# October 2020 Legal Report SWAN Legal Services Initiative

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## SUPREME COURT OF PENNSYLVANIA

#### Spotlight: Commonwealth v. Jones

On April 5, 2016, a jury trial was held based upon allegations that Child's Step-father had sexually abused the child from the ages of thirteen until seventeen. At the trial, the Commonwealth called the detective who interviewed the child during the criminal investigation as a witness in order to address some of the discrepancies in the child's testimony regarding the time and locations of some of the acts of abuse. During direct examination, the detective testified that he had ten years of law enforcement experience, that he had handled hundreds of child sexual assault cases, and that in his training and experience, he often encountered child victims who had trouble recounting exact dates and details of the abuse they suffered. Counsel for Stepfather objected to this testimony on the grounds that the Commonwealth failed to qualify the detective as an expert witness before presenting his testimony. The trial court overruled the objection, and, at the conclusion of the trial, the jury found Step-father guilty of numerous sexual offenses. He was sentenced to a term of twenty-seven to sixty years of imprisonment. Stepfather then appealed to the Superior Court who, in a divided opinion, affirmed the trial court's order. Step-father then appealed to the Supreme Court who reversed the Superior Court order and remanded the case for a new trial. The Supreme Court found that the detective's testimony constituted impermissible expert witness testimony, as his testimony was based upon his training and experience in investigating child sexual assault cases, and, as such, the detective should have been qualified as an expert prior to the presentation of his testimony. The Court further opined that the enactment of 42 Pa. C.S.A. §5920<sup>1</sup> does not render the holding from Commonwealth v. Dunkle, 602 A.2d 830 (Pa. 1992)<sup>2</sup> invalid, as Dunkle does not categorically preclude expert testimony regarding victim responses to sexual abuse, but rather precludes such testimony that touches upon witness credibility.

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<sup>&</sup>lt;sup>1</sup> 42 Pa. C.S.A. §5920 allows for expert witnesses to testify regarding victim behavior in response to sexual abuse and makes inadmissible any credibility determinations by the expert regarding another witness or the victim.
<sup>2</sup> In <u>Commonwealth v. Dunkle</u>, the Supreme Court determined that testimony regarding the inability of sexually abused children to recall details of assaults was something that could be easily understood by laypeople, and therefore did not require expert analysis. The Court further concluded that allowing expert testimony on this subject would invade the jury's authority to make credibility determinations.

## SUPERIOR COURT OF PENNSYLVANIA

#### In Re: Adoption of B.G.S.

Date of Decision: October 7, 2020 Citation: 829 EDA 2020

**Holdings:** The Superior Court denied Father's counsel's petition to withdraw under <u>Anders v</u> <u>California</u>, 386 U.S. 738 (1967), and remanded for the filing of additional briefs, as Father's appeal of the termination of his parental rights was not wholly frivolous.

**Facts and Procedural Posture:** 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. Father appealed and counsel for Father sought to withdraw via an <u>Anders</u> brief.

Did you know?

An Anders brief is a brief filed by an attorney who wants to withdraw from a case on appeal, based on the belief that the appeal is frivolous.

**Issue:** Was Father's appeal wholly frivolous under <u>Anders</u>, thus permitting Father's Counsel to withdraw from the appeal?

**Rationale:** At the onset of their analysis, the Court determined that Father's Counsel had satisfied the preliminary provisions of <u>Anders</u>, as Counsel provided the Court with a copy of her letter advising Father of his right to obtain new counsel, a summary of facts and procedural history, a list of issues that could arguably support Father's appeal, an assessment of why those issues are frivolous, and citations to the record and relevant legal authority. After determining that the preliminary requirements were met, the Court then turned its analysis to reviewing the record to see if any non-frivolous issues were present. To begin this analysis, the Court looked at 23 Pa. C.S.A. §2511(a)(1), and noted that while there is a requirement that parents make good faith efforts to maintain a relationship with the child, that case law makes clear that a parent

need not perform the impossible. The Court further expressed that even in situations where a parent has no contact with a child for more than six months, the law does not require termination of parental rights where the parent faced obstacles preventing contact with the child and made reasonable good faith efforts to overcome those obstacles. The Court then determined that because the law does not require parents to perform the impossible, it may have been improper for the court to hold Father responsible for failing to perform parental duties, where he did not know that he had a child and may not have had reason to know. The Court also opined that Father may have had four or five months to perform parental duties from the time that he learned of the child's existence until TAA filed their termination petition, which is well below the "at least six months" requirement, thus indicating that Father may have a viable appeal in relation to §2511(a)(1).

The Court then turned its analysis to the termination of Father's rights under 23 Pa. C.S.A. §2511 (a)(6), and determined that the termination order may have been contrary to the plain language of that provision. 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 old or younger. This presents another possible means of appeal, as the child in the present case was eight months old at the time the termination petition was filed. The Court also noted that §2511(a)(6) requires that the parent knows or has reason to know of the child's birth. In the present case, it is undisputed that Father was not aware of the child's birth or that the child was placed with TAA. As such, 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).

#### In the Interest of Y.W.B.

Date of Decision: October 8, 2020 Citation: 1642 EDA 2019

#### Holdings:

- 1. Mother's appeal is not moot, as it involves a question of law that is capable of repetition and is likely to evade appellate review.
- 2. The four corners rule will not apply in situations where the trial court held a hearing on an agency's petition to compel a home visit.
- 3. The trial court applied the appropriate legal standard to determine that probable cause existed to grant the agency's petition to compel a home visit.
- 4. The trial court violated Mother's First Amendment rights by inappropriately prohibiting her right to record DHS workers while they are conducting a home visit.

**Facts and Procedural Posture:** On May 22, 2019, the Philadelphia Department of Human Services (DHS) received a general protective services (GPS) report alleging that three weeks prior, the family had been seen sleeping outside of the Philadelphia Housing Authority (PHA) office and that the day before, Mother had been seen outside the PHA office for eight hours with a child. In response, DHS attempted to conduct a home visit, but Mother and Father refused to allow them entry into the home or access to the children. On May 31, 2019, DHS filed a petition to compel Mother's cooperation with a home visit. The petition also contained allegations that it was

unknown if Mother had fed the children while she was outside of the PHA office, and that Mother had told a Project Home worker that her previous residence had "burned down." The petition also contained an allegation that the DHS caseworker, while being denied entry into the home, did observe that one of the windows outside of the home was boarded up. On June 11, 2019, after a hearing, the trial court determined that probable cause was presented to grant the petition. While the family was arranging to have the home visit with DHS, Mother recorded the conversation with the DHS worker and posted it to social media. DHS sought and was granted an order directing Mother not to record or post the upcoming home visit, and ordering Mother to remove the video she posted to social media. Mother then appealed.

#### Issue:

- 1. Is the appeal moot and therefore not subject to review?
- 2. Did the court err by not applying the "four corner" legal standard to their review of the petition to compel?
- 3. Did the trial court err by determining that there was probable cause to grant the petition to compel?
- 4. Did the trial court err by issuing an order prohibiting Mother from recording the DHS home visit?

**Rationale:** In response to the notice of appeal filed by Mother, the trial court filed a responsive opinion in which it was asserted that Mother's appeal is moot as the home visit had already taken place as ordered. The Superior Court looked to <u>In re: Petition to Compel Cooperation with a Child Abuse Investigation</u>, 875 A.2d 365 (Pa. Super. 2005), where the Court determined that cases in which parents are compelled to comply with home investigations by agencies are not moot, as they involve questions of great importance, are capable of repetition, and are likely to evade appellate review. The Court then turned to the present case and determined that similar to <u>In re: Petition to Compel</u>, Mother's claims involve constitutional questions of public importance that are capable of repetition and are likely to evade appellate review, therefore the Court determined that Mother's appeal is not moot and her claims should be addressed.

The Court then turned its analysis towards Mother's assertion that the "four corner" rule for reviewing criminal search warrants should have been applied to the trial court's analysis of the petition to compel. The "four corner" rule derives from criminal law. It requires that police officers seeking a search warrant demonstrate probable cause within the application and affidavit for probable cause (within the four corners of those documents) and that courts are not allowed to consider evidence outside of these documents. The Superior Court noted that there is a difference between the search warrant procedure in criminal law, as it is *ex parte*, as opposed to the petition to compel procedure, where parents are afforded a hearing in which they can cross-examine witnesses and present evidence to challenge probable cause before the petition to compel is granted. The Court further asserted that trial courts may have prior experience with the family, which may be relevant to the



"Ex Parte" means "on one side only; by or for one party; done for, in behalf of, or on the application of, one party only."

A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to or contestation by, any person adversely interested. probable cause determination and is a permissible consideration in petition to compel cases. As such, the Court held that they are unwilling to apply the "four corner" rule, where the trial court holds a hearing on an agency's petition to compel and the parents have been afforded the opportunity to challenge the petition.

The Court then assessed the issue relating to whether probable cause was presented for the trial court to grant CYS's petition to compel. In its analysis, the Court once again looked to the holding from <u>In re: Petition to Compel</u>, in which it was determined that an agency may obtain an order compelling a parent's cooperation with a home visit upon showing that there is a fair probability that a child is in need of services, and that evidence relating to that need will be found in the home. After reviewing the record of the hearing, the Court determined that the averments in the petition were supported by evidence, as the record demonstrated that Mother was outside of the PHA office and that there was a fire at Mother's residence (as DHS observed the boarded-up windows). The Court also noted that the trial court was allowed to consider the family's history with DHS in granting the petition. As such, the Court affirmed the trial court's order as it related to the petition.

The Court then turned to the issue regarding whether the trial court was authorized to prohibit Mother from recording the home visit. In their analysis, the Court looked to the Third Circuit's ruling in Fields v. City of Philadelphia, 862 F.3d 353 (3d. Cir. 2017), to determine that First Amendment protections extended to Mother's right to record, and, as such, that the intermediate scrutiny legal standard should apply<sup>3</sup>. The Court then turned to the record of the case and noted that there was no evidence of any countervailing interest presented to support DHS's no recording provision, as the trial court granted DHS's request based solely on DHS's counsel's assertions regarding the recording, without hearing the testimony of the DHS worker. The Court further opined that while they acknowledge the trial court's concerns regarding the privacy interests of children, that their holding is limited specifically to the right to record DHS employees conducting an assessment of a home, and not Mother's posting of such videos to social media. As such, the Court reversed the trial court's provisions relating to the recording of the home visit, as DHS failed to establish that the no-recording provision was reasonable. In the decision, the Court also made clear that this holding does not make the right to record absolute, but that it is subject to the reasonable, time, place, and manner restrictions found in the Fields case.

<sup>&</sup>lt;sup>3</sup> Intermediate Scrutiny is a legal test to determine the constitutionality of a law or regulation. To pass the intermediate scrutiny test, the challenged law must further an important government interest and must do so by means that are substantially related to that interest.

#### D.Q. v. K.K., J.M. and Schuylkill County CYS

**Date of Decision:** October 15, 2020 **Citation:** 124 MDA 2020

**Holdings:** The trial court appropriately analyzed the custody best interest factors and determined that it is in the children's best interest for custody to remain with the agency and that Maternal Grandmother has to complete the ICPC process before the children can be placed with her in New Hampshire.

Facts and Procedural Posture: The children were adjudicated dependent on April 18, 2019, and they were placed in foster care due to housing concerns and concerns regarding the parents' drug use. Maternal Grandmother came forward as a placement resource. However, Schuylkill County Children and Youth Services (CYS) advised her that she would need to complete the Interstate Compact Process (ICPC) before the children could be placed with her, as Maternal Grandmother resided in New Hampshire. On July 30, 2019, Maternal Grandmother filed a custody complaint seeking legal and primary physical custody of the children. On November 26, 2019, the trial court held an evidentiary hearing regarding the custody complaint and heard testimony from CYS that the agency had an extensive history with Maternal Grandmother starting in 2007 and continuing until 2013, involving issues of non-compliance with the agency, domestic violence, drug use, medical neglect, housing instability, and truancy. CYS further testified that Maternal Grandmother's history of medical neglect is particularly concerning because one of the dependent children has a respiratory issue that requires routine medical treatments. CYS also expressed concern that Maternal Grandmother resides with her son, who struggles with drug addiction, and that the children's parents moved within close proximity of Maternal Grandmother, and that they were still struggling with drug addiction as well. After examining the evidence presented, the trial court ruled that it is in the best interest of the children to remain in CYS custody and ordered that Maternal Grandmother complete the ICPC process. Maternal Grandmother appealed.

**Issue:** Did the trial court err in failing to award Maternal Grandmother sole custody of the children and ordering her to complete the ICPC process?

**Rationale:** The Superior Court examined the record of the case and determined that the best interest factors under 23 Pa. C.S.A. §5328 were properly applied, as the trial court adequately considered Maternal Grandmother's concerning history with the agency, as well as the safety concerns presented by having the children's parents and uncle, who all struggle with drug addiction, nearby. The Court also expressed concern regarding Maternal Grandmother's lack of a viable childcare plan, which would allow her to provide care for the three children (who are all under the age of three) while also working full time as a nurse. The Court also determined that it was appropriate for the trial court to consider the ICPC within the best interest factors, as 62 P.S. §761, requires that Pennsylvania obtain approval from other states (in this case, New Hampshire), prior to placing children out of state. The Court further assessed that the completion of the ICPC is essential in allowing CYS to obtain information about the safety of the children before sending them to New Hampshire. As such, the Court held that the trial court appropriately analyzed the best interest factors and determined that custody should remain with CYS.

#### Spotlight: Pennsylvania Legislation

#### Act 83 of 2020

On October 29, 2020, Act 87 of 2020 was enacted to amend the expungement and clean slate provisions of the Criminal Code. The purpose of these amendments is to allow for the expungement of an individual's record if they have been fully acquitted of all charges, based on the same conduct or arising from the same alleged criminal episode. These amendments also allow for the Commonwealth to receive notice of a potential expungement and to have an opportunity to object and conduct a hearing. These amendments take effect in 60 days. For more information on Act 83, please click <u>here</u>.

#### Act 95 of 2020

On October 29, 2020, Act 95 of 2020 was enacted to amend §2512 and to add §2514 to the Pennsylvania Domestic Relations Code (Code). These provisions were amended to allow victims of rape or incest who conceive a child to be able to seek the involuntary termination of the other parent's rights without averring that the petitioning parent will assume custody of the child, or that adoption is being contemplated. These amendments take effect in 60 days. For more information on Act 95, please click <u>here</u>.

#### Act 97 of 2020

On October 29, 2020, Act 97 of 2020 was enacted to amend Title 57 of the Pennsylvania Consolidated Statutes to allow notaries the ability to perform notarial acts for remotely located individuals. In order to perform notary services remotely, the notary must have personal knowledge of the identity of the requesting individual, evidence of the identity of the requesting individual by oath or affirmation from a credible witness, or the notary is able to identify the requestor by two different types of identity proofing processes or services. Act 97 takes effect immediately and for more information on Act 95, please click <u>here</u>.

#### Amendment to PA Rules of Juvenile Court Procedure 1128

On October 14, 2020, the Pennsylvania Supreme Court issued an order amending Pennsylvania Rule of Juvenile Court Procedure 1128 to emphasize the requirement that children must be present at dependency proceedings unless there is good cause for their absence. The comment to Rule 1128 was also amended to emphasize that the exceptions to a child's presence at dependency proceedings are to be based on individual circumstances and to express the requirement that the child be physically present in court at least every six months. These amendments take effect on January 1, 2021. For more information on the rule change, please click <u>here</u>.

#### Amendment to PA Rules of Civil & Appellate Procedure

On October 22, 2020, the Pennsylvania Supreme Court issued orders amending Pennsylvania Rules of Civil Procedure 1915.10 & 1930.1, as well as Pennsylvania Rules of Appellate Procedure 904 & 907. These amendments allow courts to order the use of initials in the caption to child custody actions and appeals arising from custody actions. Under these amendments, courts are authorized to use initials when the child's privacy may be compromised by the sensitive nature

of the facts in the case record and when it is determined to be in the child's best interests to do so. These amendments take effect on January 1, 2021. For more information on the rule change, please use the links provided below.

<u>Rules of Civil Procedure 1915.10 & 1930.1</u> <u>Rules of Appellant Court Procedure 904 & 907</u>

#### **Spotlight: Federal Legislation**

#### Savanna's Act and the Not Invisible Act of 2019

On October 10, 2020, President Trump enacted Savanna's Act and the Not Invisible Act of 2019, which are aimed at addressing the tragedy of missing and murdered Native Americans. Both of these statutes may be viewed in their entirety at the links provided below.

<u>Savanna's Act</u> Not Invisible Act of 2019

#### The National Suicide Hotline Designation Act of 2020

On October 17, 2020, President Trump signed the National Suicide Designation Act of 2020 (Act). This law requires the Federal Communications Commission (FCC) to designate 9-8-8 as the universal telephone number for a national suicide prevention and mental health crisis hotline. The law also mandates that the Assistant Secretary for Mental Health and Substance Use develop a strategy to provide nationwide suicide prevention and crisis services for LGBTQ youth, minorities, individuals in rural areas, or other high-risk populations. For more information, please view the Act in its entirety here.

#### The Intercountry Adoption Information Act of 2019

On October 30, 2020, The Intercountry Adoption Information Act of 2019 (Act) was enacted to amend the Intercountry Adoption Act of 2000, to require the Secretary of State (Secretary) to report on intercountry adoptions from countries that have significantly reduced adoptions involving immigration to the United States. In accordance with these amendments, the Secretary will compile a report that lists the countries that have laws that prevent or prohibit adoptions by United States citizens, and the steps the Secretary has taken to reopen adoptions. For more information, please view the Act in its entirety <u>here</u>.