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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN THE INTEREST OF N.E.M.

APPEAL OF N.E.M.
Appellant

COMMONWEALTH'S BRIEF FOR APPELLEE

Defense Appeal from the September 28, 2022 Order of the Superior Court of Pennsylvania denying the Petition for Review pursuant to Pa.R.App.P. 1612(A) seeking review of the orders of July 1, 2022 and August 11, 2022, ordering out-of-home placement of N.E.M., a juvenile, entered by the Court of Common Pleas of Philadelphia County, Family Court Division, Juvenile Branch, on Petition Nos. CP-51-JV-0000789-2022 and CP-51-JV-0000790-2022.

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COUNTER-STATEMENT OF THE QUESTION INVOLVED

Did the superior court err in denying N.E.M.'s petition for specialized review under Pa.R.App.P. 1612 without issuing a memorandum opinion where Rule 1612 affords N.E.M. a right to expedited review of the juvenile court's reasons for its placement, and here the juvenile court did not explain its reasons for imposing out-of-home placement?

- *Not addressed by the court below*

COUNTER-STATEMENT OF THE CASE

N.E.M., a fifteen-year-old child, was adjudicated delinquent of two unrelated offenses and placed outside of his home. On appeal, he challenges the superior court's *per curiam* denial of his Pa.R.App.P. 1612 petition for expedited review, which the court issued without first requiring the juvenile court to provide a statement of its reasons for imposing out-of-home placement. Because the juvenile court erred in not stating its reasons for the placement, and the superior court erred both by not directing the juvenile court to provide its statement of reasons, and by treating N.E.M.'s petition as discretionary, the Commonwealth agrees that this Court should issue an opinion clarifying that Rule 1612 creates a non-discretionary right to merits review.

On May 19, 2022, around 10:30 A.M. at the High Road School in Philadelphia, N.E.M. kicked the glass door of the school in an attempt to enter the building. He caused approximately $450 in damage. He then made threats to physically assault school staff and further damage school property. He also smacked a cell phone out of the hands of the victim, a staff member at the school. He finally left, but before doing so he threw a lit Cigarello at the victim. The Cigarello hit the victim in the chest (N.T. 7/1/22, 10–11).

On June 20, 2022, around 11:15 P.M., N.E.M. ran towards a different victim, who was taking items out of his parked vehicle near 6300 North 10th Street in

Philadelphia. N.E.M. punched the victim with a closed fist, knocking him to the ground. N.E.M. said, "give me your fucking keys," and the victim handed over his keys. N.E.M. drove away in the victim's vehicle (N.T. 7/1/22, 8–9).

On June 21, 2022, N.E.M. was arrested and charged under dockets CP-51-JV-0000790-2022 and CP-51-JV-0000789-2022. Both petitions were listed for an adjudicatory hearing on July 1, 2022 before the Honorable Jonathan Q. Irvine in the Philadelphia Court of Common Pleas Family Division. At the hearing, N.E.M. entered a negotiated admission in each case, and the Commonwealth recommended N.E.M. be immediately released to house restrictions with a GPS bracelet (N.T. 7/1/22, 5, 8).

The juvenile court refused to accept the negotiated terms. When counsel for N.E.M. stated that N.E.M. may wish to withdraw his admission because the negotiation had been rejected, the court stated that N.E.M. would be unable to withdraw his admission. The court then abruptly ended the hearing. Ten days later, N.E.M. again appeared before Judge Irvine. Both the Commonwealth and N.E.M.'s attorney reiterated that they had agreed to a negotiated term of house restrictions with GPS monitoring. N.E.M.'s attorney then asked the court to "mov[e] this to crossover court," to which the court replied, "No. Listen, it's not appropriate. The recommendations are not appropriate. It's a carjacking where he punched a man in the face and took his car. It's not appropriate." The court then affirmed that it was

ordering N.E.M. to be placed outside of his home (N.T. 7/1/22, 16–18; 7/11/22, 6–7)

Fifteen days later, N.E.M. again appeared in front of Judge Irvine, who clarified that, despite failing to say so on the record at the time, he had adjudicated N.E.M. delinquent at the first hearing on July 1, 2022. The court said:

> Reasons for the adjudication: there were two separate petitions, the second being a robbery as well as a physical attack. And the thing that he stole was a man's car. These are known as carjackings. Felonies have a presumption that the juvenile is in need of treatment, rehabilitation, and supervision. These were two separate offenses. They're not the same offense. And the second escalated to violence. I stated in this case all admissions are open in the courtroom, therefore I don't agree with the recommendations[.] I'll do what I think is appropriate. Based on this young man's – the violence committed in this case, I think he's a danger to the community.

(N.T. 7/26/22, 3–4).

The juvenile court did not allow arguments regarding N.E.M.'s need for treatment, supervision, or rehabilitation. The court also did not make any finding on the record regarding those needs. The court further did not state its reasons for imposing out-of-home placement beyond commenting on the gravity of the offenses.

N.E.M. filed an emergency petition for specialized review of out-of-home placement pursuant to Pa.R.App.P. 1612. The juvenile court did not file a statement of reasons for its imposition of out-of-home placement, nor did the Commonwealth file a response. The superior court issued a *per curiam* decision denying the petition.

N.E.M. remained in out-of-home placement for eleven months. He was released during the pendency of this appeal.

This Court granted review of the superior court's denial of Rule 1612 relief without issuing a memorandum opinion or ordering the juvenile court to file a statement of reasons for imposing out-of-home placement.

SUMMARY OF ARGUMENT

Pennsylvania Rule of Appellate Procedure 1612, which was promulgated in order to give juveniles an opportunity to seek an expedited merits review of their out-of-home placement, requires the juvenile court to fully explain its reasoning for imposing out-of-home placement. In N.E.M.'s case, the juvenile court did not adequately explain its reasoning for imposing out-of-home placement. As such, it was the responsibility of the superior court, in consideration of N.E.M.'s Rule 1612 motion, to direct the juvenile court to adequately explain its reasoning. The superior court did not do this. This was an error.

Furthermore, the legislative history of Rule 1612, as well as relevant juvenile court rules, support an interpretation that the rule requires the superior court to grant an expedited merits review of N.E.M.'s out-of-home placement.

Although this issue is moot as to N.E.M., this Court should nevertheless conduct a merits review because the issue is capable of repeatedly evading review.

ARGUMENT

I. The superior court erred in not directing the juvenile court to state its reasons for imposing out-of-home placement

The plain language of Rule of Appellate Procedure 1612[1] and Juvenile Court Rule 512, as well as relevant precedent, make it clear that a juvenile court is required, upon application for review under Rule 1612, to provide an explanation for its imposition of out-of-home placement. When juvenile courts do not provide the required explanation—as happened here—it is the responsibility of the superior court to instruct the juvenile court to provide its explanation. Here, both courts did not comply with this rule.

A. Rule 1612 requires a juvenile court to fully explain its reasoning for imposing out-of-home placement.

The plain language of Rule 1612 is unambiguous. It provides: "if the judge who made the disposition of the out-of-home placement did not state the reasons for such placement on the record at the time of the disposition pursuant to Pa.R.J.C.P. 512(D), the judge *shall* file of record a brief statement of the reasons for the determination or where in the record such reasons may be found." Pa.R.App.P. 1612(f) (emphasis added). The words "shall file" impose a mandatory requirement

[1] Pa.R.App.P. 1612 was previously Pa.R.App.P. 1770. To avoid confusion, the Commonwealth will refer to it only as Rule 1612.

on a juvenile court. *In re Adoption of L.B.M.*, 161 A.3d 172, 179 (Pa. 2017) ("The word 'shall' is by definition mandatory[.]").

The drafters of Rule 1612 included a note further confirming the requirement that the juvenile court state its reasoning on the record, stating, "paragraph (f) of this rule [requiring opinion of juvenile court] is applicable only in the exceptional circumstance where the judge who made the disposition of an out-of-home placement fails to comply with Pa.R.J.C.P. 512(D)." Indeed, Rule 1612 is clearly intended to be a failsafe; the juvenile court rules already require the juvenile court to state its reasons on the record for imposing out-of-home placement. Juvenile court rule 512 states, "The court *shall* enter its findings and conclusions of law into the record and enter an order pursuant to Rule 515." Pa.R.J.C.P. 512(D) (emphasis added).

In one of the first cases in which the superior court considered a petition filed under Rule 1612, that court affirmed the requirement that the juvenile court provide a statement of the reasons for imposing out-of-home placement. *Commonwealth v. K.M.-F.*, 117 A.3d 346, 349 (Pa. Super. 2015). And, as recently as June of this year, the superior court again affirmed that the juvenile court is *required* to state its reasons for imposing out-of-home placement on the record. *Interest of S.A.R.C.*, 2023 WL 4234432, *2–*3 (Pa. Super. June 28, 2023) (Unpublished Disposition). In

this case, however, the superior court did not apply the requirement that the juvenile court provide a statement of its reasons for imposing out-of-home placement.

B. The juvenile court did not adequately explain its reasoning for imposing out-of-home placement

Here, the juvenile court did not comply with the requirements of either Pa.R.J.C.P. 512(D) or Pa.R.App.P. 1612. The Commonwealth recommended that N.E.M. be placed on GPS monitoring with house restrictions (N.T. 7/1/22, 12–13; 7/11/22, 7). The juvenile court rejected this, stating only that "it's not appropriate. It's not appropriate. The recommendations are not appropriate. It's a carjacking where he punched a man in the face and took his car. It's not appropriate." (N.T. 7/11/22, 8). This brief statement was insufficient under Rules 512(D) and, by extension, 1612(f). The juvenile court was required to consider whether out-of-home placement was the least restrictive type of placement consistent with the protection of the public, and whether out-of-home placement was best suited to N.E.M.'s treatment, supervision, rehabilitation, and welfare. Pa.R.J.C.P. 512(D)(4)(b). Instead of making that finding, the juvenile court made the inaccurate assertion that "felonies have a presumption that the juvenile is in need of treatment, rehabilitation, and supervision" (N.T. 7/26/22, 3).

This Court, however, held to the contrary in *Commonwealth v. M.W.*, 39 A.3d 958, 966 (Pa. 2012), where it noted "A determination that a child has committed a delinquent act does not, on its own, warrant an adjudication of delinquency. This is

so *even where the delinquent act constitutes a felony*[.]" 39 A.3d 958, 966 n.9 (emphasis added). Importantly, a finding of delinquency—which the juvenile court did not properly effectuate here—is only the first step in imposing out-of-home placement. Indeed, it is only once the juvenile has been properly adjudicated delinquent that the juvenile court may then consider imposing out-of-home placement. Pa.R.J.C.P. 512(D)(4).

Because the juvenile court did not comply with the mandates of Pa.R.J.C.P. 512(D)(4)(b) and Pa.R.App.P. 1612(f), the superior court erred when it did not direct the juvenile court to enter onto the record a statement of its reasons for imposing out-of-home placement. 42 Pa.C.S. § 323; *cf Commonwealth v. K.M.-F.*, 117 A.3d 346, 349 (Pa. Super. 2015) (the superior court found that "the juvenile court has complied with the directive of Rule [1612], by providing a statement of the reasons for its determination on the record at the conclusion of the hearing").

II. Rule 1612 requires the superior court to grant an expedited merits review

N.E.M. claims that the superior court improperly treated Pa.R.App.P. 1612 as discretionary—and has historically applied the rule inconsistently by viewing it as discretionary—because the rule *requires* the court to conduct an expedited merits review of the juvenile court's imposition of out-of-home placement (Brief for Appellant, 13). The Commonwealth agrees with N.E.M.'s interpretation of rule 1612 and joins its argument that an expedited merits review, which must include

consideration of the juvenile court's statement of reasoning, is mandatory, not discretionary.

Interpreting the Pennsylvania Rules of Appellate Procedure presents a question of law for which this Court's standard of review is de novo and its scope of review is plenary. *Commonwealth v. Dowling*, 959 A.2d 910, 913 (Pa. 2008). Such review makes clear that Rule 1612 grants juveniles who have been adjudicated delinquent and placed in out-of-home treatment an expedited merits review of that placement as a matter of right.

The Pennsylvania Rules of Appellate Procedure are construed according to Chapter 19 of Title 1 of the Pennsylvania Consolidated Statutes (rules of construction). Pa.R.App.P. 107. "[A]ll questions of statutory interpretation" are "guided by the principle that the language of a statute provides the best indication of the [drafters'] intent." *Commonwealth v. Ford*, 217 A.3d 824, 828 n.9 (Pa. 2019) "[T]he words of a statute 'shall be construed according to rules of grammar and according to their common and approved usage.'" *Commonwealth v. Garzone*, 34 A.3d 67, 75 (Pa. 2012) (quoting 1 Pa. C.S. § 1903(a)). "[W]hen the words of a statute are unambiguous," this Court "do[es] not look beyond the law's plain meaning." *Ford*, 217 A.3d at 828 n.9 (citing 1 Pa. C.S. § 1921(b)). A statute "shall be construed, if possible, to give effect to all its provisions." *Commonwealth v. Weir*, 239 A.3d 25, 37 (Pa. 2020) (quoting 1 Pa. C.S. § 1921(a)).

N.E.M. and amici identify several compelling reasons for this Court to clarify that Rule 1612 review is mandatory; the Commonwealth joins in those positions. By way of further argument, the Commonwealth offers two additional points of support for such an interpretation: (1) the use of the word "availability" in the juvenile court rules; and (2) specific language from the Interbranch Commission report highlighting the need for a right to expedited review.

A. The juvenile court rules' use of the word "availability" supports that a Rule 1612 expedited merits review is a right

This Court's choice of words in promulgating relevant rules of juvenile court procedure supports a finding that Rule 1612 expedited review was intended to be a right, not a privilege available only by application or petition. Specifically, two juvenile court rules refer to Rule 1612 review as "available." Because courts have previously used the word "available" to describe non-discretionary rights, the description of Rule 1612 review as "available" supports a finding that the drafters of Rule 1612 intended the expedited merits review to be available to all eligible petitioners—i.e., all juveniles who have been adjudicated delinquent and subjected to out-of-home placement.

Juvenile court rule 512 states, "when out-of-home placement is necessary . . . [t]he court should also explain to the juvenile the *availability* of review of the out-of-home placement pursuant to Pa.R.A.P. [1612]." Pa.R.J.C.P. 512(D)(7) (emphasis added). Furthermore, juvenile court rule 1612, which concerns the modification or

revocation of probation of juveniles, states, "If a change in disposition results in an out-of-home placement, then the court should also explain to the juvenile the *availability* of review of the out-of-home placement pursuant to Pa.R.App.P. 1612." Pa.R.J.C.P. 612(E) (emphasis added).

The use of the word "availability" denotes the presence of a right, not merely an opportunity subject to the court's discretion. This Court has previously used the word "available" to describe inalienable rights. *See*, *e.g.*, *Commonwealth v. Medina*, 227 A.2d 842, 843 (Pa. 1967) (citation omitted) (describing the right to remain silent during custodial interrogation as the "*availability* of the privilege") (emphasis added); *Wertz v. Chapman Tp.*, 741 A.2d 1272, 1278 (Pa. 1999) (describing federal right to jury trial under the Fair Labor Standards Act and the Age Discrimination and Employment Act of 1967 as a right that is *available* to litigants); *see also Lambert v. Blackwell*, 387 F.3d 210, 232 (3d Cir. 2004) (holding that, in the context of federal Habeas petitions, Pennsylvania Supreme Court review of a criminal or collateral appeal is considered "unavailable" in part because it is discretionary).

It is the Commonwealth's position that the drafters' use of the word "availability" in rules 512 and 612 was intentional; it meant that an expedited merits review under rule 1612 is a non-discretionary right accessible to all juveniles placed outside of the home.

B. Specific language from the Interbranch Commission report highlights the need for a *right* to expedited review

NEM and amici explained the history that resulted in the promulgation of appellate Rule 1612. In order to further assist this Court in interpreting Rule 1612, the Commonwealth highlights two important sections of the Interbranch Commission report that reveal the Commission's intent to create a non-discretionary right to an expedited merits review.

When interpreting the Rules of Appellate Procedure, the intention of the General Assembly may be ascertained by considering the occasion and necessity for the statute, the circumstances under which it was enacted, and the contemporaneous legislative history. 1 Pa.C.S. § 1921(c). As this Court explained in its April 8, 2013 Final Report on Implementation on Recommendations of the Interbranch Commission on Juvenile Justice, Rule 1612 (then Rule 1770) was enacted after reviewing the Interbranch Commission on Juvenile Justice's May 2010 report and recommendations (Final Report, April 8, 2013). As such, the Commission's May 2010 report and recommendations is a contemporaneous and useful indicator of the utility of Rule 1612.

In its May 2010 report, under the heading "Recommendation Regarding Appellate Review," the Commission stated,

> Because many dispositions are completed in 120 days or less, the Interbranch Commission on Juvenile Justice recommends that an appellate

> process be developed which *assures* that any appeals will be finalized, and a decision rendered by the Superior Court, in 90 days or less from the date the appeal is filed.

(Interbranch Commission Report, 56) (emphasis added). It then went on to say,

> The commission, therefore, further recommends that the Supreme Court's Appellate Court Procedural Rules Committee and Juvenile Court Procedural Rules Committee collaborate to develop an expedited appeals process or, in the alternative, collaborate to develop a process that affords an aggrieved party an option to *elect* a mechanism that affords some measure of review of a juvenile court judge's decision short of a formal appellate review in the following proceedings . . . an order of disposition following an adjudication of delinquency that removes a child from his or her home.

Id. (emphasis added). These phrases eliminate any ambiguity; the intention of the Commission to provide juveniles with a non-discretionary right to an expedited merits review of out-of-home placement is clear.

III. Although N.E.M.'s case is moot, this issue is capable of repeatedly evading review

The Commonwealth agrees with N.E.M. that this Court should clarify the non-discretionary nature of Pa.R.App.P. 1612 even though N.E.M. has been released from placement and his petition as it relates to himself is moot. Under the mootness doctrine, "an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Pub. Defender's Office of*

Venango Cty. v. Venango Cty. Ct. of Common Pleas, 893 A.2d 1275, 1279 (Pa. 2006). Judicial intervention "is appropriate only where the underlying controversy is real and concrete, rather than abstract." *City of Philadelphia v. Commonwealth*, 559, 838 A.2d 566, 577 (Pa. 2003). However, there is an exception to the mootness doctrine when an issue is capable of repetition yet evading review. *Pub. Defender's Office of Venago Cty.*, 893 A.2d 1275, 1279. The non-discretionary nature of Rule 1612 is such an issue.

As the Allegheny Public Defender's Office explained, the superior court has applied Rule 1612 inconsistently since its imposition (Brief for Amicus Curiae, 6–7). As it stands, future juvenile offenders who seek to avail themselves of the expedited review provided by Rule 1612 are at risk of finding themselves in the same position N.E.M. is in now: with no means to challenge a *per curiam* denial of their Rule 1612 petition because their out-of-home placement ended before the resolution of their appeal. Accordingly, the Commonwealth agrees with appellant and amici that a merits review of the issues presented is warranted.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court clarify that Pa.R.App.P. 1612 provides a non-discretionary right to an expedited merits review of out-of-home placement.

Respectfully submitted,

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