



# SWAN Legal Services Initiative

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## PENNSYLVANIA SUPERIOR COURT

### In the Interest of N.M., a Minor

Date of Decision: May 4, 2018

Cite: 154 EDA 2017

#### Holding:

Superior Court reversed permanency review orders wherein the Trial Court refused to consider kinship placement, evidence of compliance and progress, or medical evidence and vacated orders terminating parental rights.

#### Facts and Procedural Posture:

Child was removed from Mother after allegations of child abuse. Mother initially took NM to the pediatrician due to increased fussiness. The doctor diagnosed NM with an ear infection and prescribed antibiotics. Later that day, Mother returned to the pediatrician due to NM's continued fussiness and what Mother felt was a "popping" on the child's side. The doctor did not note any "popping" and believed the fussiness was due to the ear infection. When NM's fussiness increased overnight, Father took NM back to the pediatrician the next morning at which time a chest x-ray was ordered. Parents took NM to Children's Hospital of Philadelphia (CHOP) for the x-ray which revealed mildly displaced acute fractures of the sixth and seventh ribs. An MRI was ordered and the CHOP medical team opined that these injuries for a seven month old child were non-accidental and not likely the result of any genetic or metabolic causes. The only explanation Parents proffered for the injury was that NM's toddler brother sometimes runs into NM aggressively. Doctors did not believe this would explain the injury and NM and sibling were removed from parents' care. The older sibling was adjudicated dependent, but ultimately returned home and his case was closed.

At subsequent review hearings, parents were fully compliant with their family service plan; however, the trial court did not consider reunification, any changes to the supervised visits, or placement of NM with a pre-approved grandparent. The Court based these decisions on the fact that there was still no explanation for the child's injuries, and that parents needed to either "cop to it" or provide a reasonable explanation of the child's injuries before the court would consider any changes to visits or placement. Mother attempted to enter expert medical reports that would provide an explanation of the child's injuries but the court refused to consider the evidence, refused to permit testimony on this point, and refused to accept the appearance of a private attorney hired by Mother.

Orders were entered involuntarily terminating Mother's and Father's parental rights under §2511(a) 1, 2, 5, 8 and (b) based largely on Parents refusal to participate in mental health treatment to address and understand the causes of the injuries to NM.

Parents appealed the permanency review order refusing to place NM with paternal grandmother and the orders terminating parental rights.

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**Issues:**

There were many issues on appeal, which have been consolidated and amended for this report's purposes as:

1. Whether the trial court erred or abused its discretion by denying reunification when parents were in compliance with their goals or refusing to consider kinship placement.
2. Whether the trial court erred or abused its discretion by excluding evidence of the parents' compliance and finding that the agency met its burden by clear and convincing evidence to terminate parental rights.

**Rationale:**

Superior Court first determined that the permanency review orders, although not final, collateral or interlocutory orders, are reviewable on appeal as part of the entire record through the termination proceeding. The evidence of record identifies efforts made by parents to substantially comply with their goals, including submitting to all requested evaluations, therapy and parenting classes. The Trial Court's refusal to consider placement with paternal grandmother, who was assessed as being an appropriate resource, due to an unsubstantiated concern that parents would abuse visitation without agency oversight was deemed to be overreaching. Superior Court further identified the trial court's unwarranted speculation that Parents would abuse visitation if NM were placed in kinship care as the reason she remained in protracted foster care and an abuse of discretion. The trial court's refusal to consider kinship care or reunification despite Parents full compliance with their service plan created the very evidence relied on for the termination of parental rights. Superior Court described the lower court's treatment of this case as "judicially created parental alienation," and the lower court's rulings as contrary to the purposes of the Juvenile Act to preserve family when possible.

**In the Interest of A.W., a Minor**

Date of Decision: May 4, 2018

Cite: 328 EDA 2017

**Holding:**

Superior Court affirmed an order directing the Agency to vaccinate four minor children.

**Facts and Procedural Posture:**

AW was diagnosed with a rare form of epilepsy. Parents refused medical treatment based on a belief that the prescribed medication was increasing the child's seizures. Mother continued to refuse medical treatment and AW suffered forty-two seizures in one night causing him to be transferred to the PICU due to a deterioration in his medical condition. Upon investigation, the agency found that the three other children suffered from severe dental neglect. The children were adjudicated dependent. A permanency review order was issued requiring that the children be fully immunized and vaccinated so that their medical needs could be met. Parents objected to the order stating that they prefer to utilize natural modalities, such as marijuana. A hearing was held the following day regarding parents' objections to the order. The Court heard testimony from the caseworker and pediatrician and again ordered that the children be vaccinated. Parents appealed the court's order.

**Issue:**

Whether the trial court violated the parents' Constitutional Rights and due process rights in ordering that the children be vaccinated without a proper factual or legal basis.

**Rationale:**

Superior Court opined that the parents' position was not persuasive. The health, safety and welfare of any child involved in court proceeding governed by the Juvenile Act are foremost considerations. If a parent is unable or unwilling to consent to necessary medical treatment, the court may enter an order for said treatment against the wishes of the parent pursuant to 42 Pa.C.S. §6339(b). The Agency, as temporary legal custodian, is granted authority to make necessary medical decisions pursuant to 42 Pa.C.S. §6351(a)(2). The Public Welfare Code at 55 Pa. Code § 3130.91(2)(i) identifies immunizations as routine medical treatment for which an

agency can consent. “The juvenile court's decision was a reasonable exercise of discretion, as authorized by the salient statutory provisions addressing routine medical treatment.”

**In the Interest of N.B. a Minor**

Date of Decision: May 10, 2018

Cite: 527 WDA 2016

**Holding:**

Superior Court affirmed an order granting a Motion to Suppress filed on behalf of NB.

**Facts and Procedural Posture:**

Mother was concerned that NB and the twin sibling were engaging in sexually inappropriate behavior with a younger neighbor girl. Mother reported her concerns to the school and the police became involved. Mother complied with the police's request to bring her children to the police station for an interview. Mother gave consent for the interview to be recorded, the children were read their Miranda rights and each child was interviewed separately.

NB confessed to several sex acts during the interview and agreed to a subsequent interview if necessary. A delinquency petition was filed based on the confession. NB's counsel filed a Motion to Suppress. A hearing was held on the motion and Mother testified regarding NB's developmental delays and difficulties in school. NB testified regarding his academic challenges and the mental health treatment he received through school. He further testified that he did not understand that he could refuse to answer questions or leave the police station. The court granted the motion and held that NB did not knowingly, voluntarily or intelligently waive his Miranda rights. The Commonwealth appealed.

**Issue:**

Whether the court erred in granting the motion when Mother voluntarily brought NB to the police station, both Mother and NB were read the Miranda rights and both agreed that they understood.

**Rationale:**

Superior Court is not bound by any of the legal determinations made below and the standard of review is de novo. Since NB was the prevailing party, the Court considers only the evidence set forth below by JB and only those pieces of evidence submitted by the Commonwealth that are not contradicted. A totality of the circumstances analysis is employed when analyzing the waiver of rights by juveniles and the voluntariness of a juvenile's confession. In the instant matter, the record revealed that the police officer read the Miranda warnings quickly and did not provide them in writing. Due to NB's developmental delays, no significance was attached to the warnings. Mother encouraged NB to tell the truth and consequently, NB was not aware of his right to refuse to answer questions, to leave the station or to request counsel. NB believed that he was forced to be there by his Mother and directed to confess. Based on those factors, the Court concluded that he did not knowingly waive his rights.

**RULES OF JUVENILE COURT PROCEDURE**

**Rule of Juvenile Court Procedure 409 – Adjudication of Delinquency**

The Rule is amended to remove language regarding the termination of jurisdiction in delinquency matters and replacing it with language that “the petition shall be dismissed.” This change shall be effective on July 1, 2018.

**Rule of Juvenile Court Procedure 1140 – Bench Warrants for Failure to Appear**

The rule is amended to add section (a)(3) which provides as follows: The judge shall not issue an arrest warrant for a dependent child who absconds. The comment is amended to clarify that the rule does not preclude the issuance of a bench warrant for a child who is subject to the jurisdiction of the dependency and delinquency court or a pickup order for protective custody. The comments also clarify that the rule does not preclude judicial inquiry into efforts to locate a missing dependent child. This change shall be effective on July 1, 2018.

**Rule Juvenile Court Procedure 191 – Juvenile Court Hearing Officer’s Findings and Recommendations to the Judge**

This rule is amended to include a subsection B which is intended to ensure that a juvenile is advised of the right to challenge the hearing officer’s recommendation and post-dispositional rights if a judge accepts the recommendation in a delinquency matter.

**STATE LEGISLATION**

Senate Bill 844 was approved by Governor Wolf on May 4, 2018. The amendments shall take effect in sixty days. The legislation amends 23 Pa.C.S. §5324 Standing for any Form of Physical Custody or Legal Custody, Standing for Partial Physical Custody and Supervised Physical Custody and Consideration of Criminal Conviction by adding the following provisions:

(4) Subject to Paragraph (5), an individual who establishes by clear and convincing evidence all of the following:

- (i) The individual has assumed or is willing to assume responsibility for the child.
- (ii) The individual has sustained, substantial and sincere interest in the welfare of the child. In determining whether the individual meets the requirements of this subparagraph, the court may consider, among other factors, the nature, quality, extent and length of the involvement by the individual in the child’s life.
- (iii) Neither parent has any form of care and control of the child.

(5) Paragraph (4) shall not apply if:

- (i) a dependency proceeding involving the child has been initiated or is ongoing; or
- (ii) there is an order of permanent legal custody under 42 Pa.C.S. §6351 (a)(2.1) or (f.1)(3) (relating to disposition of dependent child).

The statute for standing at §5325 is also amended to permit grandparents and great-grandparents to petition for partial physical custody or supervised physical custody when the relationship with the child began either with the consent of the parents or by order of court if the parents have commended a custody action and do not agree as to whether grandparents or great-grandparents should have custody under this section.

The statute for consideration of criminal conviction at §5329 remains substantially in its current form, except that the word “parent” was changed to “party” in one instance acknowledging that a party may be someone other than a parent.