

# March 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 Re: P.G.F** (Bedford)

**Date of Decision:** March 25, 2021

**Citation:** No. 7 WAP 2020

**Holding:** The Supreme Court held that under the unique circumstances of this case the attorney was able to fulfill professional duties as both guardian ad litem and legal counsel in a contested termination of parental rights proceeding thereby upholding the order issued below.

**Facts/Procedural Posture:** Mother and Father were not married when the child was born and ended their relationship when the child was two months old. When the child was four, Mother remarried. Father was not an active participant in the child's life and as a result, the child did not know Father. She filed a petition to involuntarily terminate Father's parental rights so that step-father may adopt the child.

The Orphan's Court appointed an attorney to serve as the child's guardian ad litem and counsel. Multiple hearings were conducted on the petition to terminate Father's parental rights. Notably, the child's attorney cross-examined witnesses and argued that it was in the best interest of the child to have Father's rights terminated, but did not ask the child of his preferred outcome. The trial court terminated Father's parental rights. It is from that order Father appealed to the Superior Court.

Before addressing the merits of Father's appeal, the Superior Court *sua sponte* addressed the adequacy of the representation of the child and concluded the representation to be insufficient. The Superior Court was unable to ascertain the child's preferred outcome because it was not placed on the record nor did she suggest that the child was unable to articulate a preferred outcome. The order was vacated with instructions on remand for the child's counsel to ascertain his preferred outcome. Additionally, if no conflict existed, the order may be re-entered. On remand, the child's wish to remain with Mother and step-father was presented to the court. Consequently, the order was again issued. After reviewing Father's appeal of that order, the Superior Court upheld the trial court's order. Father appealed that order and the Supreme Court granted allocatur only on the issue of whether the attorney could act in the capacity of both the guardian ad litem and legal counsel after failing to assess the child's preferred outcome.

**Issue:** Whether an attorney could act as both guardian ad litem and legal counsel for a minor child, where legal counsel failed to expressly inquire into the child's preferred outcome of a termination proceeding.

**Rationale:** The Supreme Court cited its recent decision *In re: K.M.G.*, 240 A.3d 1218 (2020), specifically for the purposes of reiterating that a child's preference need not be placed on the record. There is no such statutory mandate and further, placing the child's position on the record is a violation of attorney-client privilege that may cause the child undue stress. The Court recognizes that ascertaining a child's preference can be a complex task. Specifically, in the instant matter the child is unaware of very sensitive information, such as his biological father's identity, and revealing such information may cause significant emotional harm. The Court is not

prepared to require attorneys for children to engage in that manner.

The Supreme Court further relied on the Superior Court's decision in *In re: Adoption of C.J.A.*, 204 A.3d 496 (Pa. Super. 2019). Here, the child was only five years old. The child identified the step-father as his father and was not aware of the identity of the biological father. The child did not understand the concept of adoption but clearly was upset at the thought of not living with Mother and Step-father. The Supreme Court opined that given the above circumstances, the attorney properly discharged her duties to ascertain the child's preferred outcome.

Justices Donohue and Wecht filed dissenting opinions.

## SUPERIOR COURT OF PENNSYLVANIA

**In the Interest of: J.B.** (Philadelphia)

**Date of Decision:** March 5, 2021

**Citation:** No. 1416 EDA 2020

**Holding:** Superior Court vacated an order transferring custody from the custodial parent to the non-custodial parent pending an investigation of abuse without a hearing as to the allegations against the custodial parent.

**Facts/Procedural Posture:** After an order of protective custody was obtained, the child was removed from Mother and placed in temporary foster care. Father attended the shelter hearing requesting custody of his son. The court ordered DHS to assess Father and gave permission to place if he was found to be appropriate. Upon completion of the assessment, the child was in fact placed with Father.

DHS filed a dependency petition alleging the child to be dependent as to Mother. At the adjudicatory hearing, all parties agreed to a continuance; however, Father requested that the petition be dismissed as there were no allegations of dependency as to him. Mother objected and cited prior court decisions that required an evidentiary hearing on Mother's suitability as a caregiver. Absent a hearing, Mother argued that the trial court lacked the authority to transfer custody.

The trial court entered an order placing the child in Father's custody and dismissed the dependency petition. It is from that order that Mother appeals.

**Issues:** Whether the trial court erred in transferring custody from the custodial parent to the noncustodial parent and dismissing a dependency petition without an evidentiary hearing.

**Rationale:** Both Mother and Father rely on *In re M.L.*, 757 A.2d 849 (Pa. 2000), and the Superior Court's decision *In the Interest of Justin S.*, 543 A.2d 1192 (Pa. Super. 1988) to frame their arguments. The Superior Court began its analysis by reviewing the two cases and their respective holdings.

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The sole issue in *M.L.* was whether the court erred in adjudicating the child dependent when the non-custodial parent was ready, willing, and able. In that case, Mother made allegations of maltreatment against Father. Upon investigation, it was determined that the allegations were false, but the agency became concerned about Mother's statements and filed a dependency petition. After evidentiary hearings, the trial court found the child dependent and placed the child in Father's custody. The Superior Court affirmed the order.

The case of *Justin S.* stands for the proposition that a child is not dependent if the non-custodial parent is ready, willing, and able to provide proper parental care and control. The Court, therefore, held that in a dependency proceeding, a court may grant custody of an allegedly dependent child to that child's non-custodial parent without first declaring the child dependent as long as sufficient evidence of dependency exists.

In the instant matter, the trial court did not hold an evidentiary hearing to determine whether there was clear and convincing evidence that Mother was unable to provide proper parental care to J.B. prior to transferring legal and physical custody to Father. Consequently, the Superior Court concluded that the court erred by failing

to do so. "To be clear, we now explicitly hold that a trial court can only transfer durable legal and physical custody to a ready, willing and able non-custodial parent in a dependency proceeding after the court has held an evidentiary hearing and found, based on that evidence, that the custodial parent is unable to provide proper parental care and control to the child by clear and convincing evidence."

**In Re: Adoption of A.H.** (Cumberland)

**Date of Decision:** March 3, 2021

**Citation:** No. 1032 MDA 2020

**Holding:** Superior Court affirmed an order involuntarily terminating Mother's parental rights and held that Mother waived the issue of a goal change from reunification to adoption.

**Facts/Procedural Posture:** The child was placed in foster care after Mother was involuntarily committed for mental health treatment. After Mother's discharge, she did not comply with recommended treatment. Mother failed to timely address goals of mental health, parenting, and maintaining a safe environment for the child. Consequently, the agency petitioned to change the goal from reunification to adoption and filed a petition to involuntarily terminate Mother's parental rights.

It is from those orders that Mother appealed.

**Issues:** Whether the evidence presented was sufficient to meet the evidentiary standards for termination of parental rights and a goal change to adoption.

**Rationale:** The Superior Court found that the evidence supported the termination of Mother's parental rights. Mother was diagnosed with schizoaffective disorder – bipolar type and

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post-traumatic stress disorder, however, she did not follow treatment recommendations. Consequently, the trial court opined, and the Superior Court supported the finding, that Mother's mental health rendered her incapable of parenting. She failed to cooperate with the agency's attempts to verify her treatment, and after twenty-eight months, failed to adequately make progress in her goals. Mother's argument attempted to relitigate the validity of her mental health diagnoses and failed to cite any legal authority, save one legal citation, to support her argument. The agency's argument below centered almost entirely on the impact of Mother's untreated mental health on her ability to appropriately parent.

After holding that the record supports the trial court's ruling under §2511(a)(2), the Superior Court then turned to evidence regarding §2511(b). The record supported the conclusion that the child loved his mother, but wished to be adopted. The child had legal counsel who also represented the child's desire to remain in the pre-adoptive home. Mother did not challenge the legal counsel's representation but rather argued that Permanent Legal Custody would be a better goal.

Mother's final issue regarding the goal change to adoption was not addressed because Mother failed to preserve the argument. The Supreme Court issued an opinion in 2018 disapproving of the practice of filing one notice of appeal for multiple docket numbers. Here, Mother filed a single appeal for both the Orphan's Court matter and the dependency matter. "Procedurally, Mother seeks to bootstrap the goal change issue onto her termination appeal, without abiding by the proper Rules of Appellate Procedure. Because no appeal of the goal change decision was actually taken, we conclude Mother waived her third issue."

**In Re: S.C.** (Allegheny)

**Date of Decision:** March 15, 2021

**Citation:** No. 242 WDA 2020

**Holding:**

Superior Court vacated an order denying the involuntary termination of parental rights after finding that the record demonstrates that the agency presented clear and convincing evidence to support the termination of parents' parental rights.

**Facts/Procedural Posture:**

Parents took their six-week-old child to the hospital because he was vomiting blood. Upon examination, medical staff determined that the child had multiple injuries, including fractures to both legs, bruises to his jaw and lower back, and injuries to his mouth. Parents were unable to offer a plausible explanation for the child's injuries. Parents suggested that perhaps the injuries occurred during a diaper change. As a result, S.C. was placed with grandparents and adjudicated dependent. Parents were ordered to participate in parenting and non-offenders treatment. Both parents pled guilty to one count of endangering the welfare of a child (EWOC) and were sentenced to a period of probation. The agency filed involuntary termination of parental rights petitions as to both parents, however, the trial court denied the agency's petitions opining that the agency failed to meet its evidentiary burden. It is from that order that the agency and the child's attorney appeal.

**Issue:** Whether the agency proved by clear and convincing evidence that the parental rights of Mother and Father should be terminated as they failed to acknowledge responsibility for the child's injuries, thereby failing to resolve the issue that caused the child to be dependent.

**Rationale:** The Superior Court began its analysis with the trial court's opinion which included a statement that the agency met its burden under 2511(a)(2) insofar as the child was injured while in the care of parents, parents pled guilty to criminal charges relating to the injury, but failed to take responsibility for the injuries. The trial court then analyzed the needs and welfare of the child. Upon review of the record, the Superior Court agreed that the agency met its burden under 2511(a)(2).

The Superior Court subsequently analyzed the 2511(b) considerations. Here, the agency and the child's attorney argue that the trial court focused solely on the parent/child bond and did not consider additional factors, such as the child's safety if in the care of parents, the safe and secure home that the grandparents provided and the child's relationship with grandparents. Further, the child's attorney argued that there is no evidence of record that the child's bond with parents was necessary or beneficial.

The trial court's opinion was based almost entirely on the expert testimony of the psychologist who conducted interactional evaluations between the child and parents and between the child and grandparents. The psychologist did note positive interaction between the child and parents and could not opine definitively that a secure attachment to grandparents would mitigate the consequences of terminating parental rights. Further, the trial court expressed concern regarding the grandparents' identification of alternate caregivers in the event that they should be unable to care for the child. Upon review, the Superior Court held that the trial court failed to consider the child's safety, as well as the love, support and security that the child experiences while in the care of grandparents. When all relevant factors are considered, the agency met its burden under section 2511(b).

**In the Interest of X.P.** (Berks)

**Date of Decision:** March 30, 2021

**Citation:** No. 1106 MDA 2020

**Holding:** Superior Court affirmed an order of adjudication and disposition for X.P. wherein Mother was found to have recklessly caused serious mental injury to X.P.

**Facts/Procedural Posture:** Berks County CYS became involved with the family upon receipt of a report of emotional abuse of X.P. and his twin sisters, who are his half-siblings. Prior to the dependency hearing, Mother participated in a psychiatric evaluation. X.P., age 16, participated in an emotional abuse evaluation and was diagnosed with adjustment disorder with mixed anxiety and depressed mood. As a result of these evaluations, the agency filed amended dependency petitions alleging that Mother is a perpetrator of abuse and that X.P. suffered a serious mental injury due to Mother's knowing, intentional, or reckless actions.

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The child testified to acts and failures to act by Mother, including being hit with belts, Mother throwing hard plastic bottles at him, and punching him in the nose. On another occasion, Mother threatened to wreck the car and kill the children. Mother also attempted suicide by taking pills and blamed the child, saying her suicide attempt was his fault. Mother would bring food home for herself and the other children, but would not provide food for X.P. The neighbor or other family members would sneak food into the home for X.P. In 2019, X.P. did not have any clothes to start school. X.P.'s grandfather sent clothes, and when X.P. went to school on the first day, he was told that he was not enrolled.

The trial court held that the child was a dependent child. At a subsequent hearing on the issue of child abuse, the trial court found by clear and convincing evidence that X.P. sustained serious mental injury and further found Mother to be the perpetrator of abuse. It is from that order that Mother appeals.

**Issue:** Whether the trial court abused its discretion and committed an error of law by finding that Mother recklessly caused serious mental injury where the record does not contain clear and convincing evidence that Mother caused the mental injury or acted recklessly.

**Rationale:** Mother acknowledged that X.P. suffered from mental injury, but denied that she was the cause of the injury. Mother offered the alternative that X.P.'s multiple sclerosis diagnosis caused his mental conditions. However, the review of the record revealed no evidence that the child suffered psychologically from his MS diagnosis.

Upon further review of the evidence, the Superior Court opined that the evidence supported a finding that Mother "recklessly" caused serious mental injury. Mother was evaluated by a psychiatric professional who diagnosed her with major depressive disorder. The testimony from the expert revealed that Mother was herself a victim of physical and emotional abuse and that she inappropriately would displace her anger towards her father to her son. While Mother's emotional responses were not done deliberately, the court concluded that Mother's conduct was a "gross deviation from the standard of conduct that a reasonable person would observe" therefore meeting the statutory definition of "reckless" as referenced in the CPSL.

#### **SPOTLIGHT: K.B. v. M.F. (Pike)**

Superior Court vacated an order granting Grandmother's request for visitation rights to her twin grandchildren, where the hearing officer failed to allow the children to testify and take into consideration their well-reasoned opinions. The trial court entered an order finding that paternal grandmother had standing to seek visitation and entered an order granting paternal grandmother two-hour visitation once a month in a mutually convenient place.

The current version of the Custody Act identifies sixteen custody factors that must be analyzed by a trial court. On appeal, the Superior Court found that the hearing officer analyzed best interest only, which is a statutory section that was repealed. As such, the order is vacated and the matter is remanded for a hearing on the relevant custody factors.

**In the Interest of: M.R.** (Philadelphia)

**Date of Decision:** March 1, 2021

**Citation:** No. 1400 EDA 2020

**Holding:** Superior Court held that the trial court improperly admitted the testimony of an expert thereby reversing orders refusing to make a finding of child abuse against parents in each child's case.

**Facts/Procedural Posture:** The family became known to DHS when two children were diagnosed with multiple unexplained fractures. The children were removed from parents and placed in kinship care. At the adjudicatory hearing, a physician from Children's Hospital of Philadelphia (CHOP) testified that one child was admitted due to scrotal swelling. Upon examination, it was found that the child had a fractured forearm and multiple rib fractures. The genetics team was consulted, but no underlying genetic cause was identified. Additionally, the endocrinologist found no underlying bone disorders that would cause the injuries. Since the children are twins, the other child was examined and found to have multiple rib fractures. That child had no underlying genetic or bone disorders that would cause the injuries. As a result, the medical team diagnosed the children with non-accidental trauma indicative of child abuse.

Mother sought a second and third opinion of the medical diagnoses, one of which was from the Director of Medical Genetics at Dayton Children's Hospital (The Director). The Director received the children's medical records from Mother and prepared a report after reviewing the same, concluding that the children had metabolic bone disease of infancy (MBDI) which was a plausible explanation for the fractures. A rebuttal witness for DHS testified that this methodology was flawed and that the diagnosis is not a recognized disorder by child abuse medical teams, a field in which the witness worked.

The court entered orders adjudicating children dependent but failed to make findings of abuse. It is from those orders that DHS appeals.

**Issues:** Whether the trial court abused its discretion in admitting medical testimony wherein the expert's methodology is not generally accepted in the medical field.

**Rationale:** Pennsylvania Rule of Evidence 702, commonly referred to as the *Frye* test, requires that a witness who is "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion" if the specialized knowledge is beyond that possessed by an average layperson and the expert's methodology is generally accepted in the relevant field. The line of *Frye* cases makes clear that the trial court's responsibility is to ensure that an expert has applied a generally accepted scientific methodology to reach his or her conclusions.

In the instant matter, DHS and the GAL filed motions to preclude The Director's testimony and in support produced several articles that questioned the Director's methodologies, as well as rejecting his hypothesis. Notwithstanding, the trial court denied the motions, allowed the testimony, and opined that his testimony would be given "the appropriate weight."

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Superior Court opined that the Director did not apply a generally accepted scientific methodology to reach his conclusion that metabolic bone disease of infancy caused the injuries to the children. While his article was published in a medical journal, countless articles criticizing his methodology have also been published. Further, publication is not the only factor to consider whether an expert's research is generally accepted in the medical community. The evidence presented in the instant matter is clear that the Director's conclusions are contrary to generally accepted practice, particularly in the field of child abuse. Further, the Director reviewed records, such as the x-rays, through PowerPoint rather than a generally accepted method of interpreting x-rays.

As the parents failed to meet their burden of showing that the medical community generally accepts the methodology of their expert, the trial court should not have admitted the testimony. This error affected the finding of child abuse as to parents. Absent the Director's testimony, upon which the court heavily relied, DHS demonstrated that the children were victims of child abuse by clear and convincing evidence.