed to raise the issue in their appeal. In his dissent, Justice Olson quoted Johnson v. Lansdale Borough, where the Supreme Court of Pennsylvania held that “It is well established that where the parties in a case fail to preserve an issue for appeal, an appellate court may not raise that issue *sua sponte*”. Johnson v. Lansdale Borough, 146 A.3d 696, 709 (Pa. 2016). Justice Olson, also disagreed with the majority’s analysis that structural errors may be raised *sua sponte*, as the Supreme Court of Pennsylvania had previously found that structural errors may be waived. Commonwealth v. Rega, 70 A.3d 777, 786-787 (Pa. 2013). After concluding that the Superior Court lacked authority to raise the issue *sua sponte*, Justice Olson then determined that based upon the merits of the case, that the paternal grandparents failed to prove the requirements of 2511(a)(1) and as such, the Orphans Court order denying termination of Mother’s parental rights should be affirmed.

AMENDMENTS TO PA RULES OF CIVIL PROCEDURE

On February 2, 2018 the Supreme Court of Pennsylvania issued an order amending sections 1915.1, 1915.4-3, 1940.2, and 1940.5 of the Rules of Civil Procedure, which govern adult family law proceedings. The primary substance behind these amendments are the addition of a number of definitions, including the definition of Child, Conference Officer, Hearing Officer, In Loco Parentis, Mediator, Mediation, and Non-record proceeding. Of particular note in these amendments, is the addition of a definition of In Loco Parentis, which is defined as “a person who puts himself or herself in the situation of a lawful parent by assuming obligations incident to the parental relationship without going through the formality of adoption.” The amendment to 1915.1 further notes that In Loco Parentis status has two characteristics, which include the assumption of a parental status; and the discharge of parental duties. The amended rules also include a new definition of Child, which is “an unemancipated individual under 18 years of age.” This does not change the definition in our Rules of Juvenile Court Procedure. The amendments to these rules are set to take effect on April 1, 2018. The amendments can be viewed at the link below.

<https://www.pabulletin.com/secure/data/vol48/48-8/287.html>

PROPOSED CHANGES TO ORPHANS' COURT FILING RULES

On February 3, 2018, the Orphans' Court Procedural Rules Committee proposed amendments to Pa. O.C. Rule 1.8 and Pa. O.C. Rule 10.1. The purpose of these amendments is to allow for the filing of forms that are stylistically different from those approved by the Supreme Court, provided that the forms are "identical in content and sequential ordering." The Proposed change to the Orphans Court Rule can be viewed at the link provided below.

<https://www.pabulletin.com/secure/data/vol48/48-5/176.html>

UPDATED LIST OF HOSPITALS THAT WILL NOT PROVIDE EMERGENCY CONTRACEPTION OR SEXUAL ASSAULT EMERGENCY SERVICES

On February 10, 2018, pursuant to 28 Pa. Code § 117.58(1)(ii), the Department of Health published its updated list of hospitals that will not provide emergency contraception due to a stated religious or moral belief, and the updated list of hospitals that will not provide any sexual assault emergency services due to the limited services provided by the hospital. These updated lists can be viewed in their entirety at the link provided below.

<https://www.pabulletin.com/secure/data/vol48/48-6/224.html>

PROPOSED CHANGES TO PROFESSIONAL AND VOCATIONAL STANDARDS FOR SOCIAL WORKERS

On February 10, 2018, the State Board of Social Workers, Marriage and Family Therapists and Professional Counselors issued proposed amendments to a number of provisions in Title 49 Chapter 47 of the PA Code. These amendments encompass the addition of the term licensed bachelor social worker and to delete the term provisional licensed social worker, in accordance with Act 179. These amendments also propose to changes to fees, including the establishment of an application fee of \$75 and a biennial renewal fee of \$95 for licensed bachelor social workers. These proposed amendments can be viewed in their entirety at the link provided below.

<https://www.pabulletin.com/secure/data/vol48/48-6/216.html>

PROPOSED CHANGES TO RULES REGARDING THE APPOINTMENT OF GUARDIAN AD LITEM/LEGAL COUNSEL

On February 24, 2018, The Juvenile Court Procedural Rules Committee proposed an amendment to Pa.R.J.C.P. 1151. This proposal seeks to change the language of Pa.R.J.C.P. 1151(A) to require the appointment of a guardian ad litem for children *under the age of 18*, who are alleged to be dependent based on the grounds listed in Pa.R.J.C.P. 1151(A)(1)-(5). This amendment would also require the appointment of legal counsel for all children 18 and older, or upon order of the court, regardless of the ground for their adjudication. Pa.R.J.C.P. 1151(C)(2) would be amended to include language allowing for the guardian ad litem to be appointed as legal counsel for the child once they reach the age of 18, provided there is no conflict (as determined by the court). These proposed amendments can be viewed in their entirety at the link provided below.

<https://www.pabulletin.com/secure/data/vol48/48-8/288.html>

AMENDMENTS TO SEX OFFENDER REGISTRATION RULES

On February 21, 2018, Pennsylvania Act 10 of 2018 (formerly House Bill 631) was enacted to add new registration requirements to the sentencing laws. (42 Pa.C.S.A.§9799.53 & 42 Pa.C.S.A.§9799.55).

This addition will require people who were convicted of sexually violent offenses, or who were required to register as a sexual offender on or after April 22, 1996, but before December 20, 2012, to register with the PA State Police for a period of ten years or for the rest of their lives, depending upon the crime that was committed. This law also adds the new section regarding registration requirements, to the grounds for involuntary termination of parental rights under 23 Pa. C.S.A. §2511 (a)(11) and the CPSL, where it is added to the definition of child abuse under 23 Pa. C.S.A. 6303(B.1)(8)(VII)(D). Other changes include amendments to the sections of the CPSL relating to the expunction of information of perpetrators who are under 18, and the section regarding the agency's use of designated addresses. (23 Pa. C.S.A. §6338.1(C)(4)(I) and 23 Pa. C.S.A. §6707 respectively). Finally, the definition of sexually violent delinquent child was amended to include those who have been adjudicated delinquent and determined to be in need of commitment for an act of sexual violence committed on or after December 20, 2012. (See 42 Pa.C.S.A.§9799.12). These provisions are set to take effect immediately, and the full text of the act can be viewed in its entirety through the link below.

<http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?sYear=2017&sInd=0&body=H&type=B&bn=0631>

AMENDMENTS TO COURT ADMINISTRATION RULES FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY

Effect March 1, 2018, the rules regarding the cost of interpreter services for persons with limited English proficiency, who are deaf, or are hard of hearing were amended. Grandparents or guardians to a principal party in interest were added to the definition of immediate family; and the definition of principal party in interest was amended to include a named party, a direct victim, or a parent, guardian or custodian of a minor or incapacitated person. (See 204 Pa. Code §102). 204 Pa. Code §107(a) was amended to reflect that counties or courts are responsible for the costs of providing an interpreter and that the cost of interpretation services shall not be the responsibility of the person with limited English proficiency. The exception to this rests in the amendment to 204 Pa. Code §107 (b), which allows for the court to order reimbursement for interpretive serves to the county or court from the family members of a person with limited English proficiency, in cases where the appointment of an interpreter is discretionary. These administrative rule changes can be viewed at the link below.

<https://www.pabulletin.com/secure/data/vol48/48-8/285.html>