

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: M.M., A MINOR : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
:
APPEAL OF: M.M. : No. 1566 WDA 2012

Appeal from the Order September 11, 2012
In the Court of Common Pleas of Allegheny County
Family Court at No. 1902-09

BEFORE: BENDER, J., GANTMAN, J. AND OLSON, J.

MEMORANDUM BY BENDER, J.: FILED: June 5, 2013

M.M. ("Mother") appeals from the order entered September 11, 2012, by the Court of Common Pleas of Allegheny County, adjudicating dependent her daughter, M.M. ("Child"), born in August of 1997, pursuant to 42 Pa.C.S. § 6302. We affirm.

The trial court related the following factual history:

[Child] was previously adjudicated delinquent in June of 2010 and placed on probation. As conditions of her supervision, [Child] was required to complete 50 hours of community service and pay standard court fees. Between June of [2010] and July 10, 2012, no probation review hearings took place.

Two years later, on July 10, 2012, [Child] was reported to have been missing from her home for more than five days. On July 12, 2012, a warrant was issued, and on July 13, 2012, the warrant was executed. [Child] was taken to Shuman Detention Center. [Child] requested a detention hearing before a judge and on July 12, 2012, [Child] appeared before Judge Guido DeAngelis. Judge DeAngelis ordered that [Child] remain detained and scheduled a detention review before me, the judge of record.

At the July 23, 2012 detention review, the probation officer reported that [Child] had not completed the 50 hours of community service ordered in June of 2010 or paid her court

fees. Most significantly[,] however, reports of inappropriate and excessive physical discipline against [Child] by her mother, the appellant, were brought to my attention by the probation officer and the public defender. A caseworker from the Office of Children, Youth and Families (CYF) was also present at the detention review hearing and reported that the agency was aware of a physical altercation between [Child] and [Mother] and that the agency had initiated an investigation into the allegations of abuse. The caseworker reported that [Mother] had agreed to cooperate with services but that (prior to her detention) [Child] had refused to return home and had been staying with relatives. CYF referred [Child] for a forensic evaluation, which was scheduled for July 25, 2012.

Based upon the information received, I ordered that [Child] be released from Shuman Detention Center to the care of her [paternal] grandmother. I scheduled a probation review hearing for July 30, 2012 and ordered CYF to be present along with the forensic evaluator (who could appear by telephone or videoconference) to testify about [Child's] evaluation. The probation officer was ordered to present information concerning the efforts to assist the child with completing her community service and paying her court fees.

On July 30, 2012, the probation officer reported that, in essence, the Probation Department did nothing to assist [Child] with completing the conditions of her supervision other than encouraging her to complete the conditions of her probation on her own. CYF reported that they had not filed a petition for dependency to date, and that the investigation into the allegations of abuse was still ongoing. The caseworker also stated that the agency had not yet received the report from the forensic evaluation, and was waiting for this information before making a decision whether to file a petition for dependency. At the close of the hearing, I ordered [Child] to remain on probation and I set a subsequent probation review hearing for August 14, 2012 and I ordered that I be provided with a copy of the report of the forensic evaluation. I also ordered [Child] to remain in the care of her paternal grandmother and for CYF to coordinate visitation with [M]other and the paternal grandmother.

On August 14, 2012, the probation officer recommended that [Child] be released from probation and her case with

juvenile probation be closed. The assistant public defender was in agreement with this recommendation. The assistant public defender also requested that [Child] continue to remain in the care of paternal grandmother, and requested financial assistance from CYF along with dental and medical care. CYF stated that they would not be filing a petition of dependency on behalf of [Child], but would refer the family for Family Group Decision Making.

Due to the concerns for the safety of [Child] should she return home to the care of [Mother], I held a shelter care hearing and appointed KidsVoice, as guardian *ad litem* to represent [Child] in the shelter hearing. At the close of the shelter care hearing, I ordered [Child] to remain in the care of her paternal grandmother, and ordered CYF to file a petition for dependency within twenty-four hours as required by the rules. I gave KidsVoice permission to file a petition for dependency in the interest of [Child] should the agency fail to file a petition as ordered. I also ordered CYF to refer paternal grandmother for foster care certification and to provide paternal grandmother with emergency caregiver funds retroactive to the placement of [Child] in her care by the court. Additionally, I ordered CYF to refer [Child], both parents and both sets of grandparents for individual mental health evaluations and interactional evaluations to assess their relationships with the [C]hild. I closed [Child's] probation case as recommended by the probation officer.

Trial Court Opinion, 1/10/13, at 1-4.

Additionally, Mother stipulated to the following facts, among others:

4. Children Youth and Families (hereinafter CYF) has received three referrals regarding [this family].

5. The first referral was in January 2004 regarding a sibling and alleged physical abuse by [n]atural [f]ather. CYF file indicates that the report was substantiated. Current child abuse clearances for natural father are pending.

6. The second referral was October 2009[.] CYF received a report that [Child] brought a loaded handgun to school. CYF was court ordered to evaluate [Mother's] home. It was determined

that a maternal uncle placed the gun in [Child's] book bag and the case was closed.

7. The third referral was July 8, 2012. CYF received a report of physical abuse by Mother with [Child] as the victim.

* * * *

10. On July 23, 2012, the Honorable Kim Berkeley Clark placed [Child] in the home of paternal grandmother.

11. [Child] alleged physical abuse by [M]other at her detention hearing on July 23, 2012. [Child's] father had pictures of injuries from previous incidents of abuse.

12. [Child] had a forensic evaluation [at] Children's Hospital of Pittsburgh on July 24, 2012.

13. Mother per her testimony does not dispute the facts as outlined in the forensic evaluation. She did indicate that some of her actions were in self[-]defense but admits that she may have gone too far.

14. Mother reports to have signed up for a parenting class.

15. There is ongoing parent child conflict and family conflict.

* * * *

18. On August 14, 2012, the Honorable Kim Berkeley Clark ordered CYF to file a petition and if they did not then KidsVoice was granted leave to file a petition for dependency. CYF confirmed with KidsVoice that they were not filing a petition.

Child's Petition for Dependency, 8/15/12, at 1-3 (unpaginated) (citations omitted); **see also** N.T., 9/11/12, at 3 (Mother's counsel stipulating to paragraphs 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, and 18 of Child's petition).

Mother also averred as follows:

3. Mother alleges, Child would be a dependent child under 42 Pa.C.S.A. 6302(6), for the following reasons:

a. In October 2008 Child was given a consent decree for the following charges:

- i. Possession of Firearm by Minor
- ii. Possession of a Weapon on School Property
- iii. Recklessly Endangering Another Person
- iv. Carrying a Firearm Without a License

b. In April 2010-Child was additionally charged with 2 counts of retail theft and 1 count of false identification to authorities.

c. Child was found delinquent in May 2010 for the charges in "b."

d. Child violated her probation by not returning home by curfew in July 2012, which resulted in a warrant being issued and the Child being detained at Shuman Detention Center.

e. Child is physically aggressive towards Mother and other children in the home.

f. Despite Mother physically transporting Child to school; Child refused to attend which resulted in her missing 22 days.

g. Mother cannot keep her other children safe with Child in the home.

Mother's Emergency Motion for Permission to File a Dependency Petition, 8/20/12, at 1 (unpaginated) (citations omitted).

On August 14, 2012, the trial court appointed KidsVoice as guardian *ad litem* ("GAL") for Child. On August 15, 2012, the GAL filed a petition for dependency, pursuant to definition (1) of Section 6302. On September 4, 2012, Mother, too, filed a petition for dependency, hers pursuant to

definition (6) of Section 6302. On September 11, 2012, the trial court held a hearing on both petitions for adjudications of dependency, and, on that same date, entered its order, adjudicating Child dependent pursuant to definitions (1) and (6) of "dependent child" under Section 6302.¹

On October 11, 2012, Mother simultaneously filed a notice of appeal and concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).

As a preliminary matter, we address the issue of mootness, raised in Child's brief filed by the GAL. Child notes that she filed a motion to quash in

¹ Section 6302 provides definitions for a "dependent child," and states, in pertinent part:

"Dependent child." A child who:

(1) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals. A determination that there is a lack of proper parental care or control may be based upon evidence of conduct by the parent, guardian or other custodian that places the health, safety or welfare of the child at risk, including evidence of the parent's, guardian's or other custodian's use of alcohol or a controlled substance that places the health, safety or welfare of the child at risk;

* * * *

(6) has committed a specific act or acts of habitual disobedience of the reasonable and lawful commands of his parent, guardian or other custodian and who is ungovernable and found to be in need of care, treatment or supervision;

42 Pa.C.S. § 6302.

this Court, alleging mootness, on November 20, 2012. On December 19, 2012, this Court denied the motion without prejudice to re-raise the issue before this panel of the Court. Child now re-raises the issue, and argues that Mother's claims are moot on the basis that Mother "stipulated to virtually all of the facts in the petition filed by [the GAL] and admitted to excessive discipline of [Child]. Additionally [Mother] filed her own petition ... and stipulated to the dependency itself." Child's Brief at 16 (citation to trial court opinion omitted). Child, however, makes this argument without citation to authority. **Contra** Pa.R.A.P. 2112; Pa.R.A.P. 2119(a), (b).

We conclude that the issues raised on appeal are not moot. We observe that Mother challenges aspects of the case beyond the dependency itself, namely, whether the trial court erred in failing to recuse, and whether the trial court erred in permitting the GAL to file a petition for dependency. Mother does not challenge the facts to which she stipulated. Accordingly, we proceed to address the following two issues Mother has raised on appeal:

- 1.) Did The Trial Court Abuse Its Discretion When It Refused To Recuse Itself?
- 2.) Did The Trial Court Abuse Its Discretion In Misapplying The Law When It Allowed KidsVoice to Be Petitioner, GAL and Counsel?

Mother's Brief at 6.

In Mother's first issue, she argues that the trial court abused its discretion by refusing to recuse itself. In considering an appeal from the denial of a motion to recuse, our standard of review is as follows:

It is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially. As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner.... The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make. Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overturned on appeal but for an abuse of discretion.

Commonwealth v. Abu-Jamal, 553 Pa. 485, 720 A.2d 79, 89 (1998) (citations omitted). Furthermore, “[a]ny tribunal permitted to try cases and controversies must not only be unbiased but must avoid even the appearance of bias.” ***In the Interest of McFall***, 533 Pa. 24, 617 A.2d 707, 713 (1992). “There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings.” ***Id.***, at 714.

Commonwealth v. White, 910 A.2d 648, 657 (Pa. 2006).

Mother argues that the trial court evinced partiality, by way of “misreading” 42 Pa.C.S. § 6351 (“Authority of court upon petition to remove child from foster parent”). Mother’s Brief at 10-11. She also argues that this misreading deprived Mother of due process. ***Id.*** at 13. Additionally, Mother argues that the trial court’s partiality is evidenced by the fact that, when the court learned that CYF did not intend to file a petition for dependency, the court stated: “[T]he Agency clearly has a different opinion and assessment of this case than I do.” ***Id.*** at 13 (citing N.T., 8/14/12, at

8-9). Mother further argues that the trial court acted as the “protagonist” of the proceedings, by appointing a GAL and directing the GAL to file a petition for dependency, when CYF declined to file a petition. Mother’s Brief at 14.

In arguing the issue of recusal, we note that Mother seeks to inject the question of whether the trial court erred as a matter of law in its application of Section 6351. That question, however, is not properly before us. Mother’s argument must be confined to her chosen issue of whether the trial court abused its discretion in denying her motion for recusal. **See** Pa.R.A.P. 2116(a) (“No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.”) Turning to the issue that she presents for our review, we are not persuaded that the trial court abused its discretion in denying Mother’s motion for recusal.

The trial court explained:

As previously stated, I received testimony from multiple reliable sources (including [Mother]) that established that [Mother] had used excessive corporal punishment to discipline [Child]. [Mother] acknowledged that she wrestled her daughter to the floor and restrained her by sitting on top of her, while stuffing a sock in her mouth to prevent [Child] from screaming. [Mother] admitted that she struck and punched the child about the face and neck causing abrasions and scratches. I also heard testimony that [Mother] directed a sibling to strike [Child] with a belt while she was held helpless on the floor. Despite this undisputed evidence, the agency felt that [Mother’s] actions did not rise to the level of abuse and was not willing to file a petition for dependency, even though required by the rules. It was in this context that I made the statement that the agency clearly had a different opinion and assessment of the case than I had.

[Mother’s] assertion that I abused my discretion by ordering KidsVoice to file a dependency petition, is equally

without merit. Initially, the decision to appoint a guardian *ad litem* for the child was made after a request from Assistant Public Defender Georgene Siroky. Ms. Siroky correctly pointed out that [Child] was entitled to receive financial assistance from the public agency because she was residing with paternal grandmother. Ms. Siroky also advised the court that [Child] had medical and dental issues and would probably need braces, a large expense that grandmother might have to incur. [(N.T., 8/14/12, at 9-10)].

I immediately held a shelter care hearing and I appointed KidsVoice, as guardian *ad litem* to represent [Child] in the shelter hearing. I did not order KidsVoice to file a petition for dependency, rather I gave them leave to file the petition if the agency declined to do so. I submit that my order permitting KidsVoice to file a petition for dependency was not contaminated with any bias, prejudice, or unfairness, but that the order was consistent with protecting the welfare and safety of [Child].

Trial Court Opinion, 1/10/13, at 11-12.

In light of the high burden placed on an appellant by our standard of review and our review of the record, as well as our review of the trial court's well-reasoned explanation, we discern no abuse of discretion in the trial court's determination to deny Mother's motion for recusal. **See White**, 910 A.2d at 657.

In Mother's second issue, she argues that the trial court erred as a matter of law by permitting the GAL to proceed as guardian *ad litem*, petitioner for dependency, and counsel for child. Mother argues that, by pursuing dependency, the GAL could not simultaneously represent Child's best interests. Additionally, Mother suggests that, because the Allegheny County Office of Children Youth and Families did not file a dependency petition, the appointment of a GAL, and Child's petition for dependency,

were attempts by the trial court to file a dependency petition *sua sponte*.
Mother's Brief at 14-17.

Section 5334 of the Custody Act governs the appointment of a GAL in child custody cases. 23 Pa.C.S. § 5334. Section 5334 states, in pertinent part:

§ 5334. Guardian ad litem for child

(a) Appointment.-The court may on its own motion or the motion of a party appoint a guardian ad litem to represent the child in the action. The court may assess the cost upon the parties or any of them or as otherwise provided by law. The guardian ad litem must be an attorney at law.

(b) Powers and duties.-The guardian ad litem shall be charged with representation of the legal interests and the best interests of the child during the proceedings

23 Pa.C.S. § 5334.

Turning first to Mother's contention that a child's counsel and guardian *ad litem* may not be one and the same, Section 5334 plainly explains that a guardian *ad litem* is charged with the representation of the legal interests and the best interests of the child. **See** 23 Pa.C.S. § 5334. As a result, the trial court did not err by permitting KidsVoice to be guardian *ad litem* and counsel for child. The definition of a guardian *ad litem's* powers and duties demonstrates that a guardian *ad litem* acts as counsel. **See** 23 Pa.C.S. § 5334(b).

Turning next to Mother's contention that a petitioner for dependency and a child's guardian *ad litem* may not be the same person or entity,

Mother does not provide citation to any provision of law that precludes a guardian *ad litem* from seeking to have a child, for which they are appointed guardian, adjudicated dependent. **See** Pa.R.A.P. 2119(b) (concerning omissions of citation to authority). In fact, Mother's appellate brief for the most part lacks citations to authority or to the record, in contravention of our rules of appellate procedure, and significantly impedes our review of her arguments. **See id.**; Pa.R.A.P. 2119(c). Nevertheless, we attempt to address the issue she has raised.

Section 6311 of the Juvenile Act states that a guardian *ad litem* is charged with making "specific recommendations to the court relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety." **See** 42 Pa.C.S. § 6311(b)(7). While Mother fails to develop her argument on the issue of a conflict of interest, we note that the Comment to the Rules of Juvenile Court Procedure Rule 1154 addresses conflicts of interest between a child's legal interests and best interests.

The Comment explains:

If there is a conflict of interest between the duties of the guardian *ad litem* pursuant to paragraphs (7) and (9), the guardian *ad litem* for the child may move the court for appointment as legal counsel and assignment of a separate guardian *ad litem* when, for example, the information that the guardian *ad litem* possesses gives rise to the conflict and can be used to the detriment of the child. If there is not a conflict of interest, the guardian *ad litem* represents the legal interests and best interests of the child at every stage of the proceedings.

* * * *

“Legal interests” denotes that an attorney is to express the child’s wishes to the court regardless of whether the attorney agrees with the child’s recommendation. “Best interests” denotes that a guardian *ad litem* is to express what the guardian *ad litem* believes is best for the child’s care, protection, safety, and wholesome physical and mental development regardless of whether the child agrees.

Comment to Pa.R.J.C.P. 1154.

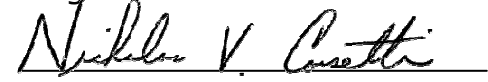
Insofar as a child’s interests call for an adjudication of dependency, a guardian *ad litem* acts on its statutory duty in filing a petition for the same. Here, if a conflict of interest exists between Child’s legal interests and Child’s best interests, Mother does not demonstrate one and our review of the record does not reveal one. Moreover, Mother admits that she physically abused child and, as noted above, a finding of dependency “may be based upon evidence of conduct by the parent, guardian or other custodian that places the health, safety or welfare of the child at risk” **See** 42 Pa.C.S. § 6302(1). Accordingly, it appears that Child’s best interests and legal interests are aligned, and that the GAL acted in accord with her duties in seeking an adjudication of dependency for Child. Mother fails to demonstrate any merit to her second issue on appeal.

For the reasons stated above, we affirm the trial court’s order.

Order affirmed.

J-A12015-13

Judgment Entered.

A handwritten signature in black ink, reading "Nicholas V. Casetta", is written over a horizontal line.

Deputy Prothonotary

Date: June 5, 2013