

# SWAN Legal Services Initiative

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## PENNSYLVANIA SUPERIOR COURT

### In the Interest of J.I.P., a Minor

Date of Decision: July 20, 2017

Cite: 368 EDA 2017

#### **Holding:**

The use of incorporated notes of testimony from a prior involuntary termination proceeding, occurring approximately one and a half years prior and resulting in termination of Mother's parental rights to her other three children based on different issues, did not constitute an abuse of discretion and was sufficient to support a finding by clear and convincing evidence of Mother's repeated demonstration of parental incapacity.

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

Philadelphia Department of Human Services became involved with Mother and her family in 2010 as a result of Mother's issues with drug use and inadequate housing. Despite provision of agency in-home services, Mother continued her substance abuse and failed to maintain adequate/appropriate housing. As a result, the subject minor child was adjudicated dependent, removed from Mother's care and placed in the home of a foster family. Mother's Family Service Plan goals and objectives included participation in drug and mental health treatment, obtaining and maintaining suitable housing and maintaining contact with the child through unsupervised visitation. From 2012 – 2016, Mother continued a pattern of initial compliance with all of her objectives, but would then lose her housing and fail to attend/complete her drug and mental health treatment programs. In October of 2016, DHS filed a petition seeking involuntary termination of Mother's parental rights pursuant to §2511(a)(1),(2), (5), (8) and (b). At the evidentiary hearing held in January of 2017, DHS sought introduction into evidence of the notes of testimony from the September 2015 proceeding in which the agency sought involuntary termination of Mother's parental rights to her other three younger children. The Trial Court admitted the notes of testimony and incorporated the information therein, including a Parenting Capacity Evaluation conducted in August of 2014 which opined that Mother had a significant impairment to provide consistent care to herself, was unable to anticipate potential problems with her actions and how they might impact her children, and minimized the impact that her poor choices had on her children, which precluded her from being able to provide them with safety and permanency. The notes of testimony also contained a stipulation by counsel that Mother had completed several of her family service plan objectives related to those children, including drug and alcohol treatment, completion of a parenting class, anger management and Achieving Reunification Center ("ARC") goals. In addition to the notes of testimony from the prior termination proceeding, the Community Umbrella Agency ("CUA") case manager testified that Mother resided in a one-bedroom apartment with her then fifteen year-old daughter, and there would not be sufficient space for the subject minor child to reside with them. Mother testified that she maintained unsupervised visitation with the child once a week and spoke with the child over the telephone every day. At the close of testi-

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mony, the trial court concluded that the evidence presented, including the notes of testimony from the prior hearing admitted into evidence in the instant proceeding, the credible testimony of the CUA case manager, the child's placement in foster care for a period of over five years, and Mother's inability to maintain sufficient housing supported a finding by clear and convincing evidence that Mother had failed to remedy any of the issues that brought the child into care and would not be in a position to remedy those issues moving forward. Additionally, the trial court determined that while there was evidence supporting a bond between Mother and the child, the bond did not rise to the level of a parental bond, as the child consented to adoption by his foster family and looked to them for fulfillment of his safety, comfort and daily needs. The trial court granted DHS' petition for involuntary termination; Mother appealed.

**Issue:**

Whether the use of notes of testimony from a prior involuntary termination proceeding, occurring approximately one and a half years prior and resulting in termination of Mother's parental rights to her three other children who were not similarly situated to the subject minor child was sufficient to support a finding of parental incapacity by clear and convincing evidence?

**Rationale:**

The Superior Court focused its analysis of the issue on §§2511(a)(2) and (b) of the Adoption Act, and noted that in order to satisfy the requirements of §2511(a)(2), the moving party must present clear and convincing evidence supporting three elements; (1) repeated and continued incapacity, abuses, neglect or refusal; (2) such incapacity, abuse, neglect or refusal 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. In re Adoption of M.E.P., 825 A.2d 1266, 1272 (Pa. Super. 2003). The Court noted that these grounds are not limited to affirmative misconduct, but may include acts of refusal as well as incapacity to perform parental duties. The trial court determined that Mother's continuing issues with mental health, substance abuse, and housing were substantiated on the record both by the credible testimony of the CUA caseworker related to Mother's lack of progress and compliance in the instant matter, as well as the notes of testimony (including expert opinions and reports contained therein) from the prior proceedings incorporated into the record. The Superior Court determined that the trial court's conclusion supported a finding of repeated and continued incapacity in terms of providing housing, stability and permanency for the child, who had been in foster care for over five years, and that Mother demonstrated throughout the life of the instant case and the cases related to her other children that she could not or would not remedy those issues. The Court further reasoned that termination under §2511(b) was supported by clear and convincing evidence that while the child was aware of Mother's relationship to him, the child looked to his foster family for safety, comfort and to meet all of his daily needs, and that termination of Mother's parental rights would not result in irreparable harm to the child. The order granting involuntary termination of Mother's parental rights was affirmed.

**S.J., a Minor, by and through B. and C.J., Guardians**

Date of Decision: July 11, 2017  
Cite: 1198 MDA 2016

**Holding:**

Applicability of the limitation period for commencing a civil action arising from childhood sexual abuse set forth in the Minority Tolling Statute (42 Pa.C.S.A. §5533(b)) is not limited to minor plaintiffs whose parents fail to bring a suit on the minor's behalf prior to the minor's eighteenth birthday.

**Facts:**

In October of 2013, S.J.'s parents (Appellants) commenced a civil action in Franklin County alleging claims of battery and intentional infliction of emotional distress in connection with damages that S.J., a minor child, had suffered from Appellee's sexual abuse. Appellants first learned of the abuse in July of 2010, when S.J. reported to them that Appellee had coerced her to engage in sexual encounters multiple times over a period of approximately two years, beginning when S.J. was

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six years old. Appellants reported the claim to the police, and in October of 2010, Appellee pled guilty to Indecent Assault (of a child less than 13 years old). In response to the October 2013 civil action, Appellee argued that the action was untimely, as it had not been commenced within the two-year statute of limitations period applicable to intentional torts. Appellants asserted that the lawsuit was properly filed within the requisite limitation under the Minority Tolling Statute (42 Pa.C.S.A. §5533(b)). The trial court concluded that the action was time-barred by the two-year statute of limitations, finding that the action accrued with the discovery of the abuse in July of 2010, and was therefore, untimely when commenced in October of 2013. In reaching its conclusion, the trial court recognized the existence of the Minority Tolling Statute, but determined that the statute was inapplicable as the instant action was initiated by S.J.'s parents. Based upon its decision that the action was time-barred, the trial court granted Appellee's Motion for Summary Judgment and dismissed the civil suit. Appellants appealed.

**Issue(s):**

Whether a civil action, filed by the parents of a minor child prior to the child's eighteenth birthday, for damages caused by sexual abuse perpetrated upon the minor child, is subject to the relevant statute of limitations associated with the tortious claims therein or the limitation period of the Minority Tolling Statute?

**Rationale:**

The Superior Court began its analysis by reviewing the Minority Tolling Statute, which provides in relevant part that,

If an individual entitled to bring a civil action arising from childhood sexual abuse is under 18 years of age at the time the cause of action accrues, the individual shall have a period of 12 years after attaining the age of 18 years of age in which to commence an action for damages regardless of whether the individual files a criminal complaint regarding the childhood sexual abuse. 42 Pa.C.S.A. §5533(b)(2)(i).

The statute additionally provides that the "...period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter." 42 Pa.C.S.A. §5533(b)(1)(i). The term "minor" under the Minority Tolling Statute is defined as "...any individual who has not yet attained 18 years of age." 42 Pa.C.S.A. §5533(b)(1)(ii). The Court concluded that the trial court's interpretation that the Minority Tolling Statute would have theoretically applied to this matter only if S.J.'s parents did not initiate suit on her behalf before her eighteenth birthday is incorrect and conflicts with existing decisional law in which our Pennsylvania courts have previously interpreted the same provision. This existing decisional law includes the Pennsylvania Supreme Court's decision in Fancsali ex rel. Fancsali v. Univ. Health Ctr. of Pittsburgh and the Superior Court's decision in Czimmer v. Janssen Pharm., Inc., both interpreting the Minority Tolling Statute to read that the limitations period for a minor's claim is measured from the time the minor turns eighteen, irrespective of the date the cause of the action accrues and regardless of whether the action is filed by the minor's guardians or by the minor in his or her individual capacity once he or she turns eighteen. Fancsali, 761 A.2d 1159, 1164 (Pa. 2000); Czimmer, 122 .3d 1043, 1060-61 (Pa. Super. 2015). Therefore, in the instant matter, the applicable time period for S.J. to file this civil suit against Appellee did not begin to run when S.J. revealed the abuse to her parents; while this discovery marked the accrual of S.J.'s cause of action, the limitations period for S.J.'s claim was suspended until S.J.'s eighteenth birthday pursuant to the Minority Tolling Statute, and thus, Appellants commenced the action on S.J.'s behalf before the period of limitations began to run. The Superior Court concluded that the trial court erred in granting Appellee's Motion for Summary Judgment, as the action was not, in fact, time-barred (as the Minority tolling Statute had suspended the applicable statute of limitations), and reversed and remanded to the trial court.

### SPOTLIGHT: 3<sup>rd</sup> CIRCUIT: PROCEDURAL DUE PROCESS

The 3<sup>rd</sup> Circuit continues to review claims of deprivations of due process associated with Children and Youth Services Agency involvement. In Vukich v. Roitz, the 3<sup>rd</sup> Circuit concluded that three counts within the Plaintiff's *pro se* complaint against a Lawrence County caseworker alleging deprivations of procedural due process based upon the failure to allow a parental participation in the drafting of a parental safety plan with respect to his son and by failing to inform him that he had a right to challenge the plan stated plausible claims containing "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" sufficient to survive the two-step analysis necessary to effectuate direct service where a plaintiff seeks to proceed *in forma pauperis*. Vukich v. Roitz, 2017 WL 3118579 (W.D. Pa. 2017).

### SPOTLIGHT: 3<sup>rd</sup> CIRCUIT: EDUCATION: IDEA, RA, THE ADA AND DUE PROCESS

The United States District Court for the Eastern District of Pennsylvania affirmed the Administrative Hearing Officer's findings that the School District of Philadelphia denied D.P, a 2<sup>nd</sup> grade student diagnosed with autism spectrum disorder, a free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and discriminated against D.P. in violation of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). The District's unilateral decision to remove the child from the classroom to receive special education without notification to, input from, or consent from D.P.'s parents constituted a violation of the FAPE "stay put" provision as well as a violation of the parental participation requirements under the IDEA. Additionally, the District's failure to adequately mainstream D.P. and their removal of the child from the classroom constituted violations of both the RA and the ADA. The findings of the Administrative Hearing Officer were affirmed, as was the award of compensatory education. School District of Philadelphia v. Post, 2017 WL 2879684 (E.D. Pa. 2017).

### SPOTLIGHT: 3<sup>rd</sup> CIRCUIT: PROCEDURAL AND SUBSTANTIVE DUE PROCESS

Defendants' Allegheny County Caseworkers' Motion to Dismiss Plaintiffs' action alleging procedural, substantive, and Fourth Amendment due process claims was denied. The action arose from allegations of child abuse due to "unexplained bruising" of the child made against the Plaintiffs, which resulted in prohibited contact between Plaintiffs and their minor child, a "unilaterally imposed" safety plan, dependency proceedings and criminal charges (both of which were subsequently withdrawn following the child's diagnosis of a platelet function disorder. The United States District Court for the Western District analogized the instant matter to Billups v. Penn State Milton S. Hershey Med. Ctr., wherein the District Court denied the Defendants' motion to dismiss the Plaintiffs' substantive due process claim because the Plaintiffs had alleged that the Defendants "represented that they had considered and rejected other bases for [the child's] injuries, when they had not conducted the necessary testing to reach such conclusions." A.L. v. Eichman, 2017 WL 3007801 (W.D. Pa. 2017) *citing* Billups, 910 F. Supp. 2d 745, 760 (M.D. Pa. 2012).