

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

IN THE INTEREST OF: D.P., A MINOR	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
	:	
APPEAL OF: D.M. AND D.M., LEGAL	:	
GUARDIANS	:	No. 117 MDA 2013

Appeal from the Order January 9, 2013,
Court of Common Pleas, Berks County,
Juvenile Division at No. CP-06-DP-0000388-2012

BEFORE: DONOHUE, WECHT and COLVILLE*, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED OCTOBER 04, 2013

D.M. ("Husband") and D.M. ("Wife") (collectively, "Appellants") appeal *pro se* from the January 9, 2013 order entered by the Court of Common Pleas, Berks County. The order required Appellants to cooperate with an investigation by Berks County Children and Youth Services ("CYS") to determine if Appellants pose a risk to the safety and well-being of D.P., a male child residing in their home for whom Wife is the legal guardian. Finding the order legally unsupportable, we vacate the trial court's order.

On July 20, 2012, CYS received a report alleging inappropriate physical discipline by Appellants of D.D.M. and D.L.M., Husband's now-adult son and daughter from a prior marriage, and inappropriate sexual contact by Husband with D.L.M., of which Wife was allegedly aware.¹ The allegations

¹ The record reflects that the allegations of child abuse made by the now-adult children came while Appellants and one of the accusers (their adult daughter, D.W.) were embroiled in a heated custody battle regarding D.W.'s minor son, C.H., as Appellants were attempting to get primary physical

stem from acts that occurred 10 to 20 years ago when the adult-children were minors and living in Appellants' home. At the time CYS received the report, Appellants had two minor children in their care: 14-year-old J.M., their adoptive son, and 17-month-old D.P.

CYS commenced an investigation pursuant to 55 Pa. Code § 3490.55 (relating to the investigation of reports of suspected child abuse) to determine whether the children currently residing in Appellants' care were at risk of harm. Husband, however, refused to submit to an evaluation by the Sexual Offender Assessment Board ("SOAB") as requested by CYS. CYS filed a petition to compel Husband's cooperation with an offender evaluation pursuant to 55 Pa. Code § 3490.73,² but filed the petition only regarding J.M. – it did not include any concerns as to D.P.³

custody or increased periods of partial custody of C.H. N.T., 9/12/12, at 19, 33. This report to CYS was one in a string of allegations of abuse made regarding Appellants or members of their household, all of which had previously been deemed unfounded. Indeed, at the hearing on the petition to compel filed regarding J.M., D.W. testified to other allegations, and essentially asked the trial court to find that C.H. should not have to continue having weekend visits with Appellants. **Id.** at 36. The record further reflects that Appellants sued D.W. for defamation based upon D.W.'s purportedly false allegations of sexual abuse. **Id.** at 38-39.

² Section 3490.73 of the Public Welfare Code states, in relevant part: "The county agency shall petition the court if [...] [a] subject of the report of suspected child abuse refuses to cooperate with the county agency in an investigation, and the county agency is unable to determine whether the child is at risk." 55 Pa. Code § 3490.73(2).

³ To the contrary, on September 21, 2012, CYS sent Wife a letter indicating that CYS "completed an assessment of the referral dated July 20, 2012,

The trial court held a hearing on September 12, 2012, at which Appellants were represented by counsel. Brandon Clinton ("Clinton"), the CYS caseworker assigned to the case, testified that he spoke with J.M., who Clinton found to be "very credible and appropriate" when discussing the concerns that were reported to CYS. N.T., 9/12/12, at 7.⁴ Although J.M. did not report that he was the victim of any abuse, Clinton testified that CYS was still concerned about the child's safety in Appellants' home based upon the report received. He further stated that it is CYS's "position" and "practice" to require that "perpetrators of abuse participate in an offender evaluation to determine if the allegations are true, to assess risks at the present time and to determine if there is a need for continued evaluation and/or treatment." *Id.* at 8.

At the conclusion of the hearing, the trial court ordered Appellants to cooperate with CYS for a period of six months (which could be extended if additional concerns arose) by providing access to J.M. and cooperating with unannounced home visits so that CYS could assure his safety. The trial court refused to order that Appellants undergo offender evaluations. Specifically, the trial court found as follows:

regarding [D.P.]," which revealed "that no further services are required at this time." Letter from CYS, 9/21/12.

⁴ The notes of testimony from the hearing in J.M.'s case were included in the certified record on appeal as an exhibit to the motion to dismiss filed by Appellants regarding the petition to compel concerning D.P. **See** Motion to Dismiss with Prejudice, 1/4/13, at Exhibit O.

[...] I believe the law is such that absent – usually what happens is we have somebody who is a founded perpetrator or a convicted person, somebody was convicted in the past, we have those objective findings. This is not the case. And absent going through litigation to resolve those disputes, I need to have probable cause to further order these people to do something such as having the offender evaluation. And I don't see it here. These are the services I believe that are substantiated by what you have presented.

I understand, I understand but these things are always very difficult when you get into the middle of a custody dispute.

Id. at 43-44.

On September 28, 2012, CYS filed a motion to reconsider the trial court's refusal to order Appellants to comply with offender evaluations, which the trial court denied on October 17, 2012. In the same order, the trial court directed CYS to file another petition to compel regarding D.P., if CYS deemed it necessary.

On November 16, 2012, CYS filed another petition to compel, naming D.P. as the target child, again based upon the allegations made in the July 20, 2012 report of inappropriate physical discipline and inappropriate sexual contact of Husband's now-adult children.⁵ CYS once again requested, *inter alia*, that Husband undergo an offender evaluation to determine "what, if any, abuse occurred, to determine risks associated with [D.P.] remaining in

⁵ As of the time of this appeal, CYS had not filed a shelter care application or a dependency petition in the underlying matter.

the home and to determine if any additional services are warranted.”
Petition to Compel, 11/16/12, at ¶ b.

On November 29, 2012, Appellants filed *pro se* a motion to suppress anticipated hearsay evidence and testimony and an answer and new matter to CYS’s petition. On January 4, 2013, Appellants filed *pro se* a motion to dismiss the petition with prejudice asserting, *inter alia*, that the petition to compel was barred by the doctrine of *res judicata* based upon the trial court’s disposition of the petition to compel in J.M.’s case.

The trial court held a hearing on January 9, 2013, at which Appellants appeared *pro se*. At CYS’s request, the trial court appointed a guardian *ad litem* to represent D.P.’s interests. At the hearing, over Appellants’ objections to hearsay and lack of notice, CYS presented the affidavit of D.D.M., wherein he detailed the aforementioned inappropriate physical discipline by Appellants, and the affidavit of D.L.M., in which she stated that Husband sexually abused her as a child and that Appellants physically disciplined her. CYS also presented pages from D.W.’s childhood diary that referenced inappropriate physical discipline inflicted upon D.D.M., again over Appellants’ objections.

At the conclusion of the hearing, the trial court granted CYS’s petition, ordering that Appellants cooperate with unannounced home visits from a CYS caseworker; provide CYS access to D.P. to ensure his safety; keep CYS informed of any changes in residence; and sign releases of information for

any services providers. The trial court further ordered that Husband participate in an offender evaluation by a member of the SOAB and follow any recommendations.⁶ Wife was ordered to participate in a non-offender evaluation (to ensure she was capable of protecting D.P.) and to follow any recommendations. The trial court further ordered that Appellants pay the cost of these evaluations. In arriving at its decision, the trial court stated the following:

I think there is enough, if you carefully read the sworn affidavits, reading the issues of prior physical abuse of the children that were in the care of [Appellants].

We need to do something to make sure that your circumstances have changed sufficiently or there's no risk for this child of physical abuse. If there's no risk, then, fine, nothing has to be done.

N.T., 1/9/13, at 37.

On January 10, 2013, Appellants filed *pro se* a motion for reconsideration, which the trial court denied on January 11, 2013. Appellants timely filed a *pro se* notice of appeal, and concomitantly filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i). On appeal, they raise the following issues for our review:

⁶ The trial court's order specifically named Dr. Kevin Kirby, a member of the SOAB, as Appellants had already contacted him about performing Husband's offender evaluation pursuant to a list of SOAB members provided to them by CYS. Trial Court Order, 1/9/13; **see** N.T., 1/9/13, at 23.

1. Did the trial court err in ordering [Husband] to undergo a sex offender evaluation when:
 - A. There has never been a charge or conviction of a sex crime?
 - B. [Husband] passed two polygraphs?
 - C. Allegations were presented in the form of sworn affidavits of adults claiming the abuse occurred twenty years ago?
 - D. The evaluation would require [Husband] to admit guilt[?]
 - E. The Court originally stated such an evaluation would be inappropriate?
2. Did the trial court err in ordering services where [CYS] had previously determined no services were necessary; no new allegations were raised since that determination; and no allegations against Appellants included either of the children currently residing in their home?
3. Did the trial court err when it failed to rule on Appellants' motion to dismiss with prejudice the action based on the doctrine of res judicata, where all allegations raised in [CYS]'s petition were previously heard by the court under the caption of Appellant[s'] older child's name; and once dismissed were raised again under [Wife]'s younger child's name?
4. Did the trial court violate Appellant[s'] due process rights when it ordered services where there are no allegations that the minor children in the home are at risk; Appellant[]s were denied the opportunity to present evidence; failed to hear evidence that the allegations were related to a pending custody matter and where Appellant[]s were not provided copies of sworn statements prior to trial or an opportunity to challenge said statements?

5. Did the trial court err when it assigned a guardian ad litem without a petition being filed by [CYS], without evidence or testimony; and without input from Appellants?

6. Did the trial court err when it ordered Appellant[]s to pay for services and an evaluation where the same court granted in forma pauperis due to their low income status?

7. Did the trial court err when it issued an order without having proper jurisdiction in this matter?

Appellants' Brief at 5-6.

We begin by addressing the first issue raised by Appellants. Therein, they assert that the trial court erred by ordering them to participate in offender evaluations, as it violates their Fourth, Fifth, and Fourteenth Amendment rights.⁷ As this presents a question of law, our standard of review is *de novo* and our scope of review is plenary. ***In re Adoption of G.K.T.***, __ A.3d __, 2013 WL 4768378, *4 (Pa. Super. Sept. 6, 2013); ***see also Commonwealth v. McAdoo***, 46 A.3d 781, 784 (Pa. Super. 2012) (question of law raised under the Fourth Amendment), *appeal denied*, __ Pa. __, 65 A.3d 413 (2013).

⁷ Appellants waived their Fifth Amendment argument based upon their failure to include this claim in their concise statement of errors complained of on appeal. ***See*** Pa.R.A.P. 1925(b)(4)(vii). The overarching argument encompassing the remaining constitutional provisions was included, and is thus properly before us for review. ***See*** Concise Statement of Errors Complained of on Appeal, 1/14/13, at ¶ 4 (order for evaluations made without probable cause).

A person ordered to comply with CYS in its investigation of suspected child abuse is subject to Fourth Amendment protections. ***In re Petition to Compel Cooperation with Child Abuse Investigation***, 875 A.2d 365, 374-77 (Pa. Super. 2005) (“***Petition to Compel***”).⁸ For a trial court to order a person to comply with an investigation of suspected child abuse, it must find that CYS presented sufficient facts in its petition to establish “probable cause to believe that an act of child abuse or neglect has occurred” and that evidence of the abuse will be found if CYS’s petition to compel is granted. ***Id.*** at 377. The Child Protective Services Law (“CPSL”) defines “child abuse” as follows:

⁸ In ***Petition to Compel***, CYS received a report of medical neglect of a one-month-old infant. The parents would not permit CYS to conduct a home visit or to have access to the child. CYS brought a petition to compel, which the trial court granted, ordering the parents to allow CYS to conduct a home visit within 10 days. Likening the circumstances to a request for a search warrant in a criminal case, this Court on appeal held that the Fourth Amendment was applicable and that CYS must present facts in its petition to compel to establish probable cause for the trial court to issue its order. Applying this standard, we found that the trial court erred by entering its order, as CYS failed to present sufficient facts to give rise to a finding of probable cause of abuse or that evidence of such abuse would be found in the parents’ home. ***Petition to Compel***, 875 A.2d at 378.

While factually distinguishable from the circumstances presented in the case at bar, there is no question that the Fourth Amendment Protections called for in ***Petition to Compel***, which addressed a caseworker requesting to enter a person’s home to look for evidence of child abuse, are applicable to this case. Here, an arguably even greater intrusion into Appellants’ privacy is at issue since CYS is requesting forced mental health evaluations.

(i) Any **recent** act or failure to act by a perpetrator which causes nonaccidental serious physical injury to a child under 18 years of age.

(ii) An act or failure to act by a perpetrator which causes nonaccidental serious mental injury to or sexual abuse or sexual exploitation of a child under 18 years of age.

(iii) Any **recent** act, failure to act or series of such acts or failures to act by a perpetrator which creates an imminent risk of serious physical injury to or sexual abuse or sexual exploitation of a child under 18 years of age.

(iv) Serious physical neglect by a perpetrator constituting prolonged or repeated lack of supervision or the failure to provide essentials of life, including adequate medical care, which endangers a child's life or development or impairs the child's functioning.

23 Pa. C.S.A. § 6303(b)(1) (emphasis added).

The trial court found that "its January 9th order was supported by probable cause to believe that ***inappropriate physical discipline*** had occurred against minors in the Appellants' care, and that services ordered would assist [CYS] in completing its investigation." Trial Court Opinion, 2/13/13, at 7 (emphasis added); ***see also*** N.T., 1/9/13, at 37 (finding the affidavits supported a finding of prior physical abuse of Husband's now-adult children when they were minors). Assuming the trial court intended its finding of "inappropriate physical discipline" to mean that Appellants caused Husband's now-adult children serious physical injury or that such discipline

created an imminent risk of serious physical injury when they were minors,⁹ this finding cannot constitute child abuse, as it was not a “recent act or failure to act” on the part of Appellants. **See** 23 Pa. C.S.A. § 6303(b)(1)(i), (iii). The only evidence of “inappropriate physical discipline” presented before the trial court was alleged to have been inflicted by Appellants upon the now-adult children approximately 10 to 20 years ago, which is by no means “recent.” **See** CYS Exhibits 1-3.¹⁰ There was no allegation, let alone probable cause, to find a “recent act” of physical abuse.

Furthermore, in light of the trial court’s finding of probable cause only that inappropriate physical discipline occurred, there is no basis for the trial court to order a sexual offender evaluation. There is absolutely no support for the trial court’s conclusion that the offender evaluation “would be helpful to [the trial court] in assessing the risk to [D.P.]” Trial Court Opinion, 2/13/13, at 7. A sexual offender evaluation certainly would not reveal any

⁹ The CPSL defines “serious physical injury” as “[a]n injury that: (1) causes a child severe pain; or (2) significantly impairs a child’s physical functioning, either temporarily or permanently.” 23 Pa.C.S.A. § 6303(a).

¹⁰ Husband’s adult daughter, D.L.M. alleged, in her affidavit, sexual abuse by Husband. CYS Exhibit 1. As indicated above, the CPSL does not require that an act of sexual abuse have been recent in order to constitute child abuse. **See** 23 Pa.C.S.A. § 6303(b)(1)(ii). The trial court, however, did not make a finding of probable cause to support this allegation. To the contrary, the trial court stated at the hearing that although it was aware of the allegations of sexual abuse, its “main concern” were the allegations of physical abuse. N.T., 1/9/13, at 24. Thus, the alleged sexual abuse is not before this Court as a basis for reviewing the trial court’s order.

information about whether inappropriate physical discipline did in fact occur.¹¹ ***See Petition to Compel***, 875 A.2d at 377.

Moreover, there is no statute, regulation, or case granting the trial court the authority to order an alleged child abuser to undergo an offender evaluation as part of CYs's investigation into a report of suspected child abuse.¹² The trial court points to subsection 3490.55(g) of the Public Welfare Code in support of its decision. Subsection 3490.55(g) states, in relevant part: "When investigating a report of suspected serious mental injury, sexual abuse or exploitation or serious physical neglect, the county agency shall, whenever appropriate obtain medical evidence or expert consultation, or both." 55 Pa. Code § 3940.55(g). There is nothing in this subsection to suggest that this allowance extends beyond an examination of

¹¹ Despite the standard enunciated in ***Petition to Compel*** requiring that a trial court must find that evidence of the abuse alleged will be found if CYs's petition to compel is granted, the trial court stated that it was not requiring Appellants to undergo evaluations "to determine whether or not abuse had occurred in the past. That's not really important to me, except to determine whether or not under the current situation [...] is this child at risk, would it [*sic*] be helpful to the [c]ourt to determine – to hear from an expert in that regard." N.T., 1/9/13, at 25-26.

¹² This case was not well briefed by the *pro se* Appellants and they did themselves a disservice by proceeding without counsel. However, our plenary scope of review requires that we conduct a "full" and "complete" review to determine if the trial court's decision was proper, and our *de novo* standard of review requires that we review the trial court's legal conclusions in a non-deferential manner. ***Commonwealth v. Manahan***, 45 A.3d 413, 416 n.2 (Pa. Super. 2012), *appeal denied*, ___ Pa. ___, 69 A.3d 601 (2013). An examination of the trial court's reasoning for its order is therefore appropriate.

the alleged victim. It is certainly too nebulous a grant of authority to provide a basis to compel Appellants, in a proceeding such as in the case before us, to undergo a mental health evaluation which, by its definition, was designed to determine whether Appellants engaged in past criminal conduct.¹³ The result here is unsupportable.¹⁴

Based upon our resolution of this issue, we need not address the remaining arguments raised by Appellants. Because the trial court erred by granting CYS's petition to compel without finding probable cause that child

¹³ As raised by Appellants, we seriously question whether an individual who has not been convicted of a sexual offense can be ordered to undergo an offender evaluation by a member of the SOAB. **See** Appellants' Brief at 14-15. An offender evaluation is conducted by the SOAB after a person has been convicted of a sexual offense, but prior to sentencing, to determine whether he or she is a sexually violent predator. 42 Pa.C.S.A. § 9799.24. Indeed, on the SOAB's website, it indicates that the board's purpose is to "conduct[] assessments of certain **convicted sex offenders** in order to assist the court in determining whether they meet the legal criteria for classification as a Sexually Violent Predator (SVP)." http://www.portal.state.pa.us/portal/server.pt/community/about_soab/7558 (emphasis added).

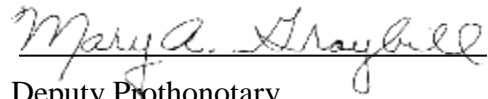
¹⁴ The trial court's decision in this case was a stunning departure from its prior finding that CYS failed to present probable cause to support ordering Appellants to comply with offender evaluations in the petition to compel concerning J.M. in which proceeding Appellants were ably represented by counsel. The allegations of abuse in the case before us were unchanged from the proceeding regarding J.M. Although the trial court stated at the hearing regarding D.P. that the physical abuse alleged was "new stuff" (N.T., 1/9/13, at 24), the record reflects that D.W. testified in detail at the hearing regarding J.M. about the alleged physical abuse of D.D.M. she witnessed. **See** N.T., 9/12/12, at 31-32. The only new information the court had before it was that CYS was seeking to protect a nearly two-year-old child (who was a part of the household at the time of the first petition) as opposed to a 14-year-old child.

abuse (as defined by the CPSL) occurred, we must vacate the trial court's order.

Order vacated. Jurisdiction relinquished.

Colville, J. notes his dissent.

Judgment Entered.


Deputy Prothonotary

Date: 10/4/2013