

Pennsylvania Family Lawyer



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FROM THE CHAIR

By J. Paul Helvy, Esq.
phelvy@mwn.com



Paul Helvy

Thanks to everyone who attended the Winter Meeting in Lancaster for their continued strong support of the Section. Our Programming Committee chairs, **Hillary Moonay** and **Kerri Cappella**, and the entire Programming Committee, which includes **Stephanie Winegrad**, **Jerry Shoemaker** and **Hilary Bendik**, spent countless hours organizing the CLE that was such an important part of the Meeting. I would also like to acknowledge Court of Common Pleas **Judges David R. Workman** (Lancaster), **Ann Marie Wheatcraft** (Chester), **Linda A. Cartisano** (Delaware), **Robert Matthews** (Philadelphia), **Leslie Gorbey** (Lancaster), **Joseph Adams** (York), **Jeannine Turgeon** (Dauphin), and **Thomas Doerr** (Butler County) for their

Paul Helvy is chair of the Family Law Practice Group at McNees Wallace & Nurick LLC, Harrisburg; Chair of the PBA Family Law Section; Past Chair; Dauphin County YLD; member, Dauphin, Cumberland and Lancaster Bar Associations; member, International Academy of Collaborative Professionals; and member, Central PA Collaborative Professionals.

hard work and participation in the CLE sessions. The comments we received confirmed that the judicial perspective on the various issues that we regularly confront in our practice is invaluable. A special thanks must also be made to our sponsors and exhibitors who help to make our Winter and Summer Meetings possible. Finally, a special thanks to the PBA's **Pam Kance** and **Janell Klein** for all of their hard work "behind the scenes" to make our meetings successful, with record numbers of attendees.

At the meeting, I was presented with a CD containing an annotated version of the Custody Statute by **Judge Matthews**. This material has been added to the PBA Family Law Section website and is available to all Section members (See Page 11).

The Section continues to be incredibly active. **Julie Auerbach** is leading a team of attorneys that is diligently working on certification for Pennsylvania Family Law attorneys. This process includes the creation of an exam and we are fortunate that **Mark Ashton**, **Jonie Burner** and **Judge Gorbey** have agreed to draft that exam. Past Chairs **Carol Behers** and **Mary Cushing Doherty** are spearheading our

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SUPERIOR COURT AFFIRMS TRIAL COURT’S DECISION TO TERMINATE PARENTAL RIGHTS AND CHANGE PLACEMENT GOAL TO ADOPTION WHERE CHILDREN WERE BONDED WITH FOSTER PARENTS AND DUE TO THE BIOLOGICAL PARENTS’ ABUSE AND UNDERDEVELOPED REASONING SKILLS
BY JUDITH A. ALGEO, ESQ.

IN THE INTEREST OF: M.T., 101 A.3d 1163 (Pa. Super. 2014)

SUMMARY

The Superior Court of Pennsylvania in an *en banc* decision, affirmed the decision of the Blair County Court of Common Pleas (Sullivan, J.), which changed the placement goal of appellants’ two children, who had previously been adjudicated dependent minors, from family reunification with their parents to adoption. The Superior Court also affirmed the involuntary termination of the appellants’ parental rights to these children by the same Blair County Court.

FACTUAL AND PROCEDURAL HISTORY

The subject children, C.E.T. IV, at age 18 months, and M.J.T., at age 8 months, were the subjects of a Childline Report in June 2012. M.J.T. had suffered severe burns, bruising and broken bones in her leg and hand while in the care of her paternal grandfather and possibly parents. As a result of this investigation, both parents signed voluntary placement agreements in June 2012 with the Blair County Children and Youth agency (hereinafter BCC&Y) placing the children in the agency’s custody. C.E.T. was placed in the “M” foster home on that date and his sister, M.J.T., was placed in the same foster home upon her release from the hospital.

On July 5, 2012, BCC&Y filed a dependency petition alleging that the children were without proper parental care and control and that a dependency adjudication was appropriate. In the subsequent adjudication of dependency in September 2012, Judge Sullivan cited as *prima facie* evidence the bruising on M.J.T.’s face, head and extremities, abrasions to her nose, lip and chin, fractures to her leg and hand along with burns to her feet, ankles and thighs. Judge Sullivan noted the fact that the parents and the paternal grandparents were the only known caretakers of the children. The children remained in the “M” foster home, a goal of family reunification was determined, and the court ordered intensive social services to assist the family in the achievement of this goal.

Judith A. Algeo is a Shareholder in the Doylestown office of Eastburn and Gray and is co-chair of the firm’s Family Law practice group, past president Bucks County Bar Association, past chair of its Family Law Section and current chair of its Pro Bono Committee, current Warwick Township Board of Supervisors (chair), current Legal Aid of Southeastern Pennsylvania (secretary); jalgeo@eastburngray.com; 215-340-7530.

At the six-month permanency review hearing in December 2012, Judge Sullivan noted that the parents had made slow progress relative to the intense social services provided and the parents needed to come to an understanding and appreciation of the grave injuries that their child had suffered. The agency worker noted the extreme dependency that the parents had on the paternal grandparents for their daily living tasks and the parents’ lack of acknowledgment that the injuries to their daughter had occurred while she was in the care of the paternal grandfather.

As a result of the parents’ minimal progress and their continued dependence on the paternal grandparents, the agency requested a psychological evaluation be completed on the parents. Judge Sullivan then ordered complete psychological evaluations on both parents, which were subsequently conducted in February 2013.

At the March 2013 nine-month interim review hearing, Judge Sullivan noted that the psychological testing results showed mother to be functioning at the intellectual level of a 14-year old and father to be functioning at the intellectual level of a nine-year old. Both parents had significant limits on their abstract reasoning and were found not to be fully attentive to keeping the children safe during their supervised visits. The psychologist testified that the parents were unable to remedy the circumstances that brought the children into care as a result of their limited intellectual capacity, despite the significant social services provided to the parents.

Judge Sullivan heard additional testimony from the agency provider that there were serious doubts that the parents would ever be able to properly parent these children and keep them safe. When Judge Sullivan inquired whether the parents would be able to remedy the current situation, the response from the service provider was that even though the parents were cooperative, they were easily distracted, inconsistent and continued to be unable to keep the children safe during their supervised visits.

At the 19-month permanency review hearing in June 2012, the agency requested that the current goal of family reunification be changed to adoption. The order of court dated June 10, 2013, summarized the testimony presented that the parents had actually regressed in the area of consistently recognizing and addressing safety concerns for the children. Judge Sullivan noted that in the past year, despite the parents attending all meetings, all supervised visits and all programs offered by the agency, after one year of intensive services, the parents had been unable to make any

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significant progress and shown no insight as to how to protect the children. In fact, it was noted that the parents were continuing to regress in their ability to consistently recognize and address safety concerns. Finally, the agency provider was unable to project a time frame when the parents would be able to achieve a level of unsupervised visits with the children because of the parents' lack of progress to date. As a result of this testimony, the court found that the children would not be protected and safe in their parents' care.

Judge Sullivan also noted that the foster parents were a current adoptive resource and the children, who were now 2-½ years and 1-½ years of age, had developed a "parent-child" relationship with "Mr. and Mrs. M." Although Judge Sullivan acknowledged the children also had a "parent-child" relationship with their biological parents; the children looked to the foster parents to provide for their needs. Judge Sullivan found no compelling reason not to pursue adoption on the children's behalf because the parents had not made any progress toward reunification, could not give a plausible explanation as to the cause of the child's serious injuries and had not demonstrated any ability to keep the children safe in spite of the "parent-child" relationship. Judge Sullivan, therefore, changed the goal from family reunification to adoption.

The parents timely appealed the goal change to the Superior Court. Specifically the parents challenged the goal change based on their compliance with all offered services and attendance at all visits and their belief that too much weight had been placed by Judge Sullivan on their inability to explain the injuries that their daughter had suffered and what they felt was insufficient evidence that they had previously placed their children at risk.

On Nov. 21, 2013, there was a combined 18-month review hearing and a termination of parental rights hearing. Testimony was presented from the BCC&Y social worker who believed that it was in the children's best interest to terminate the parents' parental rights. The social worker testified that the children had lived in the foster home for over 18 months, which was over half their lives. The children were bonded with the foster parents, they were thriving in that home and all their needs were being met. The supervised visits with the parents generally went well although the children looked to the foster parents as their parental figures. The agency believed that it was in the best interests of the children to terminate parental rights so that the children could achieve permanency.

On Nov. 27, 2013, the trial court issued an order that confirmed the goal change to adoption but deferred the decision on termination of parental rights until the Superior Court had decided the goal-change appeal.

On March 3, 2014, the Superior Court affirmed the goal change and on March 5, 2014, the trial court issued its order terminating the parents' parental rights. The parents once again timely appealed the termination order.

On April 14, 2014, the Superior Court granted the parents' request for en banc re-argument and withdrew the March 3, 2014, decision affirming the goal change. The Superior Court noted that there was no error here in that action. Finally on June 3, 2014, the Superior Court denied the BCC&Y motion to consolidate the two appeals but did list the appeals as related.

ANALYSIS

The Superior Court, *en banc*, declined to consolidate the separate appeals on the goal change and the termination but still considered the appeals together, noting the issues were interrelated. The Superior Court noted the distinction between the two hearings, clarifying that in a goal-change proceeding the best interests of the child must guide the trial court and not the parent's interests. The parent's interests are secondary. *In re A. K.*, 936 A. 2d 528, 532-533 (Pa. Super. 2007) Further the burden is on the Agency to prove that the goal change is in the child's best interests. *In the Interest of M.B.*, 674 A. 2d 702,704 (Pa. Super. 1996) In contrast, the Superior Court wrote, during a termination of parental rights proceedings, the focus is on the conduct of the parent under 23 Pa. C.S.A. § 2511.

In the matter of the goal change appeal, the issues the parents presented before the Superior Court were:

1. Did the trial court abuse its discretion when the trial court ordered the placement goal for the two dependent children be changed from family reunification to adoption with insufficient evidence that the children were at risk in their parents' care and the court not accounting for the parent-child relationship and
2. Did the trial court abuse its discretion when changing the goal from family reunification to adoption by not acknowledging the bond between the parents and the children and when the parents exhibited compliance with the permanency plan by attending nearly all visits and participating in or completing all recommended services and the trial court failing to fully consider the bond between the parents and the children and
3. Did the trial court abuse its discretion by putting an improper amount of weight on the fact that the parents were unable to explain the child's injuries although the parents acknowledge that some injury did occur without their knowledge

The Superior Court began its analysis of the appeal issues by reiterating the standard of review in both child-dependency cases and in matters involving the involuntary termination of parental rights. The Superior Court must always defer to the trial court's decision as to the findings of fact and the credibility of the witnesses. In this case the trial court wrote well-reasoned decisions after every three-month review of the case. The trial court detailed the extraordinary number of services offered to the parents and

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the testimony of the service providers, giving all the witnesses credibility in their opinions and observations of the parents' inability to change their behaviors and become more protective towards the children

The Superior Court restated the definition of a dependent child for the adjudication of dependency and the process by which the trial court must find by clear and convincing evidence that a child is dependent when the child is without the proper parental care or control, subsistence, education as required by law or other care or control necessary for his or her physical, mental or emotional health or morals. 42 Pa.C.S.A. §6302(1). A further clarification of this definition appeared in *In Re G.T.*, 834 A.2d 870 (Pa. Super. 2004) when the court simplified the question of dependency to two questions: first is the child presently without proper parental care and control and second, if so whether such care and control are immediately available.

The Superior Court reviewed the factors to be addressed at each permanency review hearing, held every three months for dependent children under the age of 5 years, as detailed in 42 Pa.C.S.A. §6300 *et. seq.*, specifically noting that the trial court must examine the extent of progress a parent makes in alleviating the circumstances that necessitated the child's placement, along with the assurance that the child is safe. Additionally the court must then determine if the goal for the child is appropriate; when the child will be returned to the parent, custodian or guardian and if not, if and when the child will be placed for adoption if a return to the parent, guardian or custodian is not in the child's best interest. The Superior Court also addressed the need for the trial court to consider the bond between a child, and the child's parents and the child and the foster parents. *In re H.V.*, 37 A. 3d 588, 594-595 (Pa. Super. 2012)

The trial court heard from the county agency and the service provider agency that both agencies continued to be greatly concerned about the parents' inability to keep the children safe and, in fact, the parents had developed no insight on safely parenting their children. The Superior Court noted the trial court gave great weight to the credibility of the agency workers and the service-provider worker, who had all been intensely involved in attempts to teach the parents how to parent with absolutely no progress by the parents but rather only regression on the parents' part. The Superior Court affirmed the trial court's decision to change the goal for the children from reunification to adoption based on the record of credibility determinations and the weight of the evidence presented.

In the matter of the involuntary termination of parental rights, the issues presented by the parents before the Superior Court were:

1. Did the trial court err and abuse its discretion in terminating the parental rights where there was insufficient evidence that the termination was in the

children's best interest and insufficient evidence that the parents' conduct had put the children at risk;

2. Did the trial court err and abuse its discretion when there was insufficient evidence that the parents' repeated and continued incapacity, abuse, neglect and/or refusal had caused the children to be without the proper parental care and control and the parents could not or would not remedy the conditions that brought the children into care and those conditions continued to persist;
3. Did the trial court err and abuse its discretion by terminating the parental rights to the child C.T. when no abuse or neglect was alleged relative to that child;
4. Did the trial court err and abuse its discretion in terminating the rights to the child M.T. when the parents could not identify injuries that may have occurred when the child was not under their care.

In a termination of parental rights case, the trial court must engage in a bifurcated process where first the court must look at the behavior of the parents while the party seeking to terminate parental rights must prove by clear and convincing evidence that the parent's behaviors satisfies the statutory grounds outlined in 23 Pa.C.S. 2511(a), after which the court must determine if termination of parental rights will meet the needs and welfare of the child as stated in 23 Pa. C.S. 2511(b).

In this case, the agency proved by clear and convincing evidence that the termination of parental rights was appropriate because the repeated and continued incapacity, abuse, neglect or refusal of the parents had caused the children to be without proper parental care and control and the parents were not able or could not remedy these conditions. 23 Pa.C.S. 2511(a)(2). Additionally the agency had proved by clear and convincing evidence that the children had been in care for more than 12 months and the conditions that led to the removal of the children from their parents' care continued to exist and the termination would best serve the needs and welfare of the children. 23 Pa.C.S. 2511(a)(8)

The trial court noted the length of time that the children had been in care, the nature and extent of the injuries to the child and the prima facie evidence that either the paternal grandparents or the parents were the perpetrators of the abuse. The trial court set out in detail the number of services offered to the parents to help them in achieving reunification and the inability of the parents to make any progress whatsoever despite taking part in all services and attending most visits. At no time when the parents were with the children were any of the supervisors able to relax the supervision because of the parents' inability to keep the children safe and to recognize safety issues. The parents with their mental incapacities would not be able to remedy any of the existing safety concerns at any time. The Superior Court affirmed the trial court's reasoning for the termination of parental rights under both

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23 Pa.C.S. 2511(a) (2) and (8).

The Superior Court addressed 23 Pa.C.S. 2511(b), which requires an examination of the needs and welfare of the children that will be served by a termination of parental rights. The trial court's decision noted that while the parents argued for more time, along with additional services for reunification with their children, the children were thriving in the current placement and all their needs were being met. The parental bond was with the foster family and not with the biological parents. Further, the trial court wrote that the children were entitled to permanency. The Superior Court affirmed the trial court's decision to terminate parental rights, citing the fact that the trial court had taken into consideration the developmental, physical and emotional needs of the children.

CASE NOTE AUTHOR'S EDITORIAL COMMENTS

Practitioners in dependency law must make note of the fact that there is no requirement for a goal change from reunification to adoption in order for the county agency to proceed to an involuntary termination of parental rights hearing. The Superior Court was clear on this point and, frequently, parents in dependency matters fail to understand that this step is not a requirement before the local child welfare agency moves to terminate their parental rights.

The Superior Court noted that the case goal is set by the agency and then approved or disapproved by the dependency court. The Juvenile Act provides that the county agency must ensure that a child receives a placement review or a "permanency hearing" at least once every six months or within 30 days in certain cases involving aggravated circumstances. 42 Pa.C.S.A. §6351. The child's placement goal is set by the child welfare agency in

the family service plan or single case plan and is approved or may be changed by the court. The purpose of the permanency hearing is to determine or review the plan, the date by which the plan is expected to be achieved and whether placement continues to be best suited for the child's safety and welfare. Section 6351 lists a number of factors the court must determine during the permanency hearing including the appropriateness, feasibility and extent of compliance with the permanency plan and the appropriateness and feasibility of the current placement goal.

Best practice suggests that cases have concurrent goals, for example for reunification and adoption as was applied by the county agency in *M.T.* If reasonable efforts failed to achieve the primary goal but the child is still in care and the goal is no longer feasible, the *Pennsylvania Judicial Deskbook* recommends that the court should consider a goal change to the concurrent goal (or another goal if the concurrent goal is not possible). *Pennsylvania Judicial Deskbook* at p.97. Both the trial court and the appellate review in *In re M.T.* took this approach.

After considering the factors listed in §6351(f) and (f.1) of the Juvenile Act, the court should determine whether the current goal or some other goal is in the best interest of the child. Specifically §6351(g) makes clear that the "disposition" ordered by the court is the "goal" determined by the court to be in the best interest of the child.

Finally the trial court conducted a combined goal-change termination hearing in *M.T.*, an approach that is emerging across the commonwealth. Note that while the fact presentations and trials are combined, legal argument must address and the court must still apply the separate statutory and constitutional standards (i.e., preponderance standard for the dispositional-change goal and clear and convincing on the termination). The court must make findings on each standard.

Mark your calendar for these upcoming PBA Family Law Section Meetings:

July 9-12, 2015
The Greenbrier,
White Sulphur Springs, W. Va.

Jan. 15-17, 2016
Marriott Lancaster at Penn Square, Lancaster

For more information on any PBA event, visit the PBA online Events Calendar at www.pabar.org and click on the event title or call the PBA at 800-932-0311.