

# August 2019

# Legal Report

## SWAN Legal Services Initiative

*A monthly publication from the SWAN Legal Training Team*

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## PENNSYLVANIA SUPERIOR COURT

**In the Interest of: D.M.D.-C. (Allegheny)**

**Citation:** 1773 WDA 2018

**Date of Decision:** August 19, 2019

**Holding:**

Superior Court affirmed an order granting the request of child D.M.D.-C. to have foster care payments paid to the biological father whose rights were previously terminated.

**Facts and Procedural Posture:**

Adoptive Father filed a private dependency petition alleging that D.M.D.-C. committed acts of habitual disobedience, including lying, manipulative conduct, verbal aggression, sexual displays and lack of remorse for his actions. At a shelter hearing, the court found that D.M.D.-C. was unable to return home due to Adoptive Father's medical condition. After three years, Adoptive Father made little progress in alleviating the conditions which lead to dependency, primarily due to his medical issues. D.M.D.-C. moved from kinship home to kinship home. The court considered and granted visitation with biological father whose rights were terminated when D.M.D.-C. was an infant. The agency was ordered to investigate biological father as a placement resource and an interactional evaluation was scheduled. The court permitted biological father to be the placement resource and D.M.D.-C.'s guardian ad litem filed a motion requesting foster care payments. A hearing was held on the motion and it was ultimately granted.

The agency filed a motion for reconsideration alleging that biological father cannot receive foster care payments because of the prior termination of parental rights. The court denied the motion. It is from that order that the agency appeals.

**Issue:**

Whether the trial court abused its discretion by ordering unapproved foster care payments to a parent whose parental rights were previously terminated.

**Rationale:**

The Superior Court analyzed the implementing statutes for foster care maintenance payments. It determined that the plain language states that a child qualifies for foster care maintenance payments either through a voluntary placement agreement or judicial determination that remaining in the home of origin is contrary to the child's welfare.

The Court concluded that the agency waived many of the issues presented by not preserving the argument below or through failure to cite any legal authority for the argument. The agency's primary argument was that M.K. did not meet the definition of a foster parent and that to provide payments to a biological parent whose rights were previously terminated would be "fiscally irresponsible and in direct contravention of public policy." However, the Superior Court held that the agency failed to establish a record to support this argument. Further, the agency conceded that PA Code does not specifically prohibit foster care payments under these circumstances. "Without any discussion by CYF, this Court cannot hold that foster care payments intended for Child's benefit should be withheld from being paid to M.K., Child's biological father, whose legal parental rights have been terminated a decade ago.

**M.W. v. Department of Human Services (Bucks)**

**Citation:** 1560 C.D. 2018

**Date Decided:** August 23, 2019

**Holding:**

Commonwealth Court reversed an order denying Mother's request for a continuance due to her incarceration and the resulting order that maintained her status as a perpetrator on the child abuse registry.

**Facts and Procedural Posture:**

Bucks County CYC filed an indicated report of abuse naming Mother a perpetrator of abuse of her two-year-old daughter. The report alleged that an altercation between Mother and Father occurred and placed the child at "great risk of harm." Mother alleged that the child was not present at the time.

Mother subsequently pled guilty to charges related to the incident and was sentenced to 11½ - 23 months of incarceration and a five-year period of probation.

The indicated report was reviewed and determined to be accurate. Mother, acting pro se, filed a timely appeal and requested a hearing. Mother was incarcerated at the time. The notice of the hearing was mailed to Mother at the county prison. Mother requested a continuance and permission to present a witness by phone, but did not provide a phone number for the county prison at which she could be reached. Furthermore, Mother's written request for a continuance did not contain a waiver of the timeliness of the hearing requirement. The ALJ held that due to her failure to include the waiver, Mother's request for a continuance could not be entertained.

Father and a caseworker testified at the hearing. Father testified as to his recollection of the events that occurred during the altercation with Mother. Caseworker testified that in an interview, Mother admitted to pouring bleach on a towel and forcing it in Father's mouth and trying to stab him with a knife. The incident occurred in the bedroom and the child was on the bed near Father. As a result of the close proximity to Father and the seriousness of the violence Mother perpetrated on Father, the caseworker concluded that Mother's actions constituted child abuse. The ALJ found that Mother created a "reasonable likelihood of danger" to the child. The Bureau adopted the ALJ's opinion in its entirety.

It is from that order that Mother appeals.

**Issue:**

Whether the ALJ erred in denying Mother's pro se request for a continuance for failure to include a waiver of timeliness.

**Rationale:**

The CPSL section 6341(c.2) does not require the filing of a waiver of timeliness, but does require reasonable efforts to coordinate a hearing date. There is no evidence of record that suggests that the Department made any efforts to coordinate a hearing date with Mother and CYC.

Furthermore, the agency was only asked its position regarding Mother's request to continue on the date and time set for the hearing. Mother's act of requesting a continuance in essence waived

the requirement to have a hearing set within 90 days. The Commonwealth Court acknowledges that a refusal to grant a continuance is in the discretion of the trial court and cannot be reviewed absent an abuse of discretion. The court concluded that the law was misapplied thereby creating a “manifestly unreasonable order.”

## LEGISLATION SPOTLIGHT

Comment to 204 PA. CODE CH. 213 was amended to include a provision for the publication of a list of applicable authorities that may restrict public access to court records and information. The list will be published on the UJS website and in the Pennsylvania Bulletin.

The entire policy, including this amendment and other related information, can be found on the Unified Judicial System's public records webpage located at <http://www.pacourts.us>.

### **Rule of Professional Conduct 1.6**

Rule 1.6 Confidentiality of Information was amended to include that a lawyer may reveal confidential information to comply with a law or order of court. The comment is also amended to clarify that if the other law supersedes this rule, a lawyer is permitted to make the disclosure to comply with the law.