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Legal Report

SWAN Legal Services Initiative

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SUPREME COURT OF PENNSYLVANIA

In the Interest of: N.B. (Philadelphia)

Citation: 11 EAP 2019

Date of Decision: January 22, 2020

Holding:

The Supreme Court held that evidence was insufficient to establish Mother as a perpetrator of child abuse under the CPSL, reversing the Superior Court's decision.

Facts and Procedural Posture:

In November 2016, Mother took her six-year-old daughter to the Children's Hospital of Philadelphia (CHOP) and reported that the child was experiencing vaginal discharge. Mother informed the emergency room staff that they moved from the Dominican Republic a year prior, they lived with maternal grandmother and she had no other concerns for her child. The child subsequently tested positive for chlamydia.

During the investigation, Mother reluctantly acknowledged that her husband and step-sons also resided in the home. All family members voluntarily submitted to screenings for sexually transmitted infections. Mother and step-son tested positive for chlamydia; step-father did not. Consequently, step-father and step-son returned to the Dominican Republic. The child was removed from the care of Mother and placed in foster care. Step-son was identified as the perpetrator of sexual abuse.

Approximately fifteen months after being adjudicated dependent, the GAL filed a motion requesting a finding of aggravated circumstances as to Mother. At the hearing on the motion, the treating physician opined that the child was a victim of sexual abuse based on the diagnosis of the STI but no other findings. The trial court also found Mother to be a perpetrator of child abuse under 23 Pa.C.S. §6303(b.1) for "causing sexual abuse through a failure to act and creating a likelihood of sexual abuse through a failure to act."

Mother appealed that finding and, in an unpublished opinion, the Superior Court affirmed in part and reversed in part. The Court reversed the finding of aggravated circumstances, which relieved the agency of reasonable efforts, but affirmed the finding that Mother was a perpetrator of abuse. It is from that order that Mother appeals.

Issues:

1. Did the Superior Court err by affirming the finding that Mother was a perpetrator of abuse absent clear and convincing evidence that she intentionally, knowingly or recklessly caused/created a likelihood of sexual abuse through an act or failure to act?
2. Did the Superior Court commit an error of law when finding that DHS established a *prima facie* case that Mother was responsible for the abuse when another individual was the identified perpetrator?
3. Did the Superior Court commit an abuse of discretion by finding that Mother failed to rebut the *prima facie* presumption that she was a perpetrator?

Rationale:

The Supreme Court agreed that DHS failed to establish by clear and convincing evidence that Mother intentionally, knowingly or recklessly created a likelihood that the child would be sexually abused. There was no evidence that her daughter exhibited any signs or symptoms of injury other than the one that caused Mother to take her to the hospital. The child made no disclosures of abuse until after her placement in foster care. Further, DHS offered no evidence to suggest that Mother should have known that the step-brother posed a risk to the child or that she disregarded a risk. When Mother was asked to bring her daughter to CHOP for further treatment, she did so willingly and was cooperative.

Mother's second argument is that the Superior Court erred in *sua sponte* applying the presumption of Section 6381(d) when a perpetrator of abuse was already identified. The Supreme Court agreed that it was an error to apply the presumption to the facts here because the plain language of the statute allows application only when a child suffers abuse "of such nature as would ordinarily not be sustained or exist except by reason of the acts of omissions of the parent or other person responsible for the welfare of the child." No evidence was presented that Mother caused the abuse or that she should have been aware that her child was at risk. The Court opined that the presumption is not applicable absent evidence that the person responsible for the welfare of the child knew or should have known of abuse or a risk of abuse and disregarded it. As the Court found that the presumption was inapplicable to the instant matter, it did not find it necessary to analyze Mother's third issue on appeal, namely whether she successfully rebutted the presumption.

Concurring Opinion - Justice Dougherty

Justice Dougherty agrees with the majority opinion but takes issue with the alternate interpretation of Mother's behavior as something other than "disinterested."

Concurring Opinion - Justice Wecht

Justice Wecht agrees that DHS failed to establish that Mother was a perpetrator of abuse by omission. At a minimum, a finding under Section 6303(b.1) requires recklessness and, in the instant matter, no such evidence existed. Justice Wecht examines the statutory history of the presumption codified at 6381(d) and agrees that it is not applicable to these facts.

Concurring and Dissenting Opinion - Justice Mundy

Justice Mundy concurs with the ruling that 6381(d) does not apply, but writes a dissent in support of affirming the trial court finding of child abuse being established under the totality of the evidence. That determination is best left to the trial court and the evidence of record could support the finding. Justice Mundy highlights that Mother lied about the men living in the home and had a questionable affect.

SUPERIOR COURT OF PENNSYLVANIA

In the Interest of: D.R.-W (Philadelphia)

Citation: 779 EDA 2019

Date of Decision: January 29, 2020

Holding:

The Superior Court affirmed orders involuntarily terminating Father's parental rights and changing the permanency goals from reunification to adoption.

Facts/Procedural Posture:

DHS received a general protective services report in 2017 alleging substance abuse and mental health concerns as to Mother. DHS alleged that Father had a history of unstable housing and drug-related convictions. Notwithstanding, the children were placed in the care of Father. A few months later Father left the children in the care of maternal grandmother, who is an indicated perpetrator of abuse. The children were removed from maternal grandmother's care and placed in a foster home. Father's whereabouts became unknown for a period of time.

Throughout the life of the case, Father failed to make any progress on his case plan objectives. DHS filed petitions to involuntarily terminate Father's parental rights and change the goal from reunification to adoption. After the hearing, the trial court entered orders terminating Father's parental rights to both children.

Father failed to file a timely appeal. Rather, Father filed a petition for allowance of appeal *nunc pro tunc*, which the court granted.

Issues:

Whether the trial court committed an error of law or abuse of discretion when changing the goal from reunification to adoption and terminating Father's parental rights.

Rationale:

The Superior Court acknowledges that Father failed to comply with P.A.R.A.P. 2119(a), as he failed to analyze any pertinent statutory sections or legal authority to support his argument. The Court found that he waived any argument as to the Adoption Act. Notwithstanding the waiver, the Court did opine that the lower court properly terminated Father's parental rights under 23 Pa.C.S. §§2511 (a) and (b).

The record supports the termination of Father's rights under 2511(a)(2), in that Father's conduct in the six months preceding the filing of the petitions evidenced a settled purpose to relinquish his parental claim to his children. The CUA case manager testified that after the children were removed from Father, his whereabouts were unknown. Father failed a urine screen, failed to attend the assessment and became incarcerated for an unspecified period of time. When Father's whereabouts became known, he was noncompliant with services at a recovery house. Father made no appreciable progress on his family service plan goals during this time.

Further, termination of Father's parental rights does meet the needs and welfare of the children.

Cont'd.

The testimony found credible by the trial court was that the children have little to no contact with Father. Father visited with the children approximately five times since they were removed from his care. The children were observed to have a parent/child bond with their prospective adoptive parents who meet all of their physical and emotional needs.

Father also waived his claim regarding the lower court's decision to change the permanency goal from reunification to adoption by failing to develop this argument in his brief. Notwithstanding, the Superior Court found no abuse of discretion by the lower court. The findings of fact and credibility determinations made by the lower court support its orders.

SPOTLIGHT

Pennsylvania Rules of Appellate Procedure

Rules 102, 120, 121, 907, 1112, 1113, 1311, 1701, 2315, 2321, 2323 of the Pennsylvania Rules of Appellate Procedure are amended and Rule 3304 of the Pennsylvania Rules of Appellate Procedure is rescinded. Most notably a definition of "counsel of record" (all attorneys who were counsel of record in the trial court at the time of the filing of the notice of appeal will be counsel of record in the appellate courts...) and "hybrid representation" (an attempt to act as counsel for oneself when one has counsel of record) were added. The changes are effective as of May 1, 2020 and can be found in their entirety at the link below.

<http://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol50/50-4/101.html>

Rules 102, 105, 120, 121, 301, 313, 341, 502, 553, 701, 702, 901, 1311, 1312, 1316, 1323, 1501, 1502, 1503, 1504, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1531, 1532, 1541, 1542, 1543, 1551, 1561, 1571, 1573, 1701, 1702, 1704, 1762, 1770, 1781, 1911, 2702, 3307, 3331 of the Pennsylvania Rules of Appellate Procedure are amended and Rules 1601, 1602, 1603, 1604, 1605, 1606, 1610, 1611, 1612, and 1613 of the Pennsylvania Rules of Appellate Procedure are also amended. The changes include adding the phrase "specialized review" to a number of rules.

The changes are effective as of August 1, 2020 and can be found in their entirety at the link below.

<http://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol50/50-4/100.html>

Pennsylvania Orphan's Court Rules

Rule 1.40, titled *In Forma Pauperis*, has been added to the Orphan's Court Rules. This rule applies the Rule of Civil Procedure 240 to all proceedings before the Orphan's Court. Prior to this addition, there was no specific guidance.

The note to Rule 14.8 titled Guardianship Reporting, Monitoring, Review and Compliance was amended. This Rule provides for the requirement and timing of guardian reports and inventories required by statute and took effect on June 1, 2019.

These changes are effective as of April 1, 2020 and can be found in their entirety at the link below.

<http://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol50/50-3/65.html>