

# November 2020

# Legal Report

## SWAN Legal Services Initiative

*A monthly publication from the SWAN Legal Training Team*

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### **In This Issue:**

**In Re: Adoption of K.M.G.**

**In the Interest of: D.G.**

**Spotlight: Denelle v. Denelle,**

### **Legal Training Team**

Division Manager  
Lauren Peters, Esq.

#### Training Specialists

Alyssa H. Holstay, Esq.  
Shawn Sangster, Esq.  
Sara Steeves, Esq.  
Rachel Thiessen, Esq.

471 JPL Wick Drive  
P.O. BOX 4560  
Harrisburg, PA 17111  
[www.diakon-swan.org](http://www.diakon-swan.org)

[lsiwarmline@diakon-swan.org](mailto:lsiwarmline@diakon-swan.org)



## SUPREME COURT OF PENNSYLVANIA

**In Re: Adoption of K.M.G.****Date of Decision:** November 10, 2020**Citation:** No. 55 WAP 2019**Did you know?** 

*Sua sponte* is used to indicate that a court has taken notice of an issue on its own motion without prompting or suggestion from either party.

**Holding:** An appellate court should verify that the orphan's court appointed counsel to represent a child's legal interests in a contested termination of parental rights hearing but may not *sua sponte* assess counsel's performance. The decision of the Superior Court was affirmed.

**Facts/Procedural Posture:** Mother has four children, ages eight, six, five, and two, who were the subject of the underlying dependency matter. The Orphan's Court issued an order appointing an attorney to represent the children in the termination of parental rights hearing, specifically finding that the attorney could represent both the legal and best interests of the children without conflict. The order provided no other details about the lack of conflict.

The underlying appeal of Mother's termination of parental rights was upheld and not the subject of litigation. The issue before the Superior Court, and now before the Supreme Court, was a question of law regarding the appellate court's authority to review *sua sponte* legal counsel's representation of a child's legal interests in a termination of parental rights proceeding. When Mother filed an appeal contesting the outcome of the termination of parental rights proceeding, the Superior Court heard the case *en banc* and directed the parties to address the appellate court's obligation to review on its own whether appointed counsel has a conflict.

**Did you know?** 

*En banc* is used when a case is heard before all the judges of a court rather than by one judge or a panel of judges selected from them.

**Issue:** Whether an appellate court has the authority to review *sua sponte* whether a child's legal interest was represented by counsel during an involuntary termination of parental rights hearing, as required by Section 2313(a) of the Adoption Act.

**Rationale:** The Court begins its analysis reiterating its longstanding disdain for the exercise of *sua sponte* review over the enforcement of the Rules of Appellate Procedure. Specifically, the posture that it is not for the Court to identify and raise issues on appeal. The Supreme Court affirmed the Superior Court's decision below and its reliance on In re K.J.H., 180 A.3d 411 (Pa. Super. 2018). The Court there held that an appellate court must verify the appointment of counsel in a termination of parental rights proceeding *sua sponte* in order to ensure that the mandate of §2303(a) is fulfilled.

Additionally, the Court held that an appellate court must review whether the orphan's court made a determination that a guardian ad litem (GAL)/counsel appointed to represent a child's best and legal interests does not have a conflict. That determination does not permit the appellate

court to assess if an actual conflict exists. The Court specifically declined to adopt a policy that the appellate courts should *sua sponte* review the record below to assess whether a conflict exists. The Court opined that doing so would be a fact-specific inquiry and not simply a review of the record. Further, the Court declined to adopt a policy of *sua sponte* review of the appointed attorney's performance.

Justices Saylor and Dougherty issued concurring opinions. Justice Wecht issued a concurring and dissenting opinion.

If you would like to review the Superior Court opinion summary, it can be found in the [September 2019 Legal Report](#).

## SUPERIOR COURT OF PENNSYLVANIA

**In the Interest of: D.G.**

**Date of Decision:** November 19, 2020

**Citation:** 2267 EDA 2019

**Holdings:**

1. Child was not afforded the full benefit of legal counsel, therefore, the orders terminating parental rights were vacated and the matter remanded for further proceedings.
2. The trial court abused its discretion in changing the permanency goal from reunification to adoption without considering the 15-year-old child's position regarding permanency.

**Facts/Procedural Posture:** DHS received a GPS referral alleging that Mother did not have sufficient food, child was truant, housing was unstable, etc. Child and siblings<sup>1</sup> were adjudicated dependent in 2016. Mother was ordered to address mental health and ensure that Child attended school. Twenty days after adjudication a hearing was held where the court determined that Mother was not compliant and the child was removed and placed in foster care.

DHS filed petitions to involuntarily terminate Mother's parental rights in March 2018. At a January 2019 review hearing, the court held the termination of parental rights (TPR) hearing in abeyance so that Child's legal counsel could visit the child, age 15. Legal counsel interviewed the child while he was in a residential treatment facility but did not interview him again after he was placed in a foster home. The TPR and goal change hearings were held in July 2019. Counsel placed the child's position, that he preferred to be with Mother, on the record and left the courtroom. Counsel did not call witnesses or present any evidence in support of the child's position. After orders were issued granting the agency's petitions, Mother and GAL filed notices of appeal.

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<sup>1</sup> The sibilngs' cases were heard at In re: D.N.G., 230 A.3d 361 (2020 PA Super 62).

**Issues:**

1. Whether the trial court violated the child's statutory right to legal counsel during an involuntary termination proceeding when counsel did not ascertain the child's position.
2. Whether the trial court erred in changing the permanency goal from reunification to adoption.

**Rationale:** Superior Court reviewed section 2313(a) regarding the child's right to counsel. The Court previously determined that the failure of a court to appoint counsel to represent a child's legal interests in a contested termination hearing is a structural error.

In March 2020, the Court considered the same legal counsel's performance as it related to D.G.'s sibling. (*In re: D.N.G.*, 230 A.3d 361 (2020 PA Super 62)) and relied heavily on its prior analysis in the instant matter. The *D.N.G.* Court rejected the notion that legal counsel adequately discharges his duties toward the child simply by interviewing the child and reporting his/her position to the court. Legal counsel is required to provide zealous, client-directed representation. Additionally, the Court in *D.N.G.* identified legal counsel's deficiencies of failing to offer any evidence to support his client's position, but most importantly failed to argue that his nearly 12-year-old client would refuse to sign a consent to adoption.

In the instant matter, the trial court appointed legal counsel to represent D.G and D.N.G., but because legal counsel did not interview D.G., the cases were heard separately. However, similar deficiencies in representation deprived both children of their statutory right to legal counsel in the respective proceedings. Here, legal counsel placed his 15-year-old client's position on the record and failed to cross examine any of the agency's witnesses or present any evidence. The Court held that the holding in *D.N.G.* is controlling; as such, the order terminating Mother's parental rights must be vacated and the matter remanded for further proceedings.

The Court next turned to the issue of the goal change from reunification to adoption. The trial court found witnesses credible who testified that D.G. was doing well in the foster home with his sibling, but failed to take into consideration that there was uncertainty in the child's willingness to be adopted or sign a consent to adoption. The Superior Court held that the trial court abused its discretion when granting the change of goal and vacated the order.

The companion case, *In the Interest of D.N.G.*, can be found in the [March 2020](#) legal report.



### Spotlight

#### Denelle v. Denelle, 617 WDA 2020 (Lawrence)

Mother and Putative Parent began dating when Mother was three months pregnant and later married. Although the birth father was responsible for support by agreement, Putative Parent's name appears on the Acknowledgement of Paternity (AOP) and birth certificate. During the marriage, Putative Parent completed gender confirmation surgery. After the marriage dissolved and Mother sought public assistance, a Complaint for Support was filed against Putative Parent. At a hearing contesting the Order of Support against Putative Parent, Mother testified that Putative Parent was not the biological father, but signed the "papers" at the hospital. Mother requested that Putative Parent's name be removed from the paperwork. The trial court dismissed the complaint on the testimony of Putative Parent that she did not sign the AOP and no other evidence was presented to the contrary. No evidence of fraud, duress, or mistake of fact was presented. The trial court opined that the rule requiring evidence of fraud, duress, or mistake of fact was not triggered because Putative Parent denied signing the AOP. Superior Court affirmed the order dismissing the complaint for support against putative parent validating the lower court's rationale.