

BACKGROUND

On May 23, 2016, the Department of Services for Children, Youth & their Families/ Division of Family Services (“DSCYF/DFS”) petitioned the Court to substantiate Father for abuse or neglect (hereinafter “Petition”). The Petition asserted that DSCYF/DFS had determined that Father had sexually abused the Child and requested the Court place Father on the Child Protection Registry at Child Protection Level IV. Father filed an Answer to the Petition on June 16, 2016, denying that any abuse had occurred. On August 16, 2016, the Court scheduled a hearing on the Petition for November 22, 2016. On November 14, 2016, Father filed a Motion for appointment of counsel, which was denied by the Court at the hearing on November 22, 2016. The Court issued a written Order on the denial of Father’s motion for counsel on December 2, 2016, stating that the purpose of the hearing was merely to determine whether Father should be placed on the Child Protection Registry, which did not involve his constitutional rights such that he should be appointed counsel.

At the hearing on November 22, 2016, the Court heard testimony from the Child’s school nurse, her teacher, her Children’s Choice social worker, and the assigned Supervisor for the Division of Family Services social worker. The Court also reviewed two Child Advocacy Center (CAC) interviews conducted with the Child and her brother. The evidence demonstrated that the Child, who is eight (8) years old and has Down Syndrome, has displayed sexually inappropriate behavior since 2015, including opening her legs suggestively and putting a pencil in between her legs and gyrating. She also reported to the school nurse that “Daddy pulls down my panties.” The Children’s Choice worker testified about a doctor’s appointment wherein she witnessed the Child straddling Father with his hand in between her legs and his hands under her shirt. At the Child Advocacy Center interview, the Child reported that “Daddy licked my butt,” the word she used to describe her vaginal area in addition to her buttocks.

During the hearing, the Court also heard testimony from Mother, who reported that she did not believe Father’s touching had any sexual intent. However, she noted that Father and the Child often slept in the same bed prior to the Child entering foster care. Father also testified that there had not been enough evidence to charge him with a crime.

Based on the evidence presented, the Court found that it was more likely than not that Father sexually abused the Child in 2015 and 2016. Following the hearing, the Court issued a

written Order which substantiated Father for sexual abuse and ordered him placed on the Child Protection Registry at Level IV.

STANDARD OF REVIEW

A party may seek a Review of a Commissioner's Order pursuant to Title 10, § 915(d)(1) of the Delaware Code, which provides:

Any party, except a party in default of appearance before a Commissioner, may appeal a final order of a Commissioner to a judge of the Court by filing and serving written objections to such order, as provided by the rules of the Court, within 30 days from the date of a Commissioner's order. A judge of the Court shall make a *de novo* determination of those portions of the Commissioner's order to which objection is made. A judge of the Court may accept, reject, or modify in whole or in part the Order of the Commissioner. The Judge may also receive further evidence or recommit the matter to the Commissioner with instruction.

In making a *de novo* determination, the Court makes "an independent review of the record."¹

Case law further explains what is meant by a *de novo* determination:

Therefore, in the *de novo* determination, the Court will make an independent review of the record and decide whether to accept, reject or modify in whole or in part the Commissioner's Order. In a *de novo* determination, the Judge considers (1) testimony presented at the Commissioner's hearing, (2) the findings of fact and recommendations of the Commissioner, and (3) the specific written objections filed by the objecting party. In making findings of fact, the Commissioner must determine the credibility of the witnesses. The Commissioner hears the evidence and has the opportunity to assess the credibility of the witnesses. Therefore, the Court will give weight to the fact findings of the Commissioner, especially in regards to the credibility of witnesses, even though the Court is not bound by them.

DISCUSSION

The Court has reviewed the written record and Father's objections. The Court will consider Father's assertion that he had a right to be appointed counsel in the proceeding and his assertion that the evidence was insufficient to substantiate him for abuse separately.

¹ C.A. v. C.A., No. CN06-04047, 2007 WL 4793921, at *1 (Del. Fam. Ct. Apr. 3, 2007).

Father's Claim regarding his Right to Court-Appointed Counsel

Father asserts that he was denied due process because he was not afforded court appointed counsel in the substantiation hearing. Father claims that the substantiation could affect his parental rights, "where a right to counsel has been recognized." The Court notes that a Petition for Termination of Father's Parental Rights has been filed and that Father has been appointed counsel in that proceeding and its related dependency proceedings.

The right to have counsel appointed at State expense in any proceeding is determined by the due process requirements in the U.S. Constitution² and the Delaware Constitution.³ The U.S. Supreme Court has found that the due process requirement in the U.S. Constitution is a "flexible concept that calls for such procedural and substantive protections as the situation demands."⁴ Accordingly, the U.S. Supreme Court has held that the due process clause in the Constitution is not a fixed concept but implicitly means "fundamental fairness" in the context of specific circumstances.⁵

In *Lassiter v. Department of Social Services*, the U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not require that counsel be appointed for indigent parents in every termination of parental rights proceeding.⁶ Rather, the Court held that the decision of whether due process requires the appointment of counsel in such cases lies within the discretion of the trial judge in the first instance, subject to appellate review.⁷ In determining whether to appoint counsel in cases where physical liberty is not endangered, the Court must weigh the three (3) factors outlined by the U.S. Supreme Court in *Mathew v. Eldridge*: 1) the private interests at stake; 2) the government's interest; and, 3) the risk that the procedures used will lead to erroneous decisions.⁸ The Delaware Supreme Court adopted the case-by-case approach outlined in *Lassiter* in *Matter of Carolyn S.S.*⁹ In *Watson v. Division of Family Services*, the Delaware Supreme Court affirmed their decision in *Carolyn* and found that counsel should also be appointed in dependency and neglect proceedings on a case-by-case basis. The

² U.S. Const. amend. XIV, § 1.

³ Del. Const. art I, § 9; See *Watson v. Division of Family Services*, 813 A.2d 1101 (Del. Supr. 2002).

⁴ *Watson v. Division of Family Services*, 813 A.2d 1101 (Del. Supr. 2002), citing *Gagnon v. Scarpelli*, 411 U.S. 778, 788, (1973).

⁵ *Watson v. Division of Family Services*, 813 A.2d 1101 (Del. Supr. 2002), citing *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

⁶ *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

⁷ *Matter of Carolyn S.S.*, 498 A.2d 1095 (Del. Supr. 1984).

⁸ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁹ *Matter of Carolyn S.S.*, 498 A.2d 1095 (Del. Supr. 1984).

Court notes that counsel has for many years been routinely appointed in the Delaware Family Court for parents in all dependency and neglect proceedings.

Most courts have declined to find that an indigent parent has an absolute right to appointed counsel in all parental rights termination cases based on the constitutional guarantee of due process.¹⁰ Instead, courts have examined the circumstances of each individual case.¹¹ Additionally, state legislatures have also created statutory rights in various instances,¹² though not in Delaware. Under these provisions, state courts have variably found that individuals *have* a right to court appointed counsel in related proceedings, such as pre-termination hearings and dependency and review hearings in some circumstances and that individuals *do not have* a right to court appointed counsel in those hearings in other circumstances.¹³

Some states have found that in a related proceeding, such as a dependency proceeding, parents should be afforded a right to counsel. For example, the District Court of Appeals of Florida reversed an order terminating a father's parental rights when his alleged admission of child abuse at a dependency hearing was used as the basis for establishing sexual abuse to terminate his parental rights.¹⁴ The father appealed the trial court's order, in part because he did not have counsel appointed at the dependency hearing in which he allegedly made the statement, arguing that this would result in the adjudication of an essential element leading to the termination of his parental rights without his being afforded the right to counsel.¹⁵ The appellate court agreed, holding that counsel must be appointed for a parent in a dependency hearing when permanent termination or child abuse charges might result.¹⁶

However, in *State ex rel. Juvenile Dept. of Multnomah County v. Grannis*, the Court of Appeals of Oregon held that although the trial court erred by denying a mother's request for appointed counsel at preliminary proceedings to declare her child a ward of the state, the error was harmless, because neither the mother nor her attorney were hampered at subsequent, more relevant stages by the mother's initial lack of representation.¹⁷ Likewise, the Tennessee Court of Appeals held that the failure to appoint counsel for a father in the dependency and neglect

¹⁰ 92 A.L.R.5th 379 (originally published in 2001) (American Law Reports).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *In Interest of A.D.J.*, 466 So. 2d 1156 (Fla. Dist. Ct. App. 1st Dist. 1985).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *State ex rel. Juvenile Dept. of Multnomah County v. Grannis*, 67 Or. App. 565 (1984).

proceedings concerning his children was not ground for reversal of a later judgment terminating his parental rights. Despite the fact that father was appointed counsel more than two years after the dependency and neglect petition was granted and his children were taken into state custody, the Court found that and father had adequate notice of termination proceedings, appeared at the hearings, brought witnesses to testify, and had a capable attorney ably representing his interests at termination hearings; therefore, his due process rights were not violated by not receiving an earlier appointment of counsel.¹⁸

Therefore, the right to counsel in termination of parental rights and dependency and neglect proceedings themselves is not absolute, although counsel is so routinely appointed in Delaware for those proceedings as to now appear beyond question. However, the herein ROCO asserts that Father should have been appointed counsel at the substantiation hearing like the dependency proceedings, to which he is a party and for which counsel was appointed, due to the pending termination of parental rights matter and this substantiation's possible effect on that case. However, it must be recognized that there is no right to court appointed counsel in most civil proceedings, including protection from abuse hearings, most child support hearings, child custody hearings, and, indeed, substantiation hearings.¹⁹ The findings in those proceedings may be relevant to a decision in the termination of parental rights trial under the Court's analysis of "best interests of the Child" utilizing the factors set out in 13 *Del. C.* §722.²⁰ Like those other civil proceedings, however, the substantiation hearing is an entirely separate matter from the termination of parental rights proceedings.

In her denial of Father's Motion for Counsel, the Commissioner stated that a substantiation hearing only seeks only to determine whether Father should be placed on the Child Protection Registry, the purpose of which is "to protect children and ensure the safety of children in child care, health care, and public educational facilities."²¹ As noted by the Commissioner,

The only consequence of being placed on the Child Protection registry is a limitation to work professionally with children or in the medical field in the State of Delaware or qualify as a foster parent. This Court does not find these consequences impact any fundamental constitutional rights and therefore will not appoint an attorney for Mr. S-----

¹⁸ *State, Dept. of Children's Services v. Mims*, 285 S.W.3d 435 (Tenn. Ct. App. 2008).

¹⁹ *See F.C. v. B.C.*, 64 A.3d 867, fn 50, (Del. Fam. Ct., 2013).

²⁰ *See Bower v. Department of Services for Children, Youth and their Families/Division of Family Services*, 142 A.3d 505 (Table) (Del. Supr. 2016) (affirming the Family Court's finding that the statutory grounds for termination of parental rights had been met and an analysis of the facts and factors under §722 demonstrated that termination was in the best interest of the child).

²¹ Civil Disposition, Child Protection Registry Substantiation, dated December 2, 2016, D.I. 8.

-. The analysis Mr. S----- listed in his Motion pursuant to *Mathews v. Eldridge* does not apply in this matter, but rather those instances where a constitutional liberty or right is impacted in the Family Court... such as incarceration, ...criminal charges, dependency/neglect hearings, or termination of parental rights.²²

The Court agrees with the Commissioner and finds that Father was not entitled to court-appointed counsel in the substantiation hearing. The substantiation proceeding is a separate matter from the termination of parental rights proceeding and does not affect a constitutional liberty such as his parental rights. Although the evidence presented at that hearing and the conclusion drawn by the Court may be the same, the *consequences* of the substantiation hearing and the termination of parental rights hearings are significantly different. The substantiation hearing only goes towards whether Father should be placed on the Child Abuse Registry and restricted from working in certain child related industries. Although the Court may consider his placement on the Registry as part of his termination of parental rights, the Court will also consider other findings and evidence and Father will have the benefit of counsel at that proceeding. The two proceedings are not sufficiently closely related to afford Father the right to counsel in the substantiation hearing. Based on the rights afforded to indigent parents under the U.S. and Delaware Constitutions, Father's due process rights are being adequately protected by being appointed counsel in both the dependency and termination of parental rights proceedings.

The same evidence evaluated by the Commissioner in this hearing may be introduced and evaluated by the Court at the termination of parental rights hearing; indeed, the Court has already been exposed to the same evidence entered into at the dependency hearings, where Father had the benefit of counsel. Although the Trial Court in the termination of parental rights proceedings may give some consideration to the Commissioner's substantiation and the placement of Father on the Child Protection Registry, the Court will consider independently of the Commissioner the same evidence in determining whether Father sexually abused the Child and if so, whether that abuse should properly lead to the termination of his parental rights.

Moreover, the transcript reflects that the Commissioner assisted Father throughout the proceeding in order to ensure that he was informed and that the proceedings were fair. The Commissioner answered all of his questions and spoke with him about the types of questions to ask on cross examination. Father was afforded leeway in his questions and was explained his

²² Id.

option to testify or not testify as part of his case. The Commissioner even provided Father ideas on how to present his case, such as suggesting that he elicit testimony from his wife about whether she ever saw him touch the Child inappropriately. Thus, it is clear from the transcript that the proceeding was more than “fundamentally fair” within the bounds of *Lassiter* and *Watson*.²³

The appointment of court-appointed counsel in cases where one’s physical liberty or one’s constitutional rights are affected is well established. Nonetheless, due process does not necessitate the appointment of counsel in every instance, and to require the Court to do so in every case where fundamental rights or physical liberty are not at stake would unnecessarily strain the resources of the Court and the citizenry.

Accordingly, the Court finds that Father did not have a right to counsel in the substantiation hearing and that he was afforded sufficient due process in that hearing.

Father’s Claim Evidence Insufficient for Substantiation

After reviewing the transcript of the proceedings, the Court also finds that the evidence against Father was sufficient to find by a preponderance of the evidence that he sexually abused the Child. The statements by the Child in the Child Advocacy Center interview, as well as the testimony regarding the Child’s sexual behaviors, indicate that abuse had occurred. Moreover, the Child’s social worker testified regarding Father’s inappropriate touching of the Child in a public setting. Father, in his defense, stated that there was not enough evidence to criminally charge him with anything. Mother also testified in Father’s defense and asserted that she found nothing wrong in his behavior. Whether Mother recognizes the seriousness of Father’s actions is irrelevant; the record clearly reflects that Father’s actions were inappropriate and that there is sufficient evidence to substantiate him for sexual abuse and place him on the Child Protection Registry at Level IV.

²³ *Watson v. Division of Family Services*, 813 A.2d 1101 (Del. Supr. 2002), citing *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

CONCLUSION

This Court finds that the Commissioner's decision in substantiating Father for sexual abuse and placing him on the Child Protection Registry at Level IV was not an abuse of discretion. The law was properly applied and the evidence clearly supports the Commissioner's conclusion. Upon *de novo* review, for the aforementioned reasons, the Court hereby accepts, in whole, the Commissioner's November 29, 2016 Order. Thus, Father's Review of Commissioner's Order is hereby ***DENIED***.

IT IS SO ORDERED.

March 21, 2017



ROBERT BURTON COONIN, JUDGE

RBC/cap

cc: Commissioner
Parties

Date Mailed: 3/21/17