

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WAP 2024

NO: 14

IN THE INTEREST OF S.W.,
A MINOR

BRIEF FOR *AMICUS CURIAE* DEFENDER ASSOCIATION
OF PHILADELPHIA IN SUPPORT OF APPELLANTS,
ALLEGHENY COUNTY CHILDREN AND YOUTH
SERVICES AND KIDSVOICE

Appeal from the March 13, 2024 Opinion and Order of the Superior Court at 22 WDA 2023, vacating the November 8, 2022 Order of the Court of Common Pleas of Allegheny County, Family Division – Juvenile Section at No. CP-02-DP-0000729-2020.

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I. INTEREST OF AMICUS CURIAE

The Defender Association of Philadelphia (“Defender Association”), was founded in 1934 by a group of attorneys who were dedicated to the belief that everyone, regardless of income, deserves the highest quality legal representation. Firmly rooted in Philadelphia for more than 80 years, the Defender Association stands as the City’s vanguard for all types of indigent defense and has continually expanded its services to provide high-quality, client-centered legal representation not only to adults but also to juveniles and children in Philadelphia. As such, in 1974, the Defender Association created the Child Advocacy Unit to act as a voice for children who are involved in the dependency court system. The Child Advocacy Unit provides an integrated, team-based approach of attorneys and social workers who work together throughout the life of a case to protect the client’s legal rights; advocate for their best interests; promote their permanency, stability, and well-being; and secure positive outcomes for them. The resolution of this case is of substantial importance to our role in representing our clients.

As the primary appointment source for Philadelphia Family Court, the Child Advocacy Unit as an entity represents the largest collective

group of children who are the subject of dependency petitions before the juvenile court. In 2023-2024, the Child Advocacy Unit represented approximately 1,069 clients in 5,200 dependency and adoption hearings. We have litigated many dependency matters in which outside parties have attempted to intervene. In these cases, our clients' voices are at risk of being drowned out by the presence of parties whose interests are too remote to countenance involvement in their dependency matters.

Amicus states that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part.

II. SUMMARY OF THE ARGUMENT

The language of Section 6336.1 is clear and unambiguous; by its plain terms, it denies legal standing to foster parents and others who do not and have not had legal custody of the child. Moreover, it comports with longstanding general principles of standing in this Commonwealth. Finally, it supports the purpose of the Juvenile Act: to reunify the family where possible, and, where it is not, to speedily move children toward permanency.

In the case decided below, the Superior Court effectively invited this Court to find that a repudiation of *In Interest of M.R.F., III* is long overdue, as its outcome contradicts the relevant statutory authority and does not reflect the realities of the dependency system and its goals. Thus, it is in the best interests of the children of Philadelphia involved in the dependency system that the Superior Court's decision be reversed.

III. ARGUMENT

The Juvenile Act, at its most basic level, prioritizes the preservation of family unity¹; thus, standing is properly limited to those who fall within the category of family protected by constitutional right. In keeping with these priorities, Section 6336.1 explicitly excludes foster parents, pre-adoptive² parents, and relatives who have never had legal custody from standing in the dependency proceedings for the limited purpose of challenging removal, and definitive recognition of that exclusion is long overdue. The Section provides a specific remedy for a foster parent from whom a child has been removed: notice and a hearing to challenge that

¹ 42 Pa.C.S. 6301(b): Purposes. - - This chapter shall be interpreted and construed as to effectuate the following purposes:

(1) To preserve the unity of the family whenever possible, or to provide another alternative permanent family when the unity of the family cannot be maintained.

(1.1) To provide for the care, protection, safety, and wholesome mental and physical development of children coming within the provisions of this chapter

(2) [].

(3) To achieve the foregoing purposes in a family environment whenever possible, **separating the child from parents only when necessary for his welfare, safety or health or in the interests of public safety** by doing all of the following: [] (emphasis added).

² The statutory language refers to “preadoptive” parents; however, in the case below, the Superior Court discussed the “prospective adoptive parent” exception. As noted in *In re M.R.F. III*, 182 A.3d 1050 (Pa. Super. 2018), courts have used these terms interchangeably. *Id.* at 1054 n.2. Neither phrase is defined in the Juvenile Act or Adoption Act, nor does case law differentiate between the two. *Id.*

removal.³ This specific, targeted procedural protection acknowledges the critical role foster parents play in the dependency system, while ensuring that the established parties retain the exclusive right to participate fully in the panoply of protections offered through litigation, including a right to appeal. Foster parents' limited, though important, role has long been recognized in this Commonwealth's jurisprudence, in that the courts recognize the parental-style roles foster parents play and the significant bonds they form with foster children, but nonetheless identify their rights as subordinate to those of the agency.⁴ While the dependency system

³ “The court shall direct the county agency or juvenile probation department to provide the child’s foster parent, preadoptive parent, relative providing care for the child or a potential kinship care resource [] with timely notice of the hearing. The court shall provide the child’s foster parent, preadoptive parent or relative providing care for the child the right to be heard at any hearing under this chapter.” 42 Pa.C.S. § 6336.1(a).

The legislature has also provided an administrative remedy allowing a foster parent to appeal a child’s relocation, so long as removal was not initiated by the court. 55 Pa.C.S. § 3700.73(a) (“Foster parent appeal of child relocation”); *see, e.g., In re G.C.*, 735 A.2d 1226, 1231-32 (Pa. 1999); *Burns v. Dep’t of Hum. Svcs.*, 190 A.3d 758, 764-66 (Pa. Comwlth. 2018).

⁴ *See In re G.C.*, 735 A.2d at 1228 (“The agency, while transferring physical custody to the foster parents, remains responsible for the care of the child, and may at any time be required by the child’s interests to regain physical custody and terminate the foster parent’s relationship to the child”; while “day-to-day supervision of the child and his activities, and most of the functions ordinarily associated with legal custody, are the responsibility of the foster parent,” “[n]evertheless, agency supervision of the performance of the foster parents takes forms indicating that the foster parent does not have full authority of a legal custodian”) (*quoting In re Adoption of Crystal D.R.*, 480 A.2d 1146, 1149, 1150 (Pa. Super. 1984)); *In Interest of J.P.*, 178 A.3d 861, 866 (Pa. Super. 2018) (foster parents cannot stand *in loco*

could not function without dedicated foster parents, their interests are not necessarily aligned with those of the child, agency, or parent whose rights are intact—the interests that define the purpose of the Juvenile Act.

The inclusion of parents, children, and agency as parties, and exclusion of foster parents, comports with longstanding case law governing the standard for parties who possess standing to challenge a trial court’s order through appeal. In *In re L.J.*, the Superior Court denied a child’s sibling the right to appeal, noting that to possess standing for appeal, a party must be aggrieved; an aggrieved party must (a) have a substantial interest in the subject matter of the litigation; (b) the interest must be direct; and (c) the interest must be immediate and not a remote consequence. 691 A.2d 520, 523-24 (Pa. Super. 1997) (*citing S. Whitehall*

parentis because their status is subordinate to that of the agency, which maintains legal custody) (*quoting In re J.S.*, 980 A.2d 117, 122 n.4 (Pa. Super. 2009)). Notably, the United States Supreme Court has said the same. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 856 (1977) (acknowledging strength of relationship that may develop between foster parents and children, but finding that any recognition afforded to the foster family is limited, because the relationship “has its origins in an arrangement in which the State has been a partner from the outset”; any interest the foster parent has “derives from a knowingly assumed contractual relationship with the State,” and whatever liberty interest it has cannot be acquired “in the face of [a biological or legal parent’s] constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right [.]”).

Twp. Police Services v. S. Whitehall Twp., 555 A.2d 793, 795 (Pa. 1989)). To determine whether the potential party’s interest is “immediate,” the court must consider whether “it lies in the ‘zone of interests sought to be protected by the statute or constitutional guarantee in question.’” *Id.* (quoting *S. Whitehall Twp.*, 555 A.2d at 524). The Superior Court found no support for the sibling’s claim that there was a constitutional right of siblings to be raised together. *Id.* Rather, the Juvenile Act is, at its core, about parents and children. By its definition, a dependent child lacks “proper *parental* care or control.” *Id.* at 525 (emphasis added). The “focal point” of the statute “refers, primarily, to sustaining the connection between children and their natural parents.” *Id.*

Allowing additional voices into the courtroom dilutes the voice of the child, as well as the family and the agency. The principle that children’s voices are critical to dependency and adoption proceedings has clearly gained traction over recent years. For example, the Pennsylvania Judicial Benchbook, a resource provided to dependency court judges, addresses this need to bring the child’s voice literally into the courtroom:

Best Practice – Children Appearing at Every Hearing

The judge or hearing officer should set an expectation that children will appear at each hearing unless there is a good reason for the child not to appear. It is important that the court see the child to develop a first-hand understanding of the child including developing a rapport with him or her. While the court may wish to exclude the child from sensitive portions of the proceeding, the presence of the child serves as a visual reminder that it is *this* child's best interest that the court is serving. It also provides the child with an opportunity to be heard and to participate in proceedings that have a profound impact on his or her life.⁵

Again, in light of the centrality of the child to dependency and adoption proceedings, this is both intuitively and legally the correct approach.⁶

Youth with lived experience in foster care, including the clients we represent, perceive that the courts hear a great deal *about* them from others, but very little directly *from* them.⁷ Their voices are often

⁵ Pennsylvania Judicial Benchbook, Ch. 20.6 (emphasis in original).

⁶ See, e.g., Katie Chilton, *Cmt., Did Anyone Ask the Child?: Recognizing Foster Children's Rights to Make Mature Decisions through Child-Centered Representation*, 72 EMORY L.J. 385 (2022).

⁷ See, e.g., Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, 25 Child Law Practice 10, American Bar Association (December 2006); Sonja T. Lenz-Rashid, *Developing Permanent, Supportive Connections While in Care: Foster Youth's Perspectives*, available at https://ocfcpcourts.us/wp-content/uploads/2020/06/Foster_Youth_Perspectives_000406.pdf#new_tab (last accessed June 18, 2024); Reina M. Sanchez, *Youth Perspectives on Permanency*, available at <https://ocfcpcourts.us/wp->

dismissed or minimized, even though the system is ostensibly most concerned with their best interests. Allowing yet another individual to have the right to be heard on the home in which they live—perhaps the most fundamental element of their lives—further diminishes their agency and basic control over their present and future well-being.

This approach has made its way into this Court’s case law as well. In termination of parental rights proceedings brought under the Adoption Act, this Court has recognized the necessity of providing children with an expressed-interest attorney for termination of parental rights proceedings, acknowledging that their voices are crucial to the outcome of proceedings ostensibly conducted for their benefit. *In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017).⁸ The same principle has been extended by the Superior Court to dependency proceedings under the Juvenile Act.⁹

content/uploads/2020/06/Youth_Perspectives_001026.pdf (last accessed June 18, 2024); American Bar Association Court Improvement Program (CIP) Talks, *available at* https://www.americanbar.org/groups/public_interest/child_law/project-areas/national-court-projects/cip-talks/ (last accessed June 18, 2024).

⁸ See also *In re T.S.*, 192 A.3d 1080 (Pa. 2018); *In re P.G.F.*, 247 A.3d 955 (Pa. 2021); *In re Adoption of K.M.G.*, 240 A.3d 1218 (Pa. 2020) (further defining children’s right to counsel in terminations of parental rights).

⁹ *Interest of J.F.*, 308 A.3d 1252 (Pa. Super. 2024); *In re J’K.M.*, 191 A.3d 907 (Pa. Super. 2018).

Prior to termination of parental rights, where the goal remains reunification, permitting the intervention of foster parents into the action detracts from the mutual right to family integrity that, by right, should be the province of both parents *and* children.¹⁰ Permitting foster parents to intervene unnecessarily complicates proceedings and may contribute to instability of placement that further harms children who have already been separated from their families and diverts the focus from the preferred outcome under the Juvenile Act: reunification of parent and child.¹¹

¹⁰ This Court has reaffirmed a parent’s fundamental right to raise their children as they see fit. *See, e.g., Interest of S.K.L.R.*, 256 A.3d 1108 (Pa. 2021) (termination of parental rights); *Interest of Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006) (grandparent visitation). The United States Supreme Court has done so as well, in a variety of contexts. *See* Shanta Trivedi, *My Family Belongs to Me: A Child’s Constitutional Right to Family Integrity*, 56 HARVARD CIV. RTS-CIV. LIBERTIES L. REV. 267, 277-282 (2021) (collecting cases).

The notion that children have a right to family integrity separate and apart from that of their parents has gained traction in recent years. *See, e.g.,* Rachel Kennedy, *Note: A Child’s Constitutional Right to Family Integrity and Counsel in Dependency Proceedings*, 72 EMORY L. J. 910 (2023); Trivedi, *supra*. The rationale of such a right is that it “recognizes and incorporates children’s experiences and attempts to bring children to the forefront of legal decision-making by listening to children’s authentic voices, and employing child-centered practical reasoning.” Trivedi, *supra* p. 22, at 274 (internal quotation marks omitted). Children ought to be afforded a greater voice in proceedings that threaten their well-being and seek to separate them from their families, given the losses they stand to suffer should their families be shattered. *Id.* at 275.

¹¹ This concern is implicated in the very case Petitioners here are seeking to overturn, in which the mother’s parental rights remained intact and reunification remained the goal; nonetheless, the appellant-foster parents were permitted to intervene. *See In Interest of M.R.F., III*, 182 A.3d 1050, 1057 (Pa. Super. 2018) (“While we agree

Once parental rights have been terminated, permitting intervention by pre-adoptive foster parents can unduly delay achieving permanency for the child. This Court recently reaffirmed and clarified the longstanding principle that a child’s need for permanency is one of the critical factors underlying a best interest analysis at a termination proceeding.¹² Uncertainty regarding a pre-adoptive parent’s standing can set off a cascade of trial-level and appellate litigation that may consume a case for months, or even years. A pre-adoptive foster parent can petition to intervene, which may result in continuances, lengthy hearings, or other delays; if it is denied, they may appeal the denial. If the conflicting precedents lead the Superior Court to grant standing, the case may be remanded to the trial court to litigate on the merits, allowing for further

with the trial court’s determinations that it never formally recognized a change of status and that [foster parent] Appellants’ subjective beliefs were immaterial, [] the certified record belies the juvenile court’s conclusion that Appellants never attained preadoptive status. The record sustains an objective determination that Appellants have a legitimate expectation of adopting M.R.F., *even though that outcome remains contingent upon the termination of [m]other’s parental rights and [the agency’s] approval.*”) (emphasis added).

In addition to reunification, intervention by foster parents or kinship parents has the potential to disrupt additional permanency options, like Permanent Legal Custody (“PLC”). See 42 Pa.C.S. § 6351(a)(2.1).

¹² *In re K.T.*, 296 A.3d 1085, 1112-13 (Pa. 2023) (in evaluating child’s needs and welfare under Section 23 Pa.C.S. § 2511(b), inquiry must include consideration of, *inter alia*, the child’s need for permanency, as well as intangible needs of love, comfort, security, safety, and stability) (*citing, inter alia, In re T.S.M.*, 71 A.3d 251 (Pa. 2013)).

delays. Should the pre-adoptive foster parent receive an adverse ruling, they can then appeal *that* decision.¹³ The fact that intervention is not limited in time, but rather could be attempted months or even years later,¹⁴ further lengthens this period of uncertainty, which is contrary to the goal of timely permanency this Court has promoted repeatedly.¹⁵ This instability contributes to the harm we already know can be inflicted upon children in the child welfare system.¹⁶

¹³ See, e.g., *In re L.J.*, 691 A.2d at 523-24 (right to appeal protects only parties with standing, which requires they be aggrieved); see also pp. 6-7, *supra* (standing to bring an appeal applies only to those who fall within the zone of interests protected by the statute); cf., e.g., *In Interest of J.P.*, 178 A.3d 861 at 867-68 (appellate court need not address merits of trial court ruling on removal, because it concluded that the foster parent lacked standing in the dependency matter; “[s]tanding [] becomes a jurisdictional prerequisite to an action”).

¹⁴ See *Interest of S.W.*, 312 A.3d 345, 345, 359–60 (Pa. Super. 2024) (citing Pa.R.J.C.P. 1133 and P.R.C.P. 2327).

¹⁵ See p. 11 n.12, *supra* (citing *In re K.T.*, 296 A.3d at 1112-13; *In re T.S.M.*, 71 A.3d 251); see also, e.g., *In re Adoption of S.E.G.*, 901 A.2d 1017, 1019, 1028-29 (Pa. 2006) (recognizing efforts to achieve permanency more quickly to combat foster care drift and the harms associated with it). High Courts in other states have recognized the same need. See, e.g., *Interest of SMD*, 503 P.3d 644, 655 (Wy. 2022); *In re A.B.*, 852 N.E.2d 1187, 1190 (Ohio 2006); *Baker v. Marion Cty. Office of Family and Children*, 810 N.E.2d 1035, 1040 (Ind. 2004) (citing *In re Adoption of A.M.B.*, 812 A.2d 659, 667 (Pa. Super. 2002) and *Lehman v. Lycoming Cty. Children’s Servs. Agency*, 458 U.S. 502, 513 (1982)); *In re A.S.H.*, 521 S.E.2d 604, 609 (Ga. App. 1999).

¹⁶ See, e.g., National Survey of Child and Adolescent Well-Being, No. 19: *Risk of Long-Term Foster Care Placement Among Children Involved with the Child Welfare System*, available at https://www.acf.hhs.gov/sites/default/files/documents/opre/nscaw_ltfc_research_brief_19_revised_for_acf_9_12_13_edit_clean.pdf (last accessed June 18, 2024); Ndjuoh MehChu, *Neither Cops Nor Caseworkers: Transforming Family Policing Through Participatory Budgeting*, 104 B.U.L.R. 73, 79 n.26 (2024) (citing, *inter alia*, Elisa Minoff & Alexandra Citrin, *Systemically Neglected: How Racism Structures Public Systems to Produce Child Neglect*, CTR. FOR STUDY OF SOC. POL’Y 1, 5 (2022) and

In dependency cases, the agency, parent(s), and child(ren) are the parties that fall within the zone of interests implicated in the Juvenile Act, and it is their voices that should be heard, at trial and on appeal. In particular, the child's voice must not be drowned out, since the best interest of the child is the polestar of a dependency proceeding. Allowing a foster parent to intervene is contrary to the Juvenile Act, and this Court should definitively decide the issue and eliminate the uncertainty brought about by the Superior Court's inconsistent jurisprudence.

Roxanna Asgarian, *We Were Once A Family: A Story of Love, Death, and Child Removal in America* 276 (2023); Clare Ryan, *Are Children's Rights Enough?*, 72 *Am. U. L. Rev.* 2075, 2077-78 & nn. 9-10 (2023) (*citing, inter alia*, Jan Jeske & Mary Louise Klas, *Adverse Childhood Experiences: Implications for Family Law Practice and the Family Court System*, 50 *FAM. L.Q.* 123 (2016)).

