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Legal Report

SWAN Legal Services Initiative

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UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

Cabrera v. Attorney General United States

Date of Decision: April 19, 2019

Cite: 921 F.3d 401

Holding:

The disparate treatment given biological children and adoptive children of United States citizens in the derivative citizenship statute was rationally related to legitimate governmental interests, as required by equal protection.

Facts and Procedural Posture:

Cabrera was born in the Dominican Republic in 1979 and admitted to the United States as a lawful permanent resident in 1988. Two years later, he was adopted by a natural born U.S. citizen, Mr. Attenborough. Had he been Attenborough's biological child, then Section 309 of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1409, would have provided him a pathway to obtain automatic derivative citizenship. But since he is an adopted child, the statute does not apply to him and his road to citizenship is more complicated. Cabrera was still lawfully residing in the United States in 2014 when he pled guilty to federal charges of conspiracy to possess with intent to distribute heroin and was sentenced to 36 months' imprisonment. Upon his release, Cabrera was served with a Notice to Appear for removal proceedings. He argued, on constitutional grounds, that he was entitled to derivative citizenship through his adoptive father and, because he was entitled to U.S. citizenship, he could not be removed. The Immigration Judge held that he lacked jurisdiction to hear this constitutional claim and ordered Cabrera removed to the Dominican Republic. The Board of Immigration Appeals affirmed the IJ's order. Cabrera then filed this petition for review.

Issue:

Is the disparate treatment given biological children and adoptive children of United States citizens in the derivative citizenship statute rationally related to legitimate governmental interests, as required by equal protection?

Rationale:

First, the Court considered which standard of review applied to this Equal Protection claim. The Court had not previously determined what standard of review applied to claims of disparate treatment on the basis of adoptive status in the citizenship context.

Both Cabrera and the Government argued that rational-basis review should apply. Given that rational basis has been applied to distinctions on the basis of adoptive status in the social security context (*See Brehm v. Harris*, 619 F.2d) and that there was no jurisprudence that suggested adopted children are a "protected" or "suspect" class the Court agreed that rational basis review should apply.

Next, the Court looked to see whether there is "a rational relationship between the disparity of treatment and some legitimate governmental purpose." The Government offered three primary justifications for Section 309's differential treatment: "(1) promoting a real relationship between child and the U.S. citizen parent; (2) preventing immigration fraud; and (3) protecting the rights

of alien parents.” The Court found the Government interests legitimate. The Supreme Court has recognized the important government interest in developing “the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.” *Tuan Anh Nguyen v. INS*, 533 U.S.53, 65, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001). Many other circuits have held that preventing immigration fraud is a legitimate interest. *See, e.g., Dent*, 900 at 1082 (holding that preventing immigration fraud is a legitimate government interest); *Smart*, 401 F.3d at 123 (same); *Bangura v. Hansen*, 434 F.3d 487, 495 (6th Cir. 2006) (same). The Court has previously recognized the government’s legitimate interest in “protecting the rights of alien parents” in the immigration context. *Catwell v. Att’y Gen. of U.S.*, 623 F.3d 199, 211 (3d Cir. 2010).

Then the Court found that the disparate treatment in Section 309 is at least rationally related to advancing these legitimate interests. Requiring an adoptive parent to apply for citizenship on behalf of his or her child, as opposed to conferring citizenship automatically reduces that chance the adoption will occur solely to obtain citizenship.

Additionally, if adopted children could obtain automatic derivative citizenship, then the child’s biological, alien parents could be cut out of the process of determining their child’s citizenship. Accordingly, the Court held that Section 309 is rationally related to legitimate government interests and upheld Cabrera’s removal.

Fulton v. City of Philadelphia

Date of Decision: April 22, 2019

Cite: 922 F.3d 140

Holdings:

1. Philadelphia’s fair practices ordinance, which included prohibition of sexual orientation discrimination in public accommodations, was neutral, generally applicable law;
2. Catholic Social Services (“CSS”) was unlikely to prevail on Establishment Clause claim;
3. Fair practices ordinance did not compel CSS to adopt municipality’s views on same-sex marriage;
4. Enforcement of the fair practices ordinance was not retaliatory;
5. Philadelphia did not place substantial burden on CSS’s free exercise of religion under the Pennsylvania Religious Freedom Act (“RFPA”); and
6. CSS was not more likely than not to suffer irreparable harm without injunction.

Facts and Procedural Posture:

The City of Philadelphia learned that Catholic Social Services (“CSS”) would not license same sex couples as foster parents and stopped making referrals to the agency based on the City’s nondiscrimination Fair Practice Ordinance. CSS brought action against the City of Philadelphia, asserting claims under the Free Exercise and Establishment Clauses of First Amendment, the Pennsylvania Religious Freedom Act (RFPA), and the Free Speech Clause of First Amendment. The United States District Court for the Eastern District of Pennsylvania denied the agency’s motion for preliminary injunction, and the CSS appealed.

Issues:

1. Did the City of Philadelphia have the authority to insist, consistent with the First Amendment and Pennsylvania law, CSS not discriminate against same-sex couples as a condition of working with it to provide foster care services?
2. Has CSS demonstrated that the City transgressed fundamental guarantees of religious liberty?

Rationale:

This opinion has detailed constitutional analysis that is only summarized for purposes of this report. Please reference the opinion itself for a complete understanding.

A. The Free Exercise Clause

CSS contends that the City's actions violated its rights under the Free Exercise Clause. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This prohibition applies to the States through the Fourteenth Amendment. The Court noted that the Free Exercise Clause jurisprudence boils down to, "whether challengers have been treated worse than others who engaged in similar conduct because of their religious character". The Court examined whether the City was appropriately neutral, or if it treated CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs? The Court concluded that the City acted only to enforce its non-discrimination policy in the face of what it considers a clear violation. Evidence of this was the fact that the City worked with CSS for a long time, is well aware of CSS's religious charter, and continues to work with CSS for other programs.

B. The Establishment Clause

CSS argues that the City's actions violated the First Amendment's Establishment Clause, which says that one religious denomination cannot be officially preferred over another. CSS contends the City has dictated its preferred religious viewpoint, that religious institutions should recognize the marriage of same-sex couples, and has conditioned CSS's future contract on adherence to that perspective. The Court again explained that Philadelphia still works with CSS as a congregate care provider and a Community Umbrella Agency. The Court noted that Philadelphia still works with Bethany Christian as a foster care agency, even though Bethany also maintains its religious opposition to same-sex marriage. There facts supported the view that CSS is not being excluded due to its religious beliefs. Instead, the City has merely insisted that, if CSS wants to continue providing foster care, it must abide by the City's non-discrimination policy in doing so. The Court found no evidence that this is a veiled attempt to coerce or impose certain religious beliefs on CSS.

C. Freedom of Speech

CSS also claims that the City has violated its freedom-of-speech rights in two different ways: by compelling it to speak in ways it finds disagreeable and by retaliating against it for engaging in protected speech. CSS claims it has been compelled to speak because Pennsylvania law imposes a requirement that, after evaluating prospective foster parents, an agency must "give written

notice to foster families of its decision to approve, disapprove or provisionally approve the foster family.” 55 Pa.Code § 3700.69. Because the City forbids CSS from finding an applicant unqualified for a “discriminatory reason,” including their sexual orientation or same-sex relationship, CSS contend that it is therefore forcing CSS “to make written endorsements that violate its sincere religious beliefs.” The Court opined that the City would be in violation if it refused to contract with CSS unless it officially proclaimed its support for same-sex marriage. Here the Court found that Philadelphia simply insists that CSS abide by public rules of nondiscrimination in the performance of its public function under any foster care contract.

To prevail on a speech retaliation claim, a plaintiff must show that it engaged in constitutionally protected activity, that the government responded with retaliation, and that the protected activity caused the retaliation. *See Eichenlaub v. Township of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004). CSS argues that it provides foster care services as a religious ministry protected by the First Amendment and that it “engages in protected speech when it evaluates families” as potential foster parents. The Court held that the City’s actions were regulatory rather than retaliatory in nature noting, “the City has directly regulated the very conduct CSS claims is constitutionally protected: its refusal to evaluate or work with same-sex couples. Thus the City has “retaliated” against CSS only in the same way enforcement of any government regulation “retaliates” against those who violate it.”

D. The Pennsylvania Religious Freedom Protection Act

CSS’s final claim is under the Pennsylvania Religious Freedom Protection Act (RFPA), 71 Pa. Stat. Ann. § 2401 *et seq.* The RFPA generally provides that an agency shall not substantially burden a person’s free exercise of religion, including any burden which results from a rule of general applicability. It may do so, however, if it proves by a preponderance of the evidence that the burden both is (1) in furtherance of a compelling interest of the agency and is (2) the least restrictive means of furthering the compelling interest. Pennsylvania courts applying the RFPA scrutinize claims of religious burden to see whether the burdened activity is truly “fundamental to the person’s religion.” *See, e.g., Commonwealth v. Parente*, 956 A.2d 1065, 1074 (Pa. Commw. Ct. 2008). Pennsylvania courts consider an activity “fundamental to a person’s religion” if it is an inherently religious activity as opposed to something that could be done either by a religious person or group or by a secular one. Here, the Court found that caring for vulnerable children can flow from a religious mission, but it is not an intrinsically religious activity under Pennsylvania law.

E. Other Preliminary Injunction Considerations

The Third Circuit agreed with the District Court that at the preliminary injunction stage CSS is not reasonably likely to succeed on the merits of any of its claims. This alone defeats the request for a preliminary injunction. The Court also found that CSS has not met the other factors considered for a preliminary injunction. First the Court looked to determine if CSS is more likely than not to suffer irreparable harm without an injunction. The Court identified the loss of revenue from foster care as a potential harm, but one that is not irreparable. The Court noted that, “even if CSS could establish both of the gatekeeping factors – likelihood of success on the merits and irreparable harm – neither the balance of the equities nor the public interest would favor issuing an injunction here.” The City’s interests in requiring CSS to abide by its nondiscrimination policy and ensuring government services are open to all Philadelphians is

substantial. Placing vulnerable **children** with foster families is a vital public service, and deterring discrimination in that effort is a paramount public interest.

PENNSYLVANIA MIDDLE DISTRICT COURT

Spanier v. Libby

Date of Decision: April 30, 2019

Cite: 2019 WL 1930155

Holding:

1. Habeas petition granted, misdemeanor conviction vacated, and the Commonwealth is directed to retry Spanier under the 1995 version of the statute within 90 days.

Facts and Procedural Posture:

In March 2017, Petitioner, Graham B. Spanier, was convicted in the Dauphin County Court of Common Pleas of one misdemeanor count of endangering the welfare of a child pursuant to 18 Pa. C.S.A. § 4304(a)(1). The Superior Court affirmed the conviction in June 2018. The charges stem from actions Spanier took in 2001 as President of the Pennsylvania State University, in formulating a response on behalf of the University to allegations of sexual abuse of a minor. Spanier brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, asking this Court to set aside that conviction as it violates his rights guaranteed under the United States Constitution, and in particular, that the conviction runs afoul of the *Ex Post Facto* and Due Process clauses of the Constitution.

Issue:

1. Is Spanier entitled to habeas relief because he was charged and tried on the basis of a statute that came into effect six years after the conduct at issue?

Rationale:

Spanier submits that his conviction violates his rights under the United States Constitution because (1) it was based on a criminal statute not in effect at the time of the alleged criminal conduct; (2) the jury was instructed that it could convict Petitioner on the basis of the later-enacted criminal statute; and (3) the conviction was upheld on the basis of a statute of limitations exception not raised by the Commonwealth before or during trial. First, the Court determined that Spanier had fully exhausted each of his claims in state court, a prerequisite for Habeas review. Turning to the merits, the Court found that the 2007 statute expanded the previous version of the statute to change the definition of who could be culpable for conduct under that law. The 2007 statute broadened the class of persons subject to being charged under the statute, adding a separate definition of individuals who may be culpable to include a person that employs or supervises a person who is supervising the welfare of a child. The application of that 2007 statute to Spanier's conduct in 2001 was a violation of the United States Constitution's *Ex Post Facto* and Due Process clauses. The Court also found that instructions to the jury based on the 2007 version of the statute was not harmless error, and further violated Spanier's right to due process.

SUPERIOR COURT OF PENNSYLVANIA

In Re: B.J.Z., Appeal of J.Z., FatherDate of Decision: April 4, 2019
Cite: 2471 EDA 2018**Holding:**

1. On an issue of first impression, the hearsay rule did not preclude children's legal-interests' counsel from informing the court of children's wishes in a parental rights termination hearing.

Facts and Procedural Posture:

Prior to the termination of parental rights hearing, legal-interest counsel met with all three children involved in this case. Legal-interest counsel determined that the oldest two children were able to participate in a discussion about their wishes regarding the termination proceeding. At the termination proceeding, legal-interest counsel shared the children's wishes to remain with the foster parents. The trial court ultimately terminated Father's parental rights.

Issues: This report will cover Issues 1 and 2; more information on 3 can be found in the opinion.

1. Did the trial court commit reversible error by permitting the court appointed counsel for Children to make hearsay statements on the record of Children's wishes over Father's objections and by considering such statements as evidence thus violating Pa Rules of Evidence 802 and denying Father due process of law?
2. Did the trial court commit reversible error by refusing to hear Children's testimony and denying Father the right to question Children when the court had permitted hearsay testimony of Children through their court appointed counsel in violation of Pa Rules of Evidence 802 and Father's right to due process of law?
3. Did the Agency fail to meet the requirements of 23 Pa.C.S § 2511(a)(2), (5), and (8) and the Agency has not produced clear and convincing evidence that the minor Children were not bonded, that the termination of Father's parental rights would best serve the needs and welfare of Children, nor that he is unable to remedy the issue that caused Children to be taken into care?

Rationale:

The Superior Court agreed with the trial court's analysis that the Supreme Court of Pennsylvania would not mandate children to testify as it would cause long lasting emotional impact on children. Additionally, such a mandate would be inconsistent with the Supreme Court's directive in *L.B.M.*, which imposes the use of child-directed legal counsel. The Court also noted that testimony as to what a child tells other people is admissible in order to establish that child's mental state at the time he or she made the comment. *In re Child M.*, 681 A.2d 793, 800 (1996). The Court quoted *In re B.L.L.* to say, "in involuntary termination proceedings, the testimony of the child is not a requisite part of the inquiry, which focuses entirely on the parenting capacity of the parent. *In re B.L.L.*, 787 A.2d 1007 (Pa. Super. 2001). The Court also found guidance in *T.S.*, which holds that for a young child who cannot express their wishes the guardian *ad litem* must "advise the court of the child's wishes to the extent that they can be ascertained and present to the court whatever evidence exists to support the child's wishes. *In re T.S.*, 192 A.3d 1080 (2018).

In Interest of: T.G., A Minor, Appeal of Philadelphia DHSDate of Decision: April 22, 2019
Cite: 1195 EDA 2018**Holding:**

Evidence did not support trial court's decision to forgo finding that mother's neglect of Child, who had myriad health conditions, was tantamount to child abuse pursuant to § 6303(b)(1), when Mother deprived child of adequate nourishment, missed more than two-thirds of the Child's medical appointments, failed to obtain a wheelchair for immobile child, refused to permit others to accompany Child to medical appointments, and declined in-home services for the Child.

Facts and Procedural Posture:

Child was born premature in 2009 and has myriad health conditions including necrotizing enterocolitis, chronic lung problems, heart arrhythmia, ventricular tachycardia, vision delays, retinopathy, cerebral palsy, and microcephaly. Child has global developmental delay, uses a feeding tube, and she is unable to speak or walk. Family came to the attention of the Agency due to missed medical appointments. The CPS report was indicated for serious physical neglect based upon Mother's failure to provide medical care. In addition to malnutrition, the investigative assessment highlighted that, due to Child's failure to attend physical therapy and orthopedic appointments, the Child's limbs had contracted, meaning that the joints had stiffened into an unnatural position. The juvenile court adjudicated Child dependent, but did not find that Mother was a perpetrator of child abuse.

Issue:

Whether the trial court erred as a matter of law and abused its discretion when it declined to find child abuse against Mother where there was uncontroverted evidence of serious physical neglect, and where the trial court found that there was failure to thrive due to Mother's medical neglect?

Rationale:

The Superior Court first addressed the juvenile court's reasoning that the agency failed to demonstrate by clear and convincing evidence that Child's malnutrition and contractures were the result of Mother's conduct. Specifically, the trial court reasoned that "the child was born with such preexisting health conditions that DHS was unable to show child abuse by clear and convincing evidence because Child's hardships were just as likely or more likely to be caused by [the] preexisting medical conditions than by child abuse or serious physical neglect." The Superior Court noted the testimony of the doctor that there was no medical explanation for Child's malnutrition beyond Mother's failure to feed her daughter the prescribed specialized formula that was shipped directly to Mother's home free of charge. Also highlighted were Mother's failure to take Child to numerous medical, dental, and physical therapy appointments. The Court also pointed out Mother's unwillingness to allow her adult children to assist with getting Child to appointments and mother's refusal of available in home services for Child. The Court found that the "record belies the juvenile court's implicit conclusion that Mother's conduct was neither intentional, knowing, nor reckless." The Court concluded that "the failure to provide Child with adequate food or medical care is tantamount to serious physical neglect insofar as it threatened the child's well-being and impaired her health and development. Accordingly, the record does not support the juvenile court's decision to forgo finding that Mother's neglect was tantamount to child abuse pursuant to § 6303(b)(1)."

In Interest of: I.R.-R., A Minor, Appeal of J.R., Father

Date of Decision: April 24, 2019

Cite: 2215 EDA 2018

Holdings:

Older Child's out-of-court statements accusing father of sexual abuse were admissible. Evidence was not competent to support Children's adjudication as dependent.

Facts and Procedural Posture:

Department of Human Services filed a dependency petition as to two minor children due to concerns that children's father had sexually abused older child. The trial court adjudicated the children dependent and found that father had perpetrated child abuse against older child. The Children were not present at the adjudication hearing. Testimony was given by a DHS social worker, a case manager, and a forensic interviewer regarding the older child's description of her sexual abuse.

Issues:

1. Did the trial court commit reversible error when it admitted the hearsay testimony of the social worker and unreliable hearsay testimony/records of the PCA investigator including what the children allegedly stated to them?
2. Did the trial court commit reversible error when it deprived Father of his due process rights and other Pennsylvania and Federal constitutional rights by admitting unreliable hearsay evidence including the children's statements which were not subject to cross examination?
3. Did the trial court commit reversible error when it adjudicated the children dependent where DHS did not meet its burden by clear and convincing evidence under 42 Pa.C.S. § 6302 as to Father?
4. Did the trial court commit reversible error when it found child abuse by Father where DHS did not meet its burden of clear and convincing evidence?

Rationale:

The Superior Court agreed with the trial court that the Child's out-of-court statements were admissible, but distinguished that they were admissible *only* for the limited purpose of demonstrating Child's state of mind for treatment and therapy purposes. The Court noted that DHS did not provide any other evidence to corroborate the claims of sexual abuse, and the trial court relied on Child's out-of-court statements to adjudicate Children dependent and find that Father had committed sexual abuse. The Court stressed that Child's out-of-court statements, which the trial court admitted as evidence of Child's state of mind, do not constitute substantive evidence proving that Father perpetrated any acts of sexual abuse. Therefore, the Court concluded that the trial court abused its discretion, and the evidence DHS presented was not competent to support Children's adjudication.

LEGISLATION SPOTLIGHT

Federal Poverty Income Guidelines for 2019

On April 27, 2019 the Department of Human Services (Department) announced the implementation in this Commonwealth of the 2019 Federal Poverty Income Guidelines (FPIG) which were issued by the Department of Health and Human Services and published at 84 FR 1167 (February 1, 2019). The FPIGs are the basis for the income eligibility limits for several categories of Medicaid whose regulations are published in 55 Pa. Code (relating to human services) and administered by the Department.

<https://www.pabulletin.com/secure/data/vol49/49-17/628.html>

Amendments to Operating Procedures of the Superior Court Decisional Procedures

§65.37 now reads:

Non-Precedential Decisions (formerly titled Unpublished Memoranda Decisions).

A. For purposes of these operating procedures, "non-precedential decision" refers to an unpublished, non-precedential, memorandum decision of the Superior Court filed after May 1, 2019. All references to a memorandum decision filed after May 1, 2019, within these operating procedures shall be analogous to "non-precedential decision" for purposes of Pa.R.A.P. 126(b).

Comment

The title to this O.P. was changed to reflect the Amendments enacted by the Supreme Court to Pa.R.A.P. 126, effective May 1, 2019. *See* 278 Appellate Procedural Rules Docket (order amending Pa.R.A.P. 126) (Pa. 2019).

B. Non-precedential decisions filed after May 1, 2019, may be cited for their persuasive value, pursuant to Pa.R.A.P. 126(b). An unpublished memorandum decision filed prior to May 2, 2019, shall not be relied upon or cited by a Court or a party in any other action or proceeding, except that such a memorandum decision may be relied upon or cited (1) when it is relevant under the doctrine of law of the case, *res judicata*, or collateral estoppel, and (2) when the memorandum is relevant to a criminal action or proceeding because it recites issues raised and reasons for a decision affecting the same defendant in a prior action or proceeding. When an unpublished memorandum filed prior to May 2, 2019, is relied upon pursuant to this rule, a copy of the memorandum must be furnished to the other party and to the Court.

C. After an unpublished memorandum decision has been filed, the panel may sua sponte, or on the motion of any party to the appeal, or on request by the trial judge, convert the memorandum to a published opinion. In the case of a motion of any party to the appeal or a request from the trial judge, such motion or request must be filed with the Prothonotary within 14 days after the entry of the judgment or other order involved. The decision to publish is solely within the discretion of the panel.