

SWAN Legal Services Initiative

July Legal Report

VOLUME 5, ISSUE 1

2018



INSIDE THIS ISSUE:

In The Interest of: J.B., Appeal of: J.B.	1
In Re: A.J.R.-H. and I.G.R.-H.	2
Washington v. Department of Public	4
In Re: Adoption of D.M.C. and A.L.C.	5
In Re: Adoption of: M.D.Q.	6
In Re: J.T.M.	6
In Re: G.M.S	7
In the Interest of E.O.	8
Burns v. Department of Human Services	9
E.M. v. Department of Human Services	10
OCYF Bulletin #3130-18-06	11
OCYF Bulletin #3130-18-02	11
Amendments to PA Rules of Civil Procedure	12
Amendment to Rule 7.3	12

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.

Contact the team:

lsiwarmline@diakon-swan.org

471 JPL Wick Drive
P.O. BOX 4560
Harrisburg, PA 17111

www.diakon-swan.org

PENNSYLVANIA SUPREME COURT

In The Interest of: J.B., Appeal of: J.B.

Date of Decision: July 18, 2018

Cite: 31 WAP 2017

Holding:

The Supreme Court reversed an order affirming the delinquency adjudication of JB holding that the evidence introduced at the adjudicatory hearing for charges of first-degree murder and homicide of an unborn child as related to the shooting death of JB's stepmother was insufficient to establish delinquency for the offenses beyond a reasonable doubt.

Facts and Procedural Posture:

JB was adjudicated delinquent at age eleven of first-degree murder and homicide of an unborn child and remanded to a secure facility until he reached age twenty-one. JB appealed to the Superior Court arguing that the verdict was against the weight of the evidence. The Superior Court vacated the order and held that certain key findings of the juvenile court were in fact against the weight of the evidence. The matter was remanded for additional proceedings. The Commonwealth appealed that order arguing that JB did not preserve those issues on appeal due to his failure to file post-trial motions. The Supreme Court held that there is no such requirement in the Juvenile Court Rules, but on remand directed JB to file post-dispositional motions *nunc pro tunc*.

In the post-dispositional motions, JB argued that the adjudication should be vacated because the evidence was insufficient as a matter of law to sustain the verdict. The juvenile court denied these motions, and JB appealed the denial of the motions to the Superior Court. The Superior Court then affirmed the order denying the post-dispositional motions, and it is from that order that JB appealed to the Supreme Court.

Issue:

1. Whether the adjudication of delinquency and corresponding orders were against the weight of the evidence.

Rationale:

The Supreme Court's review of trial evidence to determine whether the Commonwealth has proven each element of an offense beyond a reasonable doubt is well established. Upon review, the Supreme Court accepts as true the Commonwealth's evidence upon which, if believed, a jury or trial court could properly base its verdict. Similarly, the Commonwealth is entitled to the benefit of all reasonable inferences which could be drawn from the evidence it presented at trial. The Supreme Court has also consistently held that in the rare situation in which the evidence is so deficient that it does not support a finding of guilt beyond a reasonable doubt, the Court is not bound by factual findings and credibility determinations of the lower court.

(Continued on p. 2)

The Supreme Court discussed its findings in a similar case, *Commonwealth v. Woong Knee New*, 47 A.2d 450 (Pa. 1946) in which a homicide conviction was reversed on the grounds that the evidence was insufficient for a jury to have been convinced beyond a reasonable doubt that defendant murdered the victim. More specifically, the evidence supported two equal but inconsistent inferences. The Supreme Court concluded in this case that “all of the Commonwealth's forensic and eyewitness testimony, and all reasonable inferences derived therefrom, viewed in a light most favorable to it, was, at best ... equally consistent with two possibilities... The Commonwealth's evidence was, therefore, insufficient as a matter of law to overcome Appellant's presumption of innocence, and the juvenile court's adjudication of his delinquency for these serious crimes must be reversed.”

A full analysis of the evidence can be found in the Supreme Court's opinion linked below.
<http://www.pacourts.us/assets/opinions/Supreme/out/Majority%20Opinion%20%20ReversedVacated%20%2010362429840303980.pdf?cb=1>

Concurring Opinion by Justice Mundy: Justice Mundy agrees that the body of evidence was equally consistent with two plausible possibilities and, as such, the Commonwealth failed to meet its burden of establishing guilt beyond a reasonable doubt. However, the concurring opinion emphasizes that this ruling does not alter the standard for circumstantial evidence and that circumstantial evidence can itself be sufficient to prove any or every element of the crime.

In Re: A.J.R.-H. and I.G.R.-H.

Date of Decision: July 18, 2018
Cite: 38 MAP 2017

Holding:

The wholesale admission of 167 exhibits in a hearing to involuntarily terminate Mother's parental rights did not satisfy the business records exception to the prohibition against the admission of hearsay and the error was not harmless.

Facts and Procedural Posture:

The agency filed petitions to involuntarily terminate the parental rights of both Mother and Father. The agency alleged that Mother was unable to appropriately parent, failed to obtain and maintain appropriate housing, obtain and maintain a legal source of income, failure to remediate her substance abuse issues, and ongoing issues with mental health and domestic violence. Prior to the commencement of the hearing, the solicitor moved to admit exhibits 1-168 which were described as 1230 pages of documents that originated from a variety of sources and authors, including referrals made by anonymous reporting sources, psychological and domestic violence evaluations of Mother, drug and alcohol treatment evaluations, substance abuse monitoring and urinalysis results, emails to and from agency workers, observation notes from in-home workers, police reports, criminal records, Protection from Abuse Orders (PFAs), notes from telephone calls, family service plans, drawings by the children, tax records, and a seventy-three page summary of all the exhibits and casework related to the family from 2007-2016 authored by the current caseworker in preparation for the hearing.

Both parents objected to the admission of the exhibits based on hearsay, confrontation, relevance and absence of certification. The Orphan's Court sustained an objection to an exhibit relating to a 1994 PFA violation that was dismissed and initially sustained an objection to the caseworker's summary of the exhibits. The judge asked the solicitor if the remaining exhibits were contained in the agency file and collected in the ordinary course of business. The solicitor confirmed that they were and with no further inquiry the Orphan's Court overruled the objections and admitted the remaining exhibits. An additional argument was heard regarding the caseworker's summary and the Orphan's Court permitted the admission of the document as “termination testimony,” reasoning that it was prepared by the caseworker who was available to testify, and that the information contained therein that was prepared by agency workers who have since left the agency was part of the business record as a whole.

The agency called three witnesses: Mother's domestic violence and mental health counselor, the

caseworker and the child preparation worker. The caseworker was only assigned to the family for approximately six months preceding the hearing. Consequently, much of her testimony was based upon the case summary and very little of her own observations. The Orphan's Court took the matter under advisement, reviewed the exhibits and entered orders terminating the rights of parents.

Mother and Father appealed the decision to the Superior Court challenging the admissibility of the exhibits. In a unanimous, unpublished decision, the Superior Court affirmed the orders. The Superior Court opined that Mother failed to establish that she was prejudiced by the admission of the CYF summary or the documents that contained diagnosis and opinion. The Superior Court acknowledged that there was no analysis of the statements made within the documents to determine if they qualified as an exception to the prohibition against hearsay. The Orphan's Court also failed to properly discuss any bases for the finding of harmless error. Notwithstanding, the Superior Court concluded that Mother was not entitled to relief because she failed to establish how she was harmed when the testimony presented was sufficient to support termination. It is from that order that Mother appeals.

Issues:

1. Whether exhibits that are comprised of documents that were not authenticated, when admitted for the truth of the matter asserted therein, and when containing medical and psychiatric diagnoses and opinions fall under a hearsay exception.
2. If such documents were improperly admitted, whether the Superior Court misapplied the law by concluding that the admission constituted harmless error.

Rationale:

The Supreme Court begins its analysis by defining hearsay pursuant to Pennsylvania Rule of Evidence 801(c) and the business records exceptions as defined in Rule 803(6), as well as the Judicial Rule of Procedure on Business Records. In summary, these rules allow a business record that would otherwise be hearsay to be competent evidence if "the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission." 42 Pa.C.S.A. § 6108. The Court opined that the manner in which the exhibits were entered into evidence failed to meet the business records exception because the agency did not present a witness in support of the exhibits' admission or a custodian of the record or other qualified witness. There was no testimony that someone with knowledge created the exhibits and that they were created in the regular practice of the various agencies and none were certified copies. The only inquiry was a leading question from the court to which the solicitor responded that they were collected in the normal course of business.

The agency witnesses did not remedy this initial failure through their testimony. No testimony was offered by a custodian of the records. No testimony was offered as to the preparation of the various documents. Several documents did not qualify as a business records exception because they contained diagnoses which require the scrivener's testimony. Many exhibits contained multiple levels of hearsay. No testimony was offered to identify exceptions to the rule prohibiting hearsay, nor was the documents authenticated. Significantly, the Supreme Court opined that the caseworker-created summary was not admissible simply because the caseworker was available for cross-examination. The summary was created almost exclusively with hearsay statements for which no exception applies.

The Supreme Court concluded that the Orphan's Court abused its discretion in admitting the 167 exhibits. Further, the Court held that this error was not harmless. The Court has held that in a termination proceeding the existence of an erroneous evidentiary ruling, in light of the record as a whole, could potentially affect the decision to terminate parental rights, the error is not harmless and a parent is entitled to a new hearing. Based on its review of the record, the Court identified very little testimony that was not based on inadmissible documents with regard to the analysis under 23 Pa.C.S. §2511(b). The evidence presented was not competent to support the decision to terminate Mother's rights and the order was vacated.

Concurring Opinion by Justice Mundy: Justice Mundy writes separately to emphasize that many of the exhibits may be admissible if the agency had established a proper foundation. Justice Mundy further acknowledges that in a similar situation, the improper admission of a document could be harmless error. In the instant matter, the sheer volume and comingling of testimony precludes a harmless error finding.

Concurring Opinion by Justice Baer: Justice Baer writes separately because he would employ a different harmless error standard than the majority. Justice Baer disagrees that the case relied on by the majority, *In re Sanders Children*, announced a harmless error standard that the Court is bound to follow. It is his opinion that the Supreme Court has never announced a standard by which such claims should be evaluated. It is Justice Baer's opinion that a modified harmless error standard should be adopted for use in termination of parental rights cases. He would employ a "clear and convincing" standard in termination cases.

Washington v. Department of Public Welfare

Date of Decision: July 18, 2018

Cite: 50 MAP 2016

Holding:

Supreme Court held that amendments to Act 80 were not germane to the original bill and therefore required that the bill be considered three times in its final form by both Houses of the legislature before passage, as required by the Pennsylvania Constitution, and so struck the Act in its entirety.

Facts and Procedural Posture:

Three disabled individuals and seven organizations involved in various human services to poor and disabled individuals alleged that the manner in which Act 80 of 2012 was enacted violated Article III, Sections 1, 3, and 4 of the Pennsylvania Constitution.

Issue:

1. Whether the manner in which Act 80 was enacted comports with the requirements of the Pennsylvania Constitution preventing the addition of proposed legislation on an unrelated subject matter, and requiring every bill in its final form to be considered on three different days in each House of Legislature.

Rationale:

The Supreme Court reviewed the legislative history of Act 80 in detail, as well as the providing the history and legal background of the Article III, the Constitutional provision at issue. The purpose of the three-day consideration requirement contained in the Constitution of this Commonwealth is "to secure an open and deliberative legislative process in which the public has the opportunity to become aware of pending legislation and express their views on it to their elected representative. Thus, we view this obligation as a mandate that the substantive contents of a bill [. . .] be considered on three different days, so that every legislator and all members of the public are fully apprised of how the laws of Pennsylvania will be altered by the bill." The Court concluded that the three versions of H.B. 1261 each contained significant differences and that no one version contained all the provisions of Act 80. Because the House considered the Senate's final version of the bill only once, "Article III, Section 4 of the Pennsylvania Constitution was clearly, plainly and palpably violated."

The full Constitutional analysis can be found in the opinion linked below.

<http://www.pacourts.us/assets/opinions/Supreme/out/Majority%20Opinion%20%20Reversed%20%2010362461040312255.pdf?cb=1>

PENNSYLVANIA SUPERIOR COURT

In Re: Adoption of D.M.C. and A.L.C.Date of Decision: July 9, 2018
Cite: 224 WDA 2018**Holding:**

Superior Court vacated the order terminating Mother's parental rights and remanded with instruction to the lower court to appoint client-directed legal counsel for the children.

Facts and Procedural Posture:

In April 2016, Cambria County CYS received a referral due to allegations of abuse and neglect. The children were removed and adjudicated dependent based upon inadequate shelter, bug infestation, financial instability, transiency, and allegations of sexual abuse of DMC by Mother. Mother received assistance from numerous agencies; however, Mother never made more than minimal progress in alleviating the circumstances that necessitated placement. The juvenile court changed the placement goal to adoption and petitions to terminate Mother's parental rights were filed thereafter. The Orphans' Court issued an order terminating Mother's parental rights, and Mother subsequently appealed that order. The Superior Court *sua sponte* raised the issue of whether the attorney representing the children satisfied the requirements under 23 Pa.C.S. §2313(a). The record did not reflect in what capacity the attorney was representing the children. Further, the attorney identified himself inconsistently in his filings with the court.

Issue:

Whether the children had representation that satisfied the requirements of 23 Pa.C.S. §2313(a).

Rationale:

At the time of the hearing, DMC was nearly thirteen years old. The record reflects that only a brief phone call took place the night before the hearing with his court appointed counsel. The position put forth was that DMC wished to be adopted and continue contact with Mother. The record does not reflect whether or not DMC fully understood the nature of the proceedings or whether it was made clear that post-adoption contact was not guaranteed. At the time of the hearing, the children were not placed with an adoptive resource. The Superior Court identified a potential conflict between the attorney's stated position, that permanency is the best interest of DMC and is desired by DMC, and DMC's actual position if appropriately ascertained.

No position was articulated to the court on behalf of ALC, age four and a half at the time of the hearing. The record is void of any indication that the attorney conferred with ALC prior to the hearing or made any attempt to ascertain ALC's position. The attorney argued that it was in ALC's best interest to be adopted.

On remand, appointed counsel is given specific instruction to interview the children to ascertain their preferred outcomes regarding permanence and contact with Mother and to "advocate in a manner that comports with Children's legal interests." Additionally, "[s]uch legal-interests counsel may also serve as guardian ad litem only if a conflict-of-interest analysis by the orphans' court reveals commonality between Children's best and legal interests[.]" If the children's preferred outcome is consistent with the January 2018 order, said order shall be reissued. If the preferred outcome is inconsistent, the lower court is instructed to hold another hearing.

In Re: Adoption of: M.D.Q.

Date of Decision: July 6, 2018
Cite: 242 WDA 2018

Holding:

Superior Court vacated orders granting the involuntary termination petition filed by Father and Step-Mother which terminated Mother's parental rights and remanded for further proceedings.

Facts and Procedural Posture:

Mother and Father were married. After their separation and divorce, Father had primary physical custody and the parties shared legal custody. Mother became incarcerated in 2016 and had no contact with the children during her incarceration or after her release. After seven months of no contact between Mother and children, Father filed petitions to involuntarily terminate Mother's parental rights.

Prior to addressing issues raised by Mother on appeal, the Superior Court *sua sponte* raised the issue of whether the children's legal interests were adequately represented.

Issue:

Whether the attorney appointed to represent the children discharged her duties as required by Pa.C.S. §2313(a).

Rationale:

Appointed counsel for the children cross examined witnesses but made no mention of the children's preferred outcomes nor did she argue on their behalf in a closing statement. Following the hearing, counsel submitted briefs which were not part of the certified record. Counsel's conversation with the children was summarized in the lower court's opinion. The children identified step-mother as fulfilling a parental role and articulated no feelings as to Mother.

Based on the record, it is unclear whether counsel represented the children's legal interests. The record is void of any evidence that counsel attempted to ascertain the children's preferred outcomes. At the time of the hearing the children were eight and half and six and a half, certainly old enough to offer their preferences if asked.

The Superior Court vacated the order and remanded with instructions for the attorney to interview the children. If their preferred outcomes are consistent with the order, it may be re-entered. If their preferred outcomes are inconsistent with the order, another hearing must be held.

In Re: J.T.M.

Date of Decision: July 11, 2018
Cite: 367 WDA 2017

Holding:

Superior Court held that sufficient evidence was presented to establish a termination of Father's parental rights under 23 Pa.C.S. §2511(a).

Facts and Procedural Posture:

The agency had a lengthy history with the family. In 2016, JTM was removed from Mother's care due to allegations that Mother was neglecting the medical needs of a half-sibling and taking the children to purchase illicit substances. Father was unavailable to care for JTM at that time due to his continued incarceration.

Issues:

1. Whether remand was necessary to appoint counsel for the child.
2. Whether sufficient evidence was presented to establish that Father abandoned his parental role.
3. Whether the evidence established that Father was incapable of providing parental care.

(Continued on p. 7)

Rationale:

Although Father did not raise the issue of counsel for JTM at the trial or in his concise statement of matters complained of on appeal, Father relies on *In re Adoption of G.K.T.*, 75 A.3d 521 (Pa. Super. 2013) to argue that the issue cannot be waived. In that case, the Superior Court there held that the Orphan's Court erred in not appointing legal counsel to represent the child pursuant to 2313(a). The Court opined that the right to counsel belongs to the child and there was no legal counsel to raise the issue before the orphan's court.

Upon review, the Superior Court found that the child's best and legal interests were aligned; therefore, separate legal counsel was not required. The Court, quoting the *In re the adoption of LBM*, correctly identified that a child has a right to legal counsel to represent the child's legal interests in an involuntary TPR proceeding. The court further opined that legal interests are synonymous with the child's preferred outcome. Here, the record reflects that JTM's legal and best interests were aligned such that separate legal counsel was not required. JTM testified that he did not want to live with Father and hoped to live in a foster home and be adopted after release from his residential treatment facility.

The Superior Court completed a combined analysis of Father's second and third issues raised on appeal. The trial court found that Father evidenced intent to abandon his parental role because he did not make efforts to remain in contact with his child during the period of his incarceration. Father sent one letter to Child, and asked his sister to maintain contact with Child but that contact was very limited. Foster Mother testified that in a six month period, Father sent one letter to JTM. Father's sister sent one letter and a box of Easter candy. Foster Mother testified that on advice of JTM's therapist, she did not permit Father or Father's sister to speak to JTM. The Superior Court concluded that Father had no direct contact with JTM in approximately three years and only made minimal efforts for indirect contact. Father's failure to maintain contact demonstrated intent to abandon his parental role.

In Re: G.M.S.

Date of Decision: July 11, 2018
Cite: 299 WDA 2017

Holding:

Superior Court held that termination of Mother's parental rights served the needs and welfare of the children.

Facts and Procedural Posture:

Between 2012 and 2015, CYF received eleven referrals for the family. In 2015, an Emergency Custody Authorization (ECA) was obtained and the children were removed from Mother's care based on a concern for their safety. GMS was placed with Father. BDC and LAC were ultimately placed in the care of maternal grandparents. Father failed to make progress on the established goals to ensure safety and GMS was removed, placed in the care of maternal grandparents and adjudicated dependent. Neither parent made adequate progress on their goals established by the agency. Petitions were filed to involuntarily terminate Mother's and Father's parental rights. After a hearing on the petitions, the court issued an order granting the termination. It is from that order that Mother appeals.

Issues:

1. Whether appointment of separate counsel was required under 23 Pa.C.S. §2313(a).
2. Whether the court abused its discretion in concluding that termination of Mother's parental rights would serve the needs and welfare of the children pursuant to 23 Pa.C.S. 2511(b).

Rationale:

In considering the issue of separate counsel, the court found this issue was not waived despite not being raised by Mother before the Orphan's Court. The Superior Court relied on *In re Adoption of G.K.T.*, 75 A.3d 521 (Pa. Super.2013), holding that the right to counsel belongs to the child and if no

counsel is appointed, there is no one who could raise the claim before the trial court, so it could not be deemed waived. In reviewing the record, the Court held that the evidence supports that the best and legal interests were aligned. GMS wanted to be adopted and visit Mother and the child's attorney put forth the same recommendation. The opinion only addresses this issue as it relates to GMS and does not analyze this claim as to the other children.

Mother concedes that the agency presented sufficient evidence to support the termination of her parental rights under 23 Pa.C.S. §2511(a) and contests only that termination does not meet the needs and welfare of the children. The trial court accepted the testimony of Dr. Pepe who opined that sessions with Mother and all children were "utter chaos." The younger children, BDC and LAC, did not view Mother in a parental role. GMS had a bond with Mother, but it was "not necessarily positive or beneficial." The trial court found credible the expert testimony of Dr. Pepe and held that only maternal grandparents have met the developmental, physical and emotional needs of the children. The Superior Court held that the record supported the conclusions of the lower court and it did not abuse its discretion in entering the orders terminating Mother's parental rights.

In the Interest of E.O.

Date of Decision: July 30, 2018
Cite: 2641 EDA 2017

Holding:

Superior Court vacated an order finding Father in contempt for violating a visitation provision in a dependency matter and imposing a seven day sentence of incarceration, and remanded for further proceedings.

Facts and Procedural Posture:

The children were removed and adjudicated dependent. Father was granted weekly, supervised visits at the children's discretion to take place at the Community Umbrella Agency (CUA). At a permanency review hearing, the court heard testimony regarding Father's alleged violations of the court order. The children told their assigned worker that Father calls up to ten times a day and tries to meet with them after court hearings. Father denied making the phone calls or attempting to meet with the children after court hearings. Father was found in contempt of the order. The court ordered Father to serve a seven day sentence of incarceration for contempt.

Issues:

1. Whether the trial court erred in finding Father in criminal contempt rather than civil contempt.
2. Whether the trial court erred in finding Father in direct criminal contempt rather than indirect criminal contempt.

Rationale:

The Superior Court first addressed the primary purposes for findings of contempt. The primary purpose of a finding of civil contempt is to garnish cooperation while the primary purpose of a finding of criminal contempt is punishment for disobedience of an order of court. Similarly, the court defined indirect and direct contempt as utilized in its prior jurisprudence. Direct contempt consists of misconduct in the presence of the court while indirect contempt is a claim of a violation of an order outside of the presence of the court. Regardless of whether the allegation is of direct or indirect contempt, the accused is afforded certain procedural safeguards, such as the right to admission to bail, the right to be notified of the accusation, time to prepare a defense, and the right to a speedy and public trial by an impartial tribunal.

The Superior Court identified the trial court's order as a finding of criminal contempt based on Father's violation of the prior order for visitation with the children. Further, Father's conduct did not occur in open court or interfere with the business of the court, thereby classifying his conduct as indirect criminal contempt. Father may only be found guilty if every element of the charge is proven beyond a reasonable doubt. In the instant matter, Father denied that he called the

children ten times a day and denied meeting with the children after court hearings. Pursuant to 42 Pa.C.S. §4133, indirect criminal contempt is only punishable by fine, restricting incarceration to occurrences of direct criminal contempt. “Because the trial court clearly failed to understand the nature of the proceedings, imposed an unauthorized sentence of imprisonment and, concomitantly, failed to accord Father the constitutional protections he was due, we must vacate.”

PENNSYLVANIA COMMONWEALTH COURT

Burns v. Department of Human Services

Date of Decision: July 17, 2018
Cite: 1570 C.D. 2017

Holding:

The Commonwealth Court affirmed the Bureau of Hearings and Appeals (BHA) order dismissing the appeal of resource parents challenging the removal of a foster child from their home for lack of jurisdiction.

Facts and Procedural Posture:

Child, LD, was placed in the home of petitioners and remained there for seven months. At a permanency review hearing, the court ordered that the child remain in the care of petitioners, but granted the agency the authority to place with a relative by agreement of the parties. Subsequent to the issuance of the order, the agency moved the child from petitioners' care and placed the child with maternal grandmother.

Petitioners filed an administrative appeal challenging the removal of the child from their care. They simultaneously filed motions to intervene and to stay the removal before the juvenile court. The juvenile court denied the motions but scheduled a hearing to allow the Petitioners to present evidence and argument regarding the child's placement. The Court then issued an order confirming the placement with maternal grandmother.

In response to the administrative action, the Department issued a rule to show cause as to why the petitioners' administrative complaint should not be dismissed for lack of jurisdiction. A hearing was held on the rule and petitioners argued that they did not have written notice of the removal and were denied a due process hearing. The Administrative Law Judge (ALJ) issued an Adjudication and found that the child's placement was properly before the juvenile court; therefore, a contrary order could not be issued. The ALJ determined that the appeal was prohibited by 55 Pa. Code § 3700.73(a)(2), which provides: “Foster parents may appeal the relocation of a child from the foster family except under one of the following conditions: ... (2) The removal is initiated by the court...” The Department issued an order adopting the ALJ recommendation. It is from that order that Petitioners appeal.

Issue:

Whether Petitioners were denied due process when LD was removed from their care without notice and a meaningful opportunity to be heard and without being afforded the appeal process pursuant to 55 Pa. Code § 3700.73.

Rationale:

The Commonwealth Court relied on the ruling in *Sanner v. Dep't of Pub. Welfare*, 878 A.2d 947 (Pa.Cmwlt. 2005) when it held that the Department has no jurisdiction over matters relating to dependency that are vested in the court of common pleas. Here the Court of Common Pleas adjudicated the child dependent, gave permission to place with maternal grandmother and confirmed that placement. The Commonwealth Court holds that the Department correctly ruled that they lack authority to modify the terms of the child's permanency plan.

At issue is Pa.Code §3700.73 which provides resource parents the ability to appeal the relocation of a foster child, but for five specific exceptions. One of the exceptions is that the removal was initiated by the court. The Commonwealth Court engages in an analysis of the plain meaning of the statute and focuses on the term “initiate.” Petitioners argue that the county agency initiated the removal of the

child from their care rather than the removal being initiated by an order of court. Pa.R.J.C.P. 1606 requires a county agency to obtain court approval prior to changing the placement of a dependent child.

In the instant matter, the Court of Common Pleas granted permission to the county agency to change the placement of the child in a permanency review order. Prior to the issuance of Rule 1606, the Commonwealth Court affirmed a ruling dismissing an appeal for lack of jurisdiction under similar factual circumstances. Petitioners were not entitled to notice of the removal of the child because the removal was initiated by the court, falling squarely within an exception to 3700.73. The Commonwealth Court further found that Petitioners were not entitled to notice of the removal because they were not entitled to appeal the relocation of the child.

E.M. v. Department of Human Services

Date of Decision: July 19, 2018

Cite: 1159 C.D. 2017

Holding:

Commonwealth Court affirmed orders denying requests to expunge indicated reports of child abuse.

Facts and Procedural Posture:

Mother and Father had shared physical custody. At the time of the incident, Mother and Boyfriend resided in the same home with the children. Over Labor Day weekend, the child spent part of the weekend in the care of Father and part of the weekend in the care of Mother. Mother took the child to the emergency room with a left leg injury; specifically, she noticed left leg swelling. The child was transported to another medical center and underwent x-rays, lab tests, a CT scan and a physical examination. The physician observed bruises in various stages of healing, including a bruise to the ear which was indicative of physical maltreatment. A physician diagnosed the child with an oblique fracture of the shaft of the left femur, lacerated liver and multiple bruises to different areas of his body, which were in various stages of healing. Physicians testified that some of the bruises could have been from accidental causes. Lab results ruled out a clotting disorder as a potential cause of the bruising. The agency investigated and identified Mother and Boyfriend as perpetrators of physical abuse.

Mother presented testimony from the child's pediatric orthopedic medicine practitioner who examined child five weeks after the injury. The physician reviewed the x-rays and interviewed grandmother. The physician concluded that the injury could have occurred from the child falling off the couch. On cross-examination, the physician admitted that he did not review the medical reports diagnosing child with a liver laceration and multiple bruises. Further, he testified that if he was aware of the additional injuries he would have been concerned about child abuse.

Issues:

1. Whether the agency met its burden to establish that Mother and Boyfriend were in a relationship and resided together and that Boyfriend was responsible for the care of the child.
2. Whether the agency established by substantial evidence that the child's injuries were a result of abuse and if so, whether Mother and Boyfriend rebutted the presumption that they were responsible for the injuries.

Rationale:

The ALJ applied the standard articulated in *In re L.Z.*, 631 Pa. 343, 111 A.3d 1164 (2015). The agency met its burden of establishing that the child suffered bodily injury which was the result of abuse. Pursuant to *In re L.Z.*, Mother and Boyfriend were established to be the caregivers at the time the injuries were sustained. The evidence therefore supported that Mother and Boyfriend caused the injuries. The burden then shifts to Mother and Boyfriend to rebut the presumption that they abused child. Mother attempted to rebut the presumption, but was found not to be credible. Boyfriend did not submit any testimony or evidence to rebut the presumption that he committed child abuse.

(Continued on p. 11)

Evidence of record included CW's testimony that Mother and Boyfriend resided together as boyfriend and girlfriend at the time of the incident. Mother testified that Boyfriend was present in the home when the caseworker came to the home to conduct an assessment. The record showed that Mother and Boyfriend were responsible for the care of child during the time period in question. Boyfriend resided in the home with Mother and the children. It was not necessary to establish that Boyfriend had a caretaking role as that is not a requirement under the definition of a perpetrator under the CPSL. Given the foregoing, the ALJ properly applied the *prima facie* presumption of abuse to Boyfriend as well as to Mother. Therefore, the burden shifted to Boyfriend to present credible evidence that he had no responsibility for Child's welfare.

ALJ rejected Mother's alternate theories as to how the child was injured. The agency pediatrician testified that it was unlikely that the child sustained the constellation of injuries in a series of accidental events. As such, the ALJ accepted the pediatrician's testimony and opinions as credible. "Consequently, given CYS's Pediatrician's credible testimony and opinions of physical child abuse, and the ALJ's rejection of Mother's testimony regarding her theories of what caused Child's injuries, we discern no error or abuse of discretion in the ALJ's determination that the *prima facie* presumption of child abuse in 23 Pa. C.S. § 6381(d) applied against Mother, as a parent, in this case." Mother argued that she rebutted the presumption by documenting patterns of bruising during Father's custodial time frames over a period of a few months. However, Mother provided no credible evidence that the bruising underlying the finding of abuse was inflicted by Father, or a third party, or that the injuries occurred as a result of a fall off an ATV or being pushed off the couch by his 5 year old sister. These alternate theories were rejected by the Court.

The Commonwealth Court found no error or abuse of discretion in the ALJ's determination that CYS met its burden of establishing that the Department is maintaining an indicated report of child abuse against Boyfriend and Mother in a manner consistent with the CPSL and its implementing regulations.

OCYF Bulletin #3130-18-06 Revised and Reissued Indian Child Welfare Act

Bulletin #3130-18-06 was issued on July 20, 2018 and is effective immediately. The purpose of the bulletin is to update established police requirements relative to the protection of Indian Children as required by ICW and establishes policy and procedure as it relates to transfer of responsibility for placement and care of Indian children under Title –IV E. This bulletin updates the OCYF Implementation of the Indian Child Welfare Act of 1978 Bulletin #3130-09-01 that was issued on March 9, 2009 by incorporating the requirements issued through the Indian Child Welfare Act (ICWA) Proceedings Final Rule, 25 CFR Part 23, on June 14, 2016. ICWA establishes minimum standards for child custody cases involving Indian children to promote stability in Native American families and maintain the Native American culture. The Bulletin can be found through the link below.

http://swantoolkit.org/wp-content/uploads/OCYF-Bulletin-3130-18-06-Revised-and-Reissued-Indian-Child-Welfare-Act_Reissued-07202018.pdf

OCYF Bulletin #3130-18-02 Concurrent Planning Policy and Implementation

Bulletin #3130-18-02 was issued on July 20, 2018 and is effective immediately. This bulletin incorporates legislative changes and rescinds and replaces OCYF Bulletin #3130-12-03, issued in May, 2013. Since that time, amendments have been made to federal and state legislation that impact concurrent planning through the passage of Pennsylvania Acts 75 and 94 of 2015 which made Pennsylvania compliant with the federal Preventing Sex Trafficking and Strengthening Family Act (Public Law 113-183). Changes included in this updated bulletin support participation of children in out-of-home care in age appropriate and/or developmentally appropriate activities and experiences; that no child under the age of 16 shall have a court ordered goal of Another Planned Permanent Living Arrangement (APPLA), and the definition of the Reasonable and Prudent Parent Standard. The changes can be found in the Key Terms and Practice Considerations and in the Core Components of Concurrent Planning sections. The Bulletin can be found through the link below.

http://swantoolkit.org/wp-content/uploads/OCYF-Bulletin-3130-18-02-Concurrent-Planning-Policy-and-Implementation_Issued-07202018.pdf

AMENDMENTS AND RULE CHANGES

AMENDMENTS TO PA RULES OF CIVIL PROCEDURE:

An Order was issued on July 30, 2018 amending Rules 1910.4, 1910.16, 1910.16-4, 1910.17, 1920.1, 1920.13, 1920.15, 1920.31, 1920.51, 1920.52, 1920.54, 1920.56, and 1920.74 of Civil Procedure which will be effective on January 1, 2019. The Rules relate to actions commenced under the domestic relations code, and provide in part that each court of common pleas shall have a domestic relations section in which pleading and documents for child support, spousal support, and alimony pendent lite actions should be filed; filing a complaint in this section shall be the commencement of an action; and no filing fees shall be associated with such actions. Other rules relate to the allocation of support, joinder of claims, and form of pleading

The amended rules can be found through the link below.

<http://www.pacourts.us/assets/opinions/Supreme/out/attach%20%2010364024340622814.pdf?cb=1>

AMENDMENT TO RULE 7.3 OF THE PA RULES OF PROFESSIONAL CONDUCT:

An Order was issued on July 30, 2018 amending Rule 7.3 Solicitation of Clients which will be effective in sixty days. The amendment includes the addition of subsection (4) which precludes a lawyer from sending a communication that is a solicitation to a party or defendant who has been named in a domestic relations action.

Justice Donohue issued a dissenting statement, opining that the amendment does not pass Constitutional scrutiny.

The amended rule can be found through the link below.

<http://www.pacourts.us/assets/opinions/Supreme/out/Attachment%20%2010363979840613952.pdf?cb=1>