

# May 2019

# Legal Report

## SWAN Legal Services Initiative

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## PENNSYLVANIA SUPERIOR COURT

**R.L. v. M.A.**

Date of Decision: May 3, 2019  
 Cite: 2740 EDA 2018 (Lehigh County)

**Holding:**

The record supported the trial court's findings that the evidence presented was enough to rebut the statutory presumption in favor of a biological parent, and that an award of shared physical and legal custody was in the child's best interest.

**Facts and Procedural Posture:**

R.L. and M.A. were in a committed relationship and conceived a child through artificial insemination of M.A. using R.L.'s brother's sperm. The couple broke up shortly after the child's birth but shared custody via an informal agreement. When the child was five years old, R.L. and M.A. got into a dispute which resulted in M.A. ending the custody arrangement. R.L. then filed for custody and was granted "*in loco parentis*" status. The trial court awarded the two parties shared legal and physical custody. M.A. appealed.

**Issue:**

Did the trial court err in applying a best interest standard when awarding shared legal and physical custody to a biological parent and one standing *in loco parentis*?

**Rationale:**

The Superior Court first identified a parent's *prima facie* right to custody, and noted that there was a statutory presumption strongly in favor of the parent. However, it was further stated that this principle does not preclude a nonparent from being awarded custody. Although legal precedent requires a third party to tip the scale in their favor prior to awarding primary physical custody, the court found that no such requirement existed for an award of shared legal custody. Rather, a nonparent standing *in loco parentis* must establish by clear and convincing evidence that it is in the best interests of the child to maintain that relationship. As such, the court found that the record supported the trial court's ruling in that it considered all factors, including the previous custody arrangement, in awarding shared custody to both parties.

**In Interest of: R.E.L**

Date of Decision: May 24, 2019  
 Cite: 631 EDA 2018 (Pike County)

**Holding:**

The trial court's expungement of juvenile court records was improper due to the lack of consent of the Commonwealth, as required under 18 Pa.C.S.A. § 9123(a)(4).

Facts and Procedural Posture:

R.E.L. was adjudicated delinquent in 2012 for committing numerous crimes. The court terminated his supervision in 2017, when he reached the age of 21. At that time, R.E.L. filed a Petition to Expunge his juvenile record. The Commonwealth did not respond to the Petition. However, a hearing was later held and the Commonwealth orally objected to the expungement. The trial court granted the Petition, citing to Rule 170(D)(2) of the Pennsylvania Rules of Juvenile Court Procedure. It provides that the Commonwealth waives any objection to the expungement by failing to respond to the Petition within 30 days. The Commonwealth appealed.

Issue:

Whether the lower court erred in granting the Petition for Expungement, when the Commonwealth did not consent as required by 18 Pa.C.S.A. § 9123(a)(4).

Rationale:

The Superior Court first sought to interpret the statute in question, 18 Pa.C.S.A. § 9123(a)(4). It allows for expungement when:

“(4) the attorney for the Commonwealth consents to the expungement and a court orders the expungement after giving consideration to the following factors:

(i) the type of offense;

(ii) the individual's age, history of employment, criminal activity and drug or alcohol problems;

(iii) adverse consequences that the individual may suffer if the records are not expunged; and

(iv) whether retention of the record is required for purposes of protection of the public safety.”

In interpreting the statute, the court noted that it must determine legislative intent and plain meaning as required by the Statutory Construction Act. To do so, the Superior Court considered the court's analysis in *In re R.R.*, 57 A.3d 134 (Pa.Super.2012), which previously considered whether a conflict existed between Section 9123(a)(4) and Rule 170. The court recognized that, shortly after the decision in *R.R.*, the Supreme Court amended Rule 170. However, the court found that the analysis in *R.R.* remained relevant in that it acknowledged that the legislature drafted Section 9123(a) with “explicit consideration that a petition must not be granted under that section unless the Commonwealth, as gatekeeper, consents.” Additionally, the court found that this analysis did not conflict with the plain language of the statute nor the Rule. As such, the court found that affirmative consent by the Commonwealth is required under the statute, and thus, the trial court erred in granting the Petition for Expungement.

H.M.H. v. D.J.G.

Date of Decision: May 13, 2019  
Cite: 980 WDA 2018 (Mercer County)

Holding:

The trial court erred in failing to conduct a hearing on Mother's petition for a permanent PFA order and in ruling that L.M.H. lacked standing.

Facts and Procedural Posture:

H.M.H.(Mother) filed a protection from abuse (PFA) on behalf of her thirteen-year-old daughter (child), against the child's fifteen-year-old cousin. In the petition, Mother averred that the cousin sexually assaulted the child on many occasions. The trial court granted a temporary PFA order and scheduled a hearing. At the hearing, the court requested that Mother follow a "best practice policy" and offer proof of a *prima facie* case of abuse and standing. After Mother's counsel outlined the averments, the trial court found that Mother failed to present a *prima facie* case of abuse and that the relationship of first cousins did not meet the definition of "family" in the PFA Act. In reaching this decision, the trial court compared the definition of "family" to other Pennsylvania statutes, such as in the Crimes Code and Child Protective Services Law. In doing so, it determined that no other statutes are so broad and encompassing as to not specify a degree of consanguinity, and that allowing any living blood relative or relative related through marriage to be a party to a PFA would be unreasonable. Mother appealed.

Issues:

(Mother presented two issues, only one of which is discussed below)

1. Did the trial court err when it ruled that first cousins are not family as defined by the PFA statute?

Rationale:

The PFA Act provides the following definition of "family or household member":

**"Family or household members."** Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood." 23 Pa.C.S.A. § 6102(a).

The Superior Court found that the PFA Act's definition of family was "broad, but unambiguous," therefore required no further analysis. The court further found that the cousins are related by four degrees of consanguinity, and thus have standing to pursue a PFA against one another. It also recognized that the General Assembly's use of limiting language in other Pennsylvania statutes only demonstrates that similar limiting language could have been used in the PFA Act if desired. Failure to do so suggests that the PFA Act was intended to cover a broad scope of relationships. Thus, the trial court erred in ruling that the child lacked standing.

**In the Interest of: L.V.**Date of Decision: May 3, 2019  
Cite: 1392 EDA 2018 (Philadelphia)**Holding:**

The Superior Court affirmed the orders of the trial court adjudicating the Children dependent, finding abuse as to both Mother and Father, and finding aggravated circumstances and that no efforts need be made toward reunification, where the two-month-old child suffered from 26 fractures without explanation.

**Facts and Procedural Posture:**

In October 2016, Philadelphia DHS received a CPS report alleging that a two-month-old child was admitted to the hospital with multiple (26) fractures. Medical staff determined that the fractures were in multiple stages of healing and were indicative of child abuse. Upon investigation, it was determined that both Mother and Father cared for the child, but neither were able to provide an explanation of the injuries. DHS filed a Petition for Dependency and sought a finding of aggravated circumstances and child abuse against both parents. Prior to the hearing, Mother filed a motion to seek an additional medical examination from the physician(s) of her choice, both of whom were out-of-state. The court granted the motion but ordered that the examinations must occur in Philadelphia. At the hearing, all parties offered competing medical expert testimony in an attempt to explain the cause of the child's injuries. DHS's experts opined that the injuries were a result of abuse. Mother presented the testimony of two experts as well. However, the Judge limited the subject matter in which one of the experts was qualified to testify. Nevertheless, Mother's experts offered testimony to support that the injuries may have been caused by a genetic condition. Finally, the child's attorney offered two expert witnesses to rebut Mother's expert witnesses' testimony. At the conclusion of the hearing, the court adjudicated the child dependent, entered a finding of abuse, and found aggravated circumstances existed for both parents and that no efforts needed to be made towards reunification. Mother appealed.

**Issues:**

1. Did the trial court err when it denied Mother the opportunity to take her son outside of Philadelphia to be examined?
2. Did the trial court err when it failed to credit Mother's expert witness testimony because he had not examined the child, failed to credit him because he was not a child abuse doctor, failed to qualify him as an expert in endocrinology and pediatric endocrinology, and criticized Mother for failing to procure a geneticist?
3. Did the trial court err when it failed to recuse itself for having a bias in favor of child abuse and CHOP doctors?
4. Did the trial court err when it ordered that DHS make no efforts to reunify the children with their Mother?
5. Did the trial court err by extreme delay in scheduling the dependency hearing?
6. Did the trial court err when it ordered that DHS make no efforts to reunify the children with their Mother?
7. Did the trial court err when it linked reunification with one or both of the parents' confessing to abusing the child?

Rationale:

Regarding the first issue, the Superior Court found that the trial court appropriately exercised its discretion in limiting the child's medical examinations to the Philadelphia area. In support of this, the court noted that the child was recovering from serious injuries, and there was a possibility that his bones were fragile due to an underlying condition. As for the second and third issues, the court found that Mother waived the second issue for failure to preserve it at trial. Nevertheless, the court found that the issue was meritless in that the court has discretion in determining whether a witness is properly qualified to give expert testimony, and to weigh the credibility of the testimony presented. The court noted that the record supported the trial court's qualification of mother's expert and the credibility findings. Although the Superior Court recognized the trial's court's criticisms of the doctor's credentials, there was no indication that the trial judge abused his discretion in judging his ability to preside over the case fairly and impartially. Ultimately, the trial court qualified the doctor in his field of focus rather than a broader field, and chose to give more weight to the experts who physically examined the child, rather than one who simply reviewed records. As such, the record supported the trial court's finding that the fractures were indicative of child abuse and not from bone disease.

Regarding the remaining issues, the Superior Court noted that the trial court held numerous hearings, heard extensive testimony, and reviewed hundreds of pages of documents before concluding that Mother and Father were responsible for the child's injuries. The Superior Court found that the record supported the trial court's conclusion that the child was dependent, in that the parents' conduct placed the health, safety or welfare of the child at risk, thus causing him to be without parental care and control. Similarly, the Superior Court noted that, because DHS's medical expert opined that the two-month-old suffered twenty-six fractures, causing pain and swelling, as a result of non-accidental trauma or abuse, the record further supported the trial court's finding of aggravated circumstances based upon physical abuse, as well as its determination that no efforts toward reunification are required. As such, the court affirmed the orders of the trial court adjudicating the child and his sibling dependent, finding abuse as to both Mother and Father, as well as finding aggravated circumstances and that no efforts need be made toward reunification.

***Did you know?***

"Relative" is defined differently depending on the body of law one is working within. By of example, in the Child Protective Services Act (CPSL), for the purposes of being named a perpetrator, relative is defined out to the third degree of consanguinity or affinity, which, like here, would include first cousins. In the Family Finding and Kinship Care section of the Public Welfare Code "relative" is defined out to the fifth degree of consanguinity of affinity, which would include relatives up to and including first cousins once removed and second cousins.