

September 2019

Legal Report

SWAN Legal Services Initiative

A monthly publication from the SWAN Legal Training Team

In This Issue:

Major v. Luzerne County Children and Youth Services

In re: Involuntary TPR of J.R.E.

In the Interest of: J.J.M.

In the Interest of J.M.

In re: Adoption of K.M.G.

New OCYF Bulletin

Legal Training Team

Division Manager

Ilene Dubin, Esq.

Training Specialists

Lauren Peters, Esq.
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

lsiwarmline@diakon-swan.org



UNITED STATES DISTRICT COURT, M.D. PENNSYLVANIA

**Major v. Luzerne County
Children and Youth Services**Citation: 2019 WL 4573380
Date of Decision: September 20, 2019**Holding:**

Court found that Father failed to state a claim for either procedural or substantive due process violations, and granted motions for judgment on the pleadings filed by Luzerne County, Philadelphia Department of Human Services, Division of Children and Youth (DHS) and the City of Philadelphia, effectively dismissing the case.

Facts and Procedural Posture:

In 2014 Father was granted primary physical custody of Children, Mother retained shared legal custody and periodic visitation. In January 2016, Philadelphia DHS received and investigated a Child Protective Services Report. After observing bruising on the five-year-old's face and shoulder, DHS interviewed father who admitted that he had caused at least some of the bruising by hitting Child with a belt. DHS obtained an Order for Protective Custody and placed Children with Mother. Mother had a long history of mental health concerns, drug use and credit card fraud charges. LCCYS declined Philadelphia DHS's request for a courtesy home visit of Mother's home and DHS made no further attempts to arrange for a home visit. On February 23, 2016, an adjudicatory hearing was held and an order was issued finding Children were not dependent. It was ordered that legal and physical custody would remain with Mother. On October 25, 2017 while Mother was working, Mother's ex-paramour set fire to her home, and both of the young children perished. Father brings this suit as Administrator of the minor children's estates. The complaint alleges that the defendants failed to adhere to their mandated safety protocol, policies and procedures in returning Children to the custody of Mother, knowing that the environment was unsafe, and that these failures proximately caused the Children's deaths. Father further alleges that the defendants failed to obtain clearances for Mother before the children were placed back in her custody and that even a cursory review of her records would have demonstrated her instability. Father contends that these failures constitute a deprivation of procedural due process because there existed reason to believe that the safety of the children would be jeopardized by being placed back in Mother's home. Additionally, Father alleges that the fact that the children were placed with Mother even though there was no evidence that returning the children to his home would not be in the children's best interests, violated the children's substantive due process rights to familial integrity. Luzerne County, Philadelphia DHS and the City of Philadelphia filed a motions for judgment on the pleadings.

Issue:

Did Father fail to state a claim for either procedural or substantive due process violations where Children were placed with their mother in Luzerne County through Philadelphia DHS, Luzerne County CYS declined to perform a courtesy home visit, and a year and a half later, the children died by arson in Mother's home?

Rationale:

Looking at the procedural due process claim first, the District Court states that procedurally, “the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” Here, that Court finds that Father and Children were afforded all the procedural due process owed them in relation to Children’s placement. The Court based this on interviews that were conducted with Children and Father during the initial investigation and the fact that Father attended and was represented by counsel at both the Shelter Care and Adjudicatory hearings. Therefore, the court finds that Father has failed to state a procedural due process claim as he, on behalf of Children, had ample opportunity to be heard with regard to any concerns regarding the placement of Children.

Turning to the substantive due process claim, the Court explained that allegations of negligence or lack of objectively reasonable grounds for a decision, fail to rise to the level of a substantive due process violation. *Miller v. City of Philadelphia*, 174 F.3d at 376 (3d Cir. 1999). Instead, the plaintiff must show that the actions of the defendants “shocks the conscience.” *Id.* at 375. Here the Court found that returning Children to Mother, who already held shared legal custody and partial physical custody, did not rise to this level. Additionally, the Court found that there is no liability under a theory of “state created danger” because there is nothing alleged to establish that the harm to Children resulting from the actions of a third party in setting fire to Mother’s home was foreseeable to the defendants who, almost two years earlier, had been discharged of any obligations with regard to the children.”

SUPERIOR COURT OF PENNSYLVANIA

In re: Involuntary TPR of J.R.E.

Citation: 2019 Super 269

Date of Decision: September 3, 2019

Holding:

Superior Court reversed a termination of parental rights when Father failed to establish that mother evidenced settled purpose of relinquishing parental claim to child; trial court erred in failing to consider whether such termination served developmental, physical, and emotional needs and welfare of child.

Facts and Procedural Posture:

Mother and Father are the biological parents of Child, who was born in November 2006 in Florida. Initially, child resided with Mother in Florida and Father lived in Pennsylvania. In May 2007, when Child was approximately six months old, Mother took Child to a hospital with hemorrhaging in the eyes and swelling of the brain, injuries consistent with shaken baby syndrome. Mother admitted to Florida authorities that her paramour caused the injuries. Child was removed from Mother’s care and eventually placed with Father in Pennsylvania. Child was raised to believe that Father’s wife was his biological mother. Over the years, Mother occasionally reached out to Father via phone and social media to inquire about Child, and she infrequently sent packages to Child. Father refused to allow contact between Mother and Child. In 2017, Mother flew to Pennsylvania in hopes of having contact with Child, but Father did not allow a visit. Mother filed a complaint seeking custody of Child and seeking Child's enrollment

in counseling aimed at exploring reunification. Father then sought to involuntarily terminate Mother's parental rights pursuant to 23 Pa.C.S.A. § 2511(a). At trial, the GAL recommended that Mother's parental rights be terminated since Child did not know of Mother's existence and since reunification would not be in Child's best interest. The trial court adopted the GAL's recommendation and determined that Father met his burden of proof under 23 Pa.C.S.A. § 2511(a)(1).

Issue:

Was termination of parental rights proper under 23 Pa.C.S.A. § 2511(a)?

Rationale:

The Superior Court concluded that Father did not meet his burden, as he failed to show through clear and convincing evidence that Mother “for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.” 23 Pa.C.S.A. § 2511(a)(1). The Court reasoned that, “although the record establishes that Mother had no contact with Child during the relevant statutory period, and very little contact for a lengthy period prior to that timeframe, it is equally clear that the lack of contact and support is due, in substantial part, to a lack of cooperation and reasonable accommodation on the part of Father, the custodial parent.” The Court noted that the trial court made no effort to look into Mother’s explanation of her conduct and thus the record was insufficient to support termination. While it was not necessary to examine the 2511(b) needs and welfare analysis, the Court felt compelled to do so in this case. The trial court held that reintroducing Mother to Child would be disruptive and therefore, not in Child’s best interest. The Court disagrees with this analysis because Child has an interest in the correct identification of his biological parents. The Court goes on to say, “permanently severing a bond a natural parent and a child in order to perpetuate a relationship built upon a misrepresentation does not, clearly and convincingly, serve the long-term well-being and emotional interests of Child.”

In the Interest of: J.J.M.

Citation: 2019 Super 277

Date of Decision: September 10, 2019

Holding:

Superior Court affirmed adjudication of delinquency for terroristic threats, holding that a threat made in a school setting with the mental state of recklessness falls outside the protections of the First Amendment.

Facts and Procedural Posture:

J.J.M. appeals from the dispositional order entered following his delinquency adjudication for terroristic threats. At the time of the events in question, J.J.M. was a fifteen-year-old student at a vocational high school in Luzerne County. Other students reported hearing J.J.M. saying that, “he doesn’t think people deserve to live and everyone should just die” and that, “he was going to break the record of 19.” The students and school officials inferred that he was referring to the

Parkland school shooting, which occurred six days earlier where 17 people were killed. He was expelled from school and charged with terroristic threats under 18 Pa.C.S.A. § 2706(a)(3). He was adjudicated delinquent and placed on probation, which required that he comply with mental health recommendations, and prohibited him from having any contact with weapons.

Issues:

1. Whether the Commonwealth presented sufficient evidence to conclude that [Appellant] violated 18 Pa.C.S.A. § 2706(a)(3)?
2. Whether the terroristic threats statute violates [Appellant's] 1st Amendment right under the United States Constitution to free speech?
3. Whether the terroristic threats statute is unconstitutional and, as applied, in violation of [Appellant's] due process rights under the 5th and 14th Amendments of the United States Constitution?

Rationale:

First the Court looked to see if there was evidence of a violation of 18 Pa.C.S.A. § 2706(a)(3). J.J.M. argues that taken alone his statement about beating the record does not constitute a threat. The Court holds that given the special circumstances of threats made in a school setting, his words expressed an “intent to cause harm and an indication of impending menace” and thus were a threat. Additionally, J.J.M. contends that the evidence does not support a finding of *mens rea* beyond negligence because he didn't know that anyone who overheard his statements would associate it with previous school shootings. The Court finds the conduct rose to recklessness as it was proclaimed loudly in the hallway between classes while the news was dominated by the deadliest high school in the country's history. Next, the Court turned to examine the First Amendment violation claim. It is settled law that statements with the intent to threaten are not protected under the First Amendment. The question here is, does the First Amendment protect reckless threats? The Court finds that J.J.M., who had cultivated an image as someone who relished the thought of death, must have known the effect his words would have on fellow classmates in the wake of the Parkland shooting. The Court concludes that given the special circumstance here, statements made in a school just days after a well-known school shooting, the First Amendment was not intended to protect this reckless threat. Finally, the Court addresses the due process claim that the statute is invalidly vague because he had no reason to expect, based upon the language of the statute, that he could be in violation of it through the combination of two different statements that he said weeks apart from each other. The Court rejected this argument because the “beat the record of 19” was the threat that sustains his adjudication while the other statements about wanting people to die just provided context.

In the Interest of J.M.

Citation: 2019 PA Super 280

Date of Decision: September 13, 2019

Holding:

A restriction on the location of visits that does not eliminate contact altogether and could be revisited in a month is not the type of order that constitutes an appealable final or collateral order.

Facts and Procedural Posture:

Mother appeals from the December 27, 2018 order the juvenile court entered in the dependency matter of her minor children. Children were adjudicated dependent in June 2017 and subsequently removed from Mother's care in December 2017. Children's goal was reunification, and visitation was ordered to occur at Children's placements and occasionally at Mother's home. There was a permanency review hearing scheduled for December 27, 2018 and two pending motions from Mother seeking the return of Children and a home pass to allow a visit during Children's school break. Because there was not sufficient time to hear all of the Agency's evidence, the juvenile court continued the hearing. The parties agreed that in the meantime, Children could visit Mother in her home for several days around the New Year holiday, provided that Mother and Children all submitted to a drug screen and tested negative for any illegal substances. A written order documented the agreement and set a date of January 23, 2019 for continue hearing the matter. It is from this order that Mother appeals.

Issue:

Is a dependency order appealable where it puts conditions on the location of visitation and is scheduled to be revisited in a month?

Rationale:

The Court began its analysis by citing the rule that "in order to be appealable, the order must be: (1) a final order, (2) an interlocutory order appealable by right or permission, or (3) a collateral order." The Court first looks at whether the order here is a "final order." Generally, a final order is one that disposes of all claims and all parties. Unlike other types of cases, dependency matters tend to be ongoing and subject to periodic review. The Court compares the matter at hand to other cases and determines that a status change order should be treated as final. The Court concludes that this order is not a status change and further was continued for one month so it is not a final order. The Court next explores whether this order is a collateral order which requires: (1) it is separable from and collateral to the main cause of action; (2) the right involved is too important to be denied review; and (3) the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost. The Court recognizes inconsistency in the caselaw about what exactly is the "main cause of action" in dependency cases as sometimes it's been the underlying dependency adjudication, other times it has focused on broad goal at a particular stage in the case, and other times courts have looked to the purpose of each particular hearing. Ultimately, the Court decides that, here the second two prongs of the collateral analysis are not met. Concluding that while visitation is a very important right, here the conditions just temporarily put limitations on the location of the visits. Also, noting that the right to visit, and even visit in Mother's home, was not lost irreparably as the decision would be revisited in one month. Therefore, the Court held that this order is not an appealable final or collateral order and quashed the appeal.

In re: Adoption of K.M.G.

Citation: 2019 PA Super 281

Date of Decision: September 13, 2019

Holding:

Affirmed involuntary termination of parental rights and, in doing so, overruled the Court's prior decision in *In re Adoption of T.M.L.M.*, holding that the Superior Court does not have the authority to review *sua sponte* whether a conflict existed between counsel's representation and the child's stated preference in an involuntarily termination of parental rights proceeding.

Facts and Procedural Posture:

The underlying appeal of Mother's TPR is upheld, and is not the focus of the Court's decision. The Superior Court certified this case for *en banc* review to determine whether, in reviewing involuntary termination of parental rights decisions, the Court has the obligation to review *sua sponte* whether the GAL had a conflict. Previously, in *T.M.L.M.*, a three-judge panel of the Superior Court held that Superior Court must *sua sponte* make an independent determination of whether a GAL has a conflict in every involuntary termination case. *In re: Adoption of T.M.L.M.*, 184 A.3d 585 (Pa. Super. 2018).

Issues:

1. Is it mandatory that the Superior Court, in an appeal from an involuntary termination decision, review *sua sponte* whether the child's legal counsel and/or guardian *ad litem* ["GAL"] properly represented the child's legal interest, particularly in regard to whether there was a conflict between GAL's representation and the child's stated preference?
2. When a party properly raises the issue of whether a GAL has a conflict before the orphans' court, what is the standard of review that Superior Court must use to review the decision of the trial court?
3. When a party raises the issue that the GAL has an undisclosed conflict for the first time on appeal before Superior Court, must Superior Court remand the case to the orphans' court to determine whether a conflict exists or may Superior Court make its own determination from the certified record?
4. What factors must the orphans' court consider and findings the orphans' court must make in determining whether the child's preference differs from the child's best interests and thus, the GAL has a conflict?

Rationale:

First, the Court considers the question of the Court's duty to *sua sponte* raise issues of conflict between the children's best interest and legal interest when they are represented by a GAL at a TPR hearing. The Court concludes, "we now overrule *T.M.L.M.* because the Superior Court only has the authority to raise *sua sponte* the issue of whether the lower court appointed any counsel for the child, and not the authority to delve into the quality of the representation." The Court bases this finding on the Supreme Court's disfavor of intermediate appellate court's consideration of issues of *sua sponte* and preference for respecting orderly decision making and the existing process for parties to raise issues. The Court also notes that there are protections already in place to ensure that the GAL does not have a conflict at a TPR. The Rules of Professional Conduct require the GAL to notify the court of any conflict. Any party can raise the issue of a conflict at the orphans' court or the Superior Court level, and orphans' courts often

decide this issue. Second, the Court addresses the standard of review that the Superior Court must apply when reviewing an orphans' court decision that the GAL does not have a conflict and, therefore no separate counsel is needed to represent the child's legal interest at TPR. The Court finds that this is a factual determination and deference should be given to those findings absent abuse of discretion or error of law. Third, the Court turns to the standard of review to use when a party fails to raise the conflict issue before the orphans' court and raises it for the first time on appeal. In such cases, the Court determines that it should review the record to determine if the record is clear and undisputed about whether the child is able to express "a subjective, articulable preference" and if that preference differs from their best interest. Finally, the Court recommends the best practices for the orphans' court in determining if the GAL has a conflict. The Court suggests these steps: (1) The orphans' court should first determine whether the GAL has spoken with the child about the child's preferences regarding TPR and whether this inquiry results in the GAL having a conflict. (2) If the GAL represents to the court that there is not a conflict, the orphans' court should permit any other party to present evidence to support that party's position that the GAL has a conflict. (3) If the orphans' court at that point decides that it is necessary to question the child, the court should do so in a manner that is least difficult for the child. Further, the Court recommends that if it is possible to obtain the information from a mental health provider who is working with the child, that the court should hear that testimony in lieu of questioning the child.

SPOTLIGHT

New OCYF Bulletin

Issue Date: September 30, 2019

Effective: Immediately

Number: 3130-19-04

Subject: Serving Child Victims of Human Trafficking in Pennsylvania

This bulletin pulls together the various Federal and State laws related to child victims of human trafficking, including Commercial Sexual Exploitation and labor trafficking. To combat this crime, PA must ensure a multidimensional and interdisciplinary approach. Some important implications for CCYAs include:

- Required screening of potential victims of trafficking:
- Required assessment of potential victims of trafficking
- Participation in Multi-Disciplinary Investigative Teams (MDITs)
- Addressing the unique physical and mental health needs of victims
- Specialized placement, treatment and services for victims
- Concurrent jurisdiction between the Attorney General and district attorneys
- Dependency rather delinquency adjudication for offenses directly related to being a victim of trafficking
- Enhanced reporting requirements of missing children

This bulletin also contains three helpful attachments that provided even more information and resources:

- Attachment A: Child Victims of Human Trafficking Screening Tool
- Attachment B: Child Victims of Human Trafficking Assessment Tool
- Attachment C: Practice Guide to Serving Child Victims to Human Trafficking in Pennsylvania

Link to Bulletin: <http://swantoolkit.org/wp-content/uploads/OCYF-Bulletin-3130-19-04-Serving-Child-Victims-of-Human-Trafficking-in-Pennsylvania.pdf>