

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

IN THE INTEREST OF :
AI, JR., : **NO. DP-27-2010**
:

OPINION AND ORDER

AND NOW, this 25th day of **April, 2011**, this order is entered regarding an oral Motion to Dismiss the Dependency Petition raised by Mother's counsel at the conclusion of the Agency's case on April 11, 2011 by way of a demur.

The Montour County Children & Youth Services became involved with the family on January 8, 2010, after AI, Jr., was taken to Geisinger Medical Center on January 7, 2010, with near fatal abusive head trauma (formerly referred to as shaken baby syndrome). The child's injuries included acute and chronic subdural hematomas, severe retinoschisis and fractures of the fifth, sixth and seventh ribs bilaterally. The alleged perpetrator was the child's father, AI, Sr. On January 8, 2010, both parents signed a Safety Plan regarding AI, Jr., and JB (Mother's child and Father's step-daughter). The Safety Plan stated as follows:

- “1. Mother and Father will have no unsupervised contact with JB.
2. Mother and Father will not cause or condone inappropriate discipline on children by any other adult.
3. The door to AI, Jr.'s hospital room will remain open.”

The Safety Plan was also signed by maternal grandmother.

On January 22, 2010, around the time of AI, Jr.'s release from the hospital, a second Safety Plan was signed which states:

- “1. AI Sr. cannot reside in the home until further notice by the agency.
2. No unsupervised contact between AI and either child until further notice.
3. Contact/visits between the natural father and child (AI) must be at the agency, supervised by agency staff.
4. Contact between the AI and child (JB) are at the discretion of the grandmother (R) and must be supervised by her until further notice.
5. No unsupervised contact by the BB-I with either child until further notice.
6. Maternal Grandmother (R) will provide the assurance of safety for the children and monitor that the safety plan is being followed.
7. No physical discipline will be used on either child by any individual during this investigation period.”

On or about January 29, 2010, the biological father, AI, Sr., was formally charged with aggravated assault, simple assault, and endangering the welfare of a child. Father's bail conditions required him to abide by the conditions set forth by Children & Youth related to visitation/contact with the child.

On February 3, 2010, a third Safety Plan was signed which states:

- “1. Both parents shall have no unsupervised contact with the children.
2. Father may not be in the home while the children are present.
3. Paternal Grandmother, L, will provide the assurance of safety for the children and monitor that the safety plan is being followed.
4. No physical discipline will be used on either child during the investigation.”

On February 16, 2010, the Agency indicated AI, Sr., for physical abuse of AI, Jr.

On February 16, 2010, a fourth Safety Plan was signed by Mother and Father which states:

- “1. AI Sr. cannot reside in the home until further notice by the agency. AI Sr. cannot be present in the home when the victim child, AI Jr. is present in the home.
 2. AI Sr. cannot have unsupervised contact with any minor child.
 3. No unsupervised contact between AI Sr. and JB until further notice.
 4. Contact/visits between the natural father and AI Jr. must be at the agency, supervised by agency staff ONLY.
 5. Condition for Contact with JB ONLY:
 - a. Contact between AI Sr. and JB must meet the following criteria:
 - i. There can be no unsupervised visits.
 - ii. There must be a third party assurance of safety at all times. This supervision may be provided by the natural mother or a designated individual approved by the agency.
 - iii. Social activities are allowable when there is a third party assurance of safety and when the victim child is not present. This supervision may be provided by the natural mother or a designated individual approved by the agency.
1. BB-I may have unsupervised contact with either child.
 2. No physical discipline will be used on either child by any individual.”

On or about March 5, 2010, an incident occurred where Father was at the home with JB as he was permitted under the Safety Plan. Mother returned to the home along with AI, Jr. At that time, Father left the home and went out onto the back patio and was grilling. The Montour County Agency Caseworker, Julie Spencer, was also at the home. Rather than discuss with the family her concern that Father being on the back patio may

be a violation of the Safety Plan, Ms. Spencer left the home and then phoned her supervisor. After discussing the matter with her supervisor, Ms. Spencer returned to the home and told Father he needed to leave the property. Father complied. Both Mother and Father were upset and expressed to the Agency that they believed they were complying with the Safety Plan which stated “AI, Sr., cannot be present in the home when the victim child, AI, Jr., is present in the home.”

Thereafter, the Safety Plan was amended on March 12, 2010 to add the following:

“#1a. AI cannot physically be present on the property of the home when the victim child is on the property of the home.

#4a. The Father will not be in the same room, building or within one hundred yards of the victim child.”

On May 5, 2010, the Montour County Children & Youth Agency Caseworker, Julie Spencer, witnessed Father at the property line of the marital residence. Father was not on the property of the home, but was within 100 yards of the home. Father explained to the caseworker that he was supposed to be picking Mother up to go along to a soccer practice with Mother and JB. Apparently, the sitter that Mother had arranged to be home with AI, Jr., did not show. There was an indication that Father had a camera card for the camera that he needed to return to Mother. There was no testimony presented indicating that Father stepped on the property or was anywhere near the minor child at the time of this incident.

On May 6, 2010, the Montour County Children & Youth Agency sought emergency protective custody of the child and was denied custody by the Court.

On May 27, 2010, the Montour County Children & Youth Services Agency filed a Petition for Dependency of AI, Jr. At the time of the scheduled hearing on dependency on June 30, 2010, all parties involved agreed that the child would be placed in temporary in-home dependency. Specifically, the parties agreed

“the stipulation would be that there would be a temporary in-home dependency for the child, it would be entered without prejudice to raise the issues that were to be raised today at this dependency hearing at a later date and without any findings of fact. The home dependency would not be less than three months nor more than five months and a review or a hearing or an additional proceeding or continuation of this proceeding could then be held at the request of either party.”

The parties' stipulation was made an Order of Court on June 30, 2010, by Judge Thomas James, Montour County. At the time the stipulation was entered, Mother disclosed on the record that it was her intention to move to Lycoming County within the next two months and that she had made the Montour County Children & Youth Agency aware of this fact and that they had indicated that they would not object to Mother's move. On September 21, 2010, the Montour County Children & Youth Agency filed a Petition for Judicial Review of In-Home Dependency at which time the Agency requested that the matter be transferred to Lycoming County Children & Youth as the family had moved to Lycoming County. Pursuant to an Order dated October 7, 2010, the Honorable Thomas James, Jr., of Montour County approved the Montour County Children & Youth Services Agency's transfer of the case to Lycoming County Children & Youth Services and directed that jurisdiction and venue for any further proceedings under the Juvenile Act shall be with the Court of Common Pleas of Lycoming County, Pennsylvania.

On November 9, 2010, Lycoming County Children & Youth Agency filed a Petition for Permanency Review Hearing. A Permanency Review Hearing was scheduled before the undersigned Judge on November 24, 2010. At the time set for the hearing, both Mother and Father requested a full hearing on dependency pursuant to the stipulation entered into at the time the temporary in-home dependency was ordered. Despite the Agency's objection, the Court determined that the dependency "agreed to without findings of fact" established in Montour County would have to be litigated in light of the fact that the parents did not agree to dependency outright, nor was there a finding of dependency by the Court. A hearing on dependency was scheduled for January 4, 2011; however, at the time of the hearing, it was apparent to the Court that none of the parties were prepared to proceed. Therefore, the Court chose to treat the scheduled hearing as a pre-adjudicatory conference and ordered the parties to comply with various exchanges of discovery.

Proceedings were then set for March 1, 2011 and March 8, 2011 in order for this Court to make a determination in this matter regarding dependency. The Agency was to present its case on March 1, 2011, and they so arranged for their witnesses to present testimony on that date. Mother and Father were to present their cases on March 8, 2011, and Mother and Father's respective counsel arranged for their witnesses to be present testimony on that date. In light of the numerous amount of expert witnesses, all parties were cooperative in taking witnesses out of order accommodate scheduling issues. Neither the Agency, nor the parents concluded their cases by the end of the day on March 8, 2011. The Court then scheduled the matter to be continued on April 11, 2011,

and directed that this hearing date would be reserved for the Agency to continue to present their case in chief. The Agency presented and rested their case in chief on April 11, 2011. At the conclusion of the Agency's case in chief, counsel for Mother made an oral motion for demur to dismiss the dependency petition, presenting oral argument in support of the motion. The Court reserved decision on the Mother's motion, noting at the conclusion of proceedings on April 11, 2011, that a separate written Order would be issued regarding Mother's motion prior to the next scheduled hearing date in this matter, June 9, 2011.

Presently before this Court is the Petition for Dependency filed by Montour County on May 27, 2010, and the Amended Petition for Dependency filed by Lycoming County on February 4, 2011. Both Petitions seek dependency pursuant to 42 Pa.C.S. §6302(1). Both Petitions state that the child is not in protective custody and the child was located in the Mother's home. The Petition filed by Montour County on May 27, 2010, alleges that the child remains in the home, but is in imminent risk of placement and foster care. The Petition filed by Lycoming County on February 4, 2010, does not indicate that there is an imminent risk of placement in foster care. The Montour County Petition for Dependency alleges the following basis for dependency: (1) the family is acting in a manner that is deceptive; (2) the natural parents failed to notify the Agency that the child needed medical care; (3) the family has demonstrated a disregard for the safety plan; (4) the Agency has assessed that the natural Mother has a diminished protective capacity and, therefore, the Agency cannot assure that the safety plan is being fully implemented. The Amended Petition for Dependency filed by Lycoming County on February 4, 2011,

alleges the following additional facts as a basis for dependency: (1) Mother has stated to the Agency staff that she does not believe her son, AI, Jr., was abused, but that she believes he was misdiagnosed by medical professionals; (2) Mother meets with the Agency staff for announced visits; however, the Agency had made ten total unannounced visits and was unable to make contact with Mother or child during the unannounced visits; (3) Father has not contacted Agency staff weekly to discuss the status of the case; (4) Father has canceled twelve visits between August, 2010, and the present; (5) Father has failed to verify that he missed visitation due to his employment schedule. It is noted that the Agency also alleges that Father was enrolled in the Fatherhood classes through the Salvation Army, but that he missed several of the classes. Through testimony offered by the Caseworker, information was presented to the Court that Father has, since the filing of the Petition, successfully completed the Fatherhood classes at the Salvation Army.

The question before this Court for determination is a narrow one. That is, whether AI, Jr. falls within the definition of a dependent child. *In the Interests of T.M.*, 689 A.2d 954 (Pa. Super. 1996). A dependent child is a child who “is without proper parental care of control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals...” 42 Pa.C.S. § 6302. In a dependency proceeding, the burden of proof lies with the Agency which must establish, by clear and convincing evidence, that proper parental care and control are not available. *In the Interests of T.M.*, 689 A.2d 955, citing *In the Interest of J.M.*, 652 A.2d 877 (Pa Super. 1995). “The standard of clear and convincing evidence means

testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitation, of the truth of the precise facts in issue.” *Ibid.*, quoting *Matter of Sylvester*, 555 A.2d 1202, 1203-04 (Pa. 1989).

If the Court finds that the Agency does not prove that a child meets the definition of being a dependent child by clear and convincing evidence, the Court may grant demur and must deny the Agency’s dependency petition. *In the Interests of T.M.*, at 955 and 957 citing *In the Interest of J.M.*, 652 A.2d 877 (Pa Super. 1995). The Agency may not rely on a parent’s failure to comply with a court order as prima facie evidence of the lack of proper parental supervision and control. *In the Interests of T.M.*, 956. The standard, rather, is that the Agency must “show, by clear and convincing evidence, that the child falls within the Act’s definition of a dependent child.” *Ibid.* The Superior Court strongly explained the above reasoning stating “We adopt this position in recognition of the seriousness of the nature of these proceedings and the potential harm that could result from adjudicating the merits of a dependency petition without a proper evidentiary foundation.” *Ibid.*

Upon review of the relevant case law, it is clear to the court that if Mother and Father were separated, AI, Jr., would clearly not fit the definition of a dependent child as Mother is a ready, willing, and able to provide proper parental care or control of the child. See *In re B.B.*, 622 A.2d 979, 983 (Pa. Super. 1992). This case’s perceived complexity is that Mother and Father, although not residing together, are preserving their marital relationship. Mother believes that Father is innocent of the alleged abuse of their child, AI, Jr., and Mother desires for her and her children’s relationship with Father to

revert back to normalcy once they have overcome the ongoing dependency and criminal proceedings resulting from Father's alleged abuse of AI, Jr.

This complexity does not preclude Mother as a ready, willing, and able to provide proper parental care or control of the child. Father is accused of abuse against AI, Jr., based on the fact that he was the last known caretaker when AI began to show signs of the alleged abuse and he "admitted" to shaking the child while on the bed to awaken him. Mother was not present while Father was caring for AI, Jr., when AI, Jr., began to show signs of the alleged abuse. Upon her return home, Mother took AI, Jr., to the emergency room for treatment. The Agency is satisfied that Mother had no part in the alleged abuse.

Based upon the testimony presented, Mother is competent to care for AI, Jr.; she is ready, willing, and able to provide proper parental care or control. Father does not presently live with Mother. Had Mother allowed Father to reside with her and the child and have unsupervised contact with AI, Jr., pending the results of the criminal case, this Court would not have entertained her motion for demurrer. The opposite, however, is the case. It is irrelevant that Mother has chosen to stand by Father believing that he is innocent of the charges against him.

Additionally, any of Mother's alleged non-compliance with Agency directives do not, by themselves nor in this case, serve to make AI, Jr., a dependent child. ***In the Interests of T.M.*** The Agency alleges that the family acted deceptive by canceling the visitation on May 18, 2010, by not telling the Agency that the child was at Hershey Medical Center. Further, the Agency alleges that the fact that the child was taken to Hershey Medical Center in March and again in May without notifying the Agency is a

basis for dependency. The Safety Plans in effect during March and May made no reference to Mother having to provide the Agency with any notice of her seeking medical treatment for the child. The Agency confirmed with Hershey Medical Center that Father was not present during either of the stays the child had at Hershey Medical Center. The Court cannot find that Mother, in any way, violated the Safety Plan or failed to provide for the child's proper physical care by taking the child to Hershey Medical Center.

The Agency argues that the family disregarded the Safety Plan. The Court does not find that Mother, in any way, disregarded any of the numerous Safety Plans that have been instituted in this matter between January 8, 2010, and the present. In fact, it is clear from the testimony the Court has heard that Mother has done everything within her power to ensure her compliance with the Safety Plan. Mother, on numerous occasions, has requested changes and modifications to the Safety Plan to allow her family to spend time as a family within the confines of the Safety Plan. Unfortunately, the Agency has perceived this as Mother and Father pushing the limits by repeatedly requesting for reunification or modifications to the Safety Plan to allow them to spend time as a family. The Court does not find that the incident which occurred on March 5, 2010, at Mother's home when Father was on the back patio grilling was a violation of the Safety Plan that was in affect at that time. The Safety Plan stated Father was not to be in the home when AI, Jr., was present. Father was not in the home. The Court further does not find that the incident which occurred on May 5, 2010, when Father was present on the property line was a violation of the Safety Plan that could be attributed to Mother. It was Father who was present within the 100 yard boundary provided for in the Safety Plan, though the

Court notes that he did remain outside of the property line. Mother was in the home with the child and there was no testimony presented which would lead the Court to believe that Mother had invited Father to come to the home that day or be at the home in violation of the Safety Plan. While Father may have technically been in violation of the 100 yard boundary that was established by the Safety Plan, he was not on the property of the home and clearly at no time was the minor child in danger of Father harming him or in fact Father even seeing the child. The explanation that was given by the caseworker as to why Father stated he was at the property line is a reasonable explanation for his presence.

As an additional basis for dependency, the Agency argues that the Mother has a diminished protective capacity and the Agency cannot assure the Safety Plan is being fully implemented and further that Mother has stated to Agency staff that she does not believe her son, AI, Jr., was abused, but that she believes that he was misdiagnosed by medical professionals. The Court finds that there was no testimony presented that in any way could lead the Court to conclude that the Mother currently has a diminished capacity to protect the minor child. Despite her belief that her husband is innocent and despite her wish that the family be reunited, Mother has complied with the multiple Safety Plans that have been implemented by the Agency since January, 2010. There was no testimony presented to indicate that Mother, at any time, has, despite her belief that her husband is innocent, allowed Father to be unsupervised with AI, Jr., or to allow Father to be present with her and AI, Jr., unless being supervised by third parties in the church setting which is currently allowed by the Safety Plans that are in place. As part of its additional basis

for dependency in the Amended Petition filed by Lycoming County on February 4, 2011, the Agency alleges that, though available to meet with the Agency staff at all announced visits, that the Agency has been unable to make contact with Mother or the child during unannounced visits. The Court does not believe that the Agency can hold the fact that Mother is not home when they show up unannounced against her. There is no evidence to indicate that Mother is not home because she is allowing the child to be around Father contrary to the existing Safety Plans, or that Mother, in any way, is avoiding the Agency. Mother works full-time, has another child who is involved in activities, and is also very involved in her church community. The Court does not find it suspicious that Mother is not at home when the Agency appears unannounced.

The remaining allegations raised in the Amended Petition filed by Lycoming County center around Father not contacting the Agency on a weekly basis, Father canceling supervised visits with the child, Father failing to verify his employment and Father's failure to complete Fatherhood classes. The Court finds that these allegations in no way can be attributable to Mother and whether or not is ready, willing and able to provide proper parental care or control for AI, Jr.

Because this Court cannot find that AI fits the definition of a dependent child and his Mother is ready, willing, and able to provide proper parental care or control, pursuant to Pennsylvania Rule of Juvenile Court Procedure 1409A(2), the Agency's Petition for Dependency is hereby DISMISSED. Legal and physical custody of AI shall be with his Mother. The hearings scheduled for June 9, 2011, and July 8, 2011 in this matter are hereby cancelled.

By the Court,

Joy Reynolds McCoy, Judge