

January 2021

Legal Report

SWAN Legal Services Initiative

A monthly publication from the SWAN Legal Training Team

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SUPREME COURT OF PENNSYLVANIA

In the Interest of Y.W.-B./N.W.-B.

Date of Order(s): January 5, 2021

Cite: 436 & 437 EAL 2020

Petition for Allowance of Appeal GRANTED on the following issues:

Did the Superior Court err when it ruled that a government agency shall have sweeping authority to enter and search a private home when a Pennsylvania Child Protective Services agency receives a report that alleges that a child is in need of services and that there is a fair probability that there is evidence that would substantiate that allegation in a private home, but the record does not display a link between the allegations in the report and anything in that private home?

In re: Adoption of C.M.

Date of Order: January 7, 2021

Cite: 640 MAL 2020

Petition for Allowance of Appeal GRANTED on the following issues:

1. Whether the Superior Court erred by misapprehending and improperly applying the essential holding in the Supreme Court case of *In Re: Adoption of M.R.D.*, 145 A.3d 1117 (Pa. 2016) in reversing an order granting the involuntary termination of parental rights where the petitioners did not seek a good cause exception pursuant to 23 Pa.C.S. §2901; and
2. Whether the Superior Court improperly disturbed the factual and credibility findings of the trial court in a termination of parental rights proceeding to conclude the proposed adoption was unlawful “custody gamesmanship.”



SUPERIOR COURT OF PENNSYLVANIA

In Re: Adoption of B.G.S. (aka S.S.S.)¹**Date of Decision:** January 21, 2021**Citation:** 829 EDA 2020**Holdings:**

1. Where Father did not know and had no reason to know, of Child's existence and/or the possibility that he was the Child's Father, his failure to parent the child prior to this discovery did not evidence a settled purpose of relinquishing his parental claim, or refusal or failure to perform his parental duties.
2. Termination of parental rights pursuant to §2511(a)(6) was in error where the subject child was not six (6) months of age or younger at the time of the filing of the petition pertaining to Father.

Facts and Procedural Posture: Procedurally, this case was previously before the Superior Court in the fall of 2020 following Father's appeal of the decree terminating his parental rights and Father's Counsel's filing of an Anders brief alleging the appeal was frivolous and requesting permission to withdraw. In October of 2020, the Superior Court issued an opinion denying Father's Counsel's request to withdraw and remanding the matter for the filing of a brief related to viable issues for appeal under 23 Pa.C.S.A. §2511(a)(1) & (6). This opinion was issued following the Superior Court's review of the matter on the merits.

The relevant facts (adopted herein from the October 2020 legal report) are as follows: Father and Mother dated from the beginning of 2017 until April 2018. Mother discovered that she was pregnant after the relationship ended, but she did not inform Father of the pregnancy. After the child was born, Mother decided to place the child for adoption through Transitions Adoption Agency (TAA). Mother told TAA that the child was the result of a sexual assault suffered by Mother and that the father of the baby was the unidentified assailant. TAA placed the child with a prospective adoptive couple. In March of 2019, Mother and Father reestablished contact. In April 2019, Father noticed a picture of the child as a background image on Mother's phone. Mother initially told Father that the child was hers, but did not disclose that the child may be Father's. Two weeks later, Mother informed Father that the baby may be his child, and Mother subsequently met with the director of TAA and informed her of Father's existence and potential paternity. Mother also gave Father the contact number to TAA. Father attempted to call TAA, but his call went to voicemail and he did not leave a message. Father also attempted to attain legal counsel, but the attorney that he contacted directed him to another attorney. On August 26, 2019, Father contacted TAA again and this time he spoke to the director, who according to Father, refused to disclose any information regarding the child. At some point during the case, Father attained a paternity test and it was confirmed that he is the child's biological father. On September 9, 2019, TAA filed a petition to involuntarily terminate Father's parental rights under 23 Pa. C.S.A. §2511(a)(1), (6), and (b). After holding two hearings, the orphans' court entered a decree terminating Father's parental rights on January 22, 2020.

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¹ This case was previously featured in the October 2020 Legal Report. It is featured in the January 2021 Legal Report for the Superior Court's decision following review on the merits.

Father appealed and counsel for Father sought to withdraw via an Anders brief.

The Court denied Father's Counsel's request to withdraw and remanded for Father's Counsel to file an advocate brief with the Superior Court, as Father may have viable appeals in regards to §2511(a)(1) & (6).

Issues:

1. Whether the orphans' court committed an error of law and/or abuse of discretion in terminating Father's parental rights pursuant to 23 Pa.C.S.A. §2511(a)(1) where Father was unaware of his paternal relationship to the child until approximately two and a half (2 ½) months after the child's birth, and once made aware, made diligent efforts towards the assumption of parental responsibilities?
2. Whether the orphans' court committed an error of law and/or abuse of discretion in terminating Father's parental rights pursuant to 23 Pa.C.S.A. §2511(a)(6) where Father was unaware of his paternal relationship to the child at the time of the child's birth?

Rationale: The Superior Court began by addressing whether the orphans' court erred or abused its discretion by terminating Father's parental rights to Child pursuant to Section 2511(a)(1). To meet the requirements of this subsection, "the moving party must produce clear and convincing evidence of conduct, sustained for at least the six months prior to the filing of the termination petition, which reveals a settled intent to relinquish parental claim to a child or a refusal or failure to perform parental duties." In re Z.S.W., 946 A.2d 726, 730 (Pa. Super. 2008). The court must then consider "the parent's explanation for his or her conduct" and "the post-abandonment contact between parent and child." Id. The Court noted the most critical question in this matter was *when* Father knew or should have known of Child's existence, and the possibility that he was Child's father. While the plain language of Section 2511(a)(1) does not require that a parent know or have reason to know, of a child's existence before the relevant six-month period begins, Pennsylvania case law instructs that a court must consider the performance of a parent "'in light of what would be expected of an individual in circumstances in which the parent under examination finds himself.'" In re Adoption of C.M.W., 603 A.2d 622, 625-26 (Pa. Super. 1992). The Court opined that it would be contrary to these principles to hold a Father responsible for failing to perform parental duties when he did not know, nor did he have reason to know, that he was, in fact, actually a parent. Additionally, the Agency filed its petition seeking termination well before Father would have had six (6) months to perform (or fail to perform) his parental duties. Based upon this analysis, the Court determined that the orphans' court committed an abuse of discretion in terminating Father's parental rights under §2511(a)(1) because Father did not know and had no reason to know, of Child's existence and the possibility that he was the Child's Father, and therefore, his failure to parent the child prior to this discovery should not be held against him. Additionally, because Father did not evidence a settled purpose of relinquishing his parental claim, or refuse or fail to perform his parental duties, the portion of the decree terminating his parental rights under §2511(a)(1) was reversed.

The Court then turned its analysis to §2511(a)(6). The Court noted that §2511(a)(6) applies solely to newborn children and that the term "newborn child" is defined as a child who is six months

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old or younger; because Child was about eight (8) months old at the time the Agency filed the petition, she was not a “newborn child.” The Court further noted that the Agency’s argument that “petitions filed (even against other individuals) during the first six months of a child’s life will continue to hold a child as a newborn child” would produce a “plainly absurd” result that our law forbids.

Based upon this analysis, the Trial Court’s decision to terminate Father’s parental rights pursuant to both §§2511(a)(1) and (6) was reversed in its entirety.

COMMONWEALTH COURT OF PENNSYLVANIA

Blair County CYS v. DHS

Date of Decision: January 6, 2021

Cite: 1813 CD 2019

Holdings:

1. The Agency bears the burden to prove a CY-48 is properly designated as a founded report; therefore, an administrative hearing is warranted wherein an appeal challenging the relationship between the founded report and the adjudication is timely filed, regardless of the fact that the appeal failed to address reasons why the report was not properly founded.
2. A criminal guilty plea, in and of itself, does not constitute substantial evidence of a finding of abuse and therefore, cannot support an amended CY-48 where said plea is lacking in factual offerings and no colloquy or information is offered for consideration.

Facts and Procedural Posture: On July 5, 2018, both Blair County and the Altoona Police Department received a report that Mother had physically abused Child that same day by allegedly striking Child with a bat (and causing injury to the Child’s arm) while attempting to strike Child’s grandmother. Mother was charged with multiple criminal offenses as a result of the incident. Following an investigation, the County filed an indicated report of child abuse against Mother. Mother, as the alleged perpetrator, filed an administrative appeal with respect to the indicated CY-48. The Department stayed the matter pending the outcome of the criminal proceedings.

On August 17, 2018, the Court of Common Pleas of Blair County issued an Order accepting Mother’s guilty pleas and sentencing Mother on the following charges: Endangering the Welfare of a Child, Simple Assault, and Recklessly Endangering Another Person. Based on these pleas, the County changed Mother’s status from indicated to founded.

Upon receipt of the amended report, the ALJ issued a Rule to Show Cause for Mother to provide an explanation as to why the Amended CY-48 was not properly founded. Mother argued in response that she was “regretful of her actions and desire[d] that her case proceed to a hearing” and “did not address whether her guilty pleas support[ed] the designation of her [R]eport as ‘founded.’” In response, the County filed a Motion to Dismiss Mother’s appeal for failure to provide an explanation as to why the amended CY-48 was not properly founded. The ALJ denied the County’s Motion to Dismiss and proceeded to a hearing on the Amended CY-48,

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limited in scope as to whether the Amended report was proper and supported by the judicial adjudication.

During the hearing, a copy of the original CY-48 (listing the report as indicated) and the Amended CY-48 (reflecting the change in status from indicated to founded), as well as the Criminal Information and sentencing order from Mother's criminal case, were introduced and admitted into evidence without objection. The Criminal Information outlined the various charges against Mother. The sentencing order identified the counts to which Mother pled and the sentences associated with the same, but did not include any facts connected to the criminal pleas. Additionally, among the Department exhibits was a copy of the criminal complaint, which listed Mother as the Defendant and charged her, in relation to Child, with endangering the welfare of a child, simple assault, and recklessly endangering another person for the incident on July 5, 2018.

Based upon the above evidence, the ALJ recommended sustaining Mother's appeal of the founded report. Specifically, the ALJ found that Mother was the alleged perpetrator in the CY-48 and the Defendant in the criminal case, that Child was listed as the victim in both the CY-48 and criminal complaint, and the date of the incidents was the same. Despite these findings, however, the ALJ ultimately concluded Mother's guilty pleas did not contain any specific findings of child abuse, as there was no plea colloquy or transcript to prove the specific factual basis to which Mother pled guilty. The ALJ recommended sustaining the alleged perpetrator's (Mother) appeal, thereby removing her name from the ChildLine and Abuse Registry and amending her status on the Child Protective Services Investigation Report (CY-48) from founded to indicated. The Department adopted the Recommendation of the ALJ. The County filed an Application for Reconsideration, which was denied. The County petitioned for review with this Court, and this opinion followed.

Issues:

1. Whether the Department erred in granting Mother an administrative hearing on the amended CY-48 wherein she provided no explanation as to why the report was not properly founded;
2. Whether the Department erred in finding the report of child abuse did not involve the same facts and circumstances as Mother's guilty pleas and therefore, erred in finding the guilty pleas did not constitute "child abuse" as defined by the CPSL to support the amended CY-48.

Rationale: The lens through which the Commonwealth Court examined this appeal is provided in the Pennsylvania Child Protective Services Law (CPSL). An indicated report is one in which, after an investigation by the Department or an agency, there is a determination that there is substantial evidence of child abuse by an alleged perpetrator. 23 Pa.C.S. §6303(a). The indicated report may change to a founded report if a judicial adjudication supports the founded report. A founded report may be sustained with evidence of a judicial adjudication when there is a finding of abuse and the adjudication involves the same factual circumstances involved in the allegation of child abuse. 23 Pa.C.S. §6303(a).

The Court began its analysis with the issue of whether or not an administrative hearing should have been granted. The County argued that the ALJ's denial of their Motion to Dismiss (as well as the hearing that followed) was in error because Mother did not make a proper showing

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of why she should be granted a hearing on her appeal; specifically, that Mother failed to provide explanation as to why the report was not properly founded. The Court found the County's argument without merit and noted it is not an alleged perpetrator's burden to prove why the guilty pleas do not support a founded designation for a child abuse report. Instead, the Court noted, as our case law shows, that burden rests on the agency filing the report; it is the agency that must prove "the factual circumstances of the judicial adjudication and the indicated report are identical, and, if it does, the report is properly designated as a founded report." C.F., IV v. Department of Human Services, 174 A.3d 683, 688 (Pa. Cmwlth. 2017). Additionally, the Court indicated that there are multiple avenues to challenge a founded report; provision of a court order indicating that the underlying adjudication (that formed the basis of the founded report) has been reversed or vacated or a challenge to whether the underlying adjudication properly supports that report. 23 Pa.C.S. §6341(c.1); J.G. v. Dep't of Pub. Welfare, 795 A.2d 1089, 1093 (Pa. Cmwlth. 2002). In this case, the Court determined that because Mother had already filed an appeal of the indicated report and was awaiting a hearing on that specific appeal, she did not bear the burden to additionally prove that a hearing on the founded report was warranted. Under these circumstances, an alleged perpetrator, such as Mother, need not bring an additional appeal or a proffer of why a hearing on a founded report is warranted, particularly when the agency bears the burden of supporting the founded report.

The Court then turned to the Agency's second issue; whether the Department erred in finding the report of child abuse did not involve the same facts and circumstances as Mother's guilty pleas and therefore, erred in finding the guilty pleas did not constitute "child abuse" as defined by the CPSL to support the amended CY-48. Specifically, the County argued that the record showed the founded report arose from the same set of facts and circumstances as Mother's guilty pleas, including that the Child was the victim in both the founded report and Criminal Information, Mother was the alleged perpetrator and Defendant, and that the events that formed the basis of each occurred on July 5, 2018. In the instant case, the Court denoted the County did not submit **any** plea colloquy or colloquy of any kind for examination by the ALJ to determine the facts to which Mother pled guilty. The Court noted that "[B]inding Commonwealth Court authority mandates that [the Department] cannot infer child abuse from a guilty plea for endangering the welfare of a child when the facts adduced during a plea colloquy did not support such a finding. R.F. v. Dep't of Pub. Welfare, 845 A.2d 214 (Pa. Cmwlth. 2004). If the adjudication's record is "too vague," the adjudication will not "resolve all of the issues in the indicated report definitively and conclusively." *Id.* at 692. The Court observed that as the Agency had provided no guilty plea colloquy or transcript to prove the specific factual basis to which Mother pled guilty, and there existed no specific factual averments in the record regarding child abuse, the three offenses to which Mother pled guilty could not qualify as child abuse as defined by the CPSL, and therefore, could not warrant a founded report. The Order sustaining Mother's appeal of the founded report was affirmed.

SPOTLIGHT

FEDERAL UPDATES

On January 5, 2021, the Children's Bureau of the U.S. Department of Health and Human Services Administration on Children, Youth and Families issued an [updated Information Memorandum](#) (IM) related to Achieving Permanency for the Well-being of Children and Youth. The purpose of this updated IM is to provide information on best practices, resources, and recommendations for achieving permanency for children and youth in a way that prioritizes the child's or youth's wellbeing. Included are reviews related to the permanency goals of reunification, adoption, and guardianship as well as an emphasis on the importance of state and tribal child welfare agencies and courts focus on each child's unique needs, attachments, and connections when making permanency decisions.

PENNSYLVANIA UPDATES

On January 12, 2021, former Auditor General Eugene A. DePasquale released a new State of the Child Special Report entitled, ["Fixing PA's Child Abuse Courts: How to Better Protect Children, Ensure Fairness"](#).

On Thursday, January 21, 2021, the Pennsylvania Department of Human Services issued the ["Racial Equity Report 2021: Leading the Fight for Justice, Equity, and Opportunity for All People"](#).

On January 25, 2021, the Pennsylvania Office of Children Youth and Families issued [Bulletin 3130-21-01, "Appointment of Legal Counsel for a Child in Contested Termination of Parental Rights Hearing"](#). The purpose of this bulletin is to transmit to County Children and Youth Agencies (CCYAs) requirements related to a Supreme Court decision on the appointment of legal counsel for a child in a contested Termination of Parental Rights (TPR) hearing. This bulletin is effective **immediately** and all requirements must be followed.