IN THE SUPREME COURT OF PENNSYLVANIA

NO. 10 MAP 2018

In the Interest of: L.J.B., a minor

Appeal of: A.A.R., Natural Mother

Brief for Appellant

Appeal from the Order of the Superior Court Entered on December 27, 2017, at No. 884 MDA 2017 Vacating the Order Entered May 24, 2017, of Clinton County Court of Common Pleas, Juvenile Division, at No. CP-18-DP-0000009-2017, and Remanding for Further Proceedings

---

Robert H. Lugg
(Pa. Bar No. 41262)
350 East Water Street
Lock Haven, PA 17745
(570) 748-2481

David S. Cohen
(Pa. Bar No. 88811)
3320 Market St., Suite 232
Philadelphia, PA 19104
(215) 571-4714

Carol Tracy
(Pa. Bar No. 40258)
WOMEN'S LAW PROJECT
125 S. Ninth St., Suite 300
Philadelphia, PA 19107
(215) 928-5770

Counsel for Petitioner

CHILDREN'S FAST TRACK APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF JURISDICTION

The Supreme Court of Pennsylvania has jurisdiction over this appeal from the Superior Court of Pennsylvania pursuant to 42 Pa. C.S.A. § 724(a), which states that, upon granting of a Petition for Allowance of Appeal, jurisdiction lies in the Supreme Court of Pennsylvania in the manner provided in 42 Pa. C.S.A. § 5105(d)(1).

II. ORDER IN QUESTION

"We conclude that a mother's use of illegal drugs while pregnant may constitute child abuse under the CPSL if CYS establishes that, by using the illegal drugs, the mother intentionally, knowingly, or recklessly caused, or created a reasonable likelihood of, bodily injury to a child **after** birth. We therefore vacate the order and remand for further proceedings." *In re L.B.*, 177 A.3d 308, 309 (Pa. Super. Ct. 2017) (emphasis in original).

III. SCOPE AND STANDARD OF REVIEW

As this case involves a question of statutory interpretation, it is purely a question of law to be reviewed *de novo*, and the scope of review is plenary. *Commonwealth v. Giulian*, 141 A.3d 1262, 1266 (Pa. 2016).

IV. QUESTIONS PRESENTED[1]

1. Under 23 Pa. C.S.A. § 6303 et seq., can a woman be a "perpetrator" of "child abuse" for her actions while pregnant that might affect the health of her newborn?

2. Under 23 Pa. C.S.A. § 6386, is the consequence of a mandatory report for children experiencing neonatal withdrawal symptoms limited to providing protective services to newborns and their families or is this section an indication that the General Assembly believes that the mother should be found to have committed child abuse?

V. STATEMENT OF THE CASE

On January 26, 2017, L.J.B. was born at the Williamsport Hospital. R. 1a. The mother, Appellant A.A.R., had been in a drug treatment program for the month prior to L.J.B.'s birth. R. 23a. She was first seen by Dr. Henry Dietrich on December 20, 2016, who prescribed buprenorphine to treat her opioid addiction. *Id.* Over the course of several visits during the remainder of A.A.R.'s pregnancy, she continued to see Dr. Dietrich. *Id.* Unfortunately, like many people suffering from opioid addiction, A.A.R. was not able to refrain from using opiates despite

[1] These two questions present the same issues that were part of this Court's grant of allocatur, but they both use language that better frames the issues for this Court's current consideration.

her treatment protocol. *Id.* As a result, on January 12, 2017, and then again on the day of L.J.B.'s birth, A.A.R. tested positive for marijuana, oxycodone, and benzodiazepines. R. 28a-29a; R. 22a.

When L.J.B. was born, initial testing indicated that she was healthy. R. 22a (Apgar score of 9/9). However, on January 29, her hospital records indicate that she began to show signs of what the physician labeled "opioid withdrawal" -- tremors, increased muscle tone, excessive suck, and loose stools. *Id.* Because of these symptoms, L.J.B. was admitted to the hospital for opiate withdrawal, and she remained there for 19 days. *Id.*; R. 35a. There is no indication in the record of any further health problems for L.J.B.

Based solely on A.A.R.'s positive drug test and L.J.B.'s hospitalization for alleged withdrawal symptoms, Appellee Clinton County Children and Youth Services (CYS) claimed that L.J.B. is a victim of child abuse. CYS did so in two separate dependency petitions - first in a Dependency Petition filed February 13, 2017 (that was preceded by an Application for Emergency Protective Custody on February 7, 2017, R. 1a), and then again in an Amended Dependency Petition filed March 10, 2017. R. 15a; R. 30a. Both petitions alleged that L.J.B. is a dependent child because she was "without proper care or control," R. 17a; R. 32a, but as to the child abuse allegation, in both the original Dependency Petition and the Amended Dependency Petition, CYS's sole basis for alleging that L.J.B. was a

victim of child abuse is A.A.R.'s drug use during pregnancy and L.J.B.'s alleged withdrawal symptoms. R. 19a; R. 35a. In both petitions, CYS wrote the following as the basis of the child abuse allegation:

> (b.1) Child abuse -- The term "child abuse" shall mean intentionally, knowingly, or recklessly doing any of the following:
>
> (1) Causing bodily injury to a child through any recent act or failure to act.
>
> [L.J.B.] has been in the Williamsport Hospital for a period of nineteen (19) days suffering from withdrawal due to substances Mother ingested while Mother was pregnant with her. Mother tested positive for marijuana, oxycodone, and Benzodiazepines at the time of [L.J.B.'s] birth, for none of which Mother had a prescription.

R. 19a; R. 35a. Nothing about A.A.R.'s behavior subsequent to L.J.B.'s birth is part of the alleged basis for a child abuse finding, and this case has been litigated on this basis -- drug use during pregnancy with alleged withdrawal symptoms after birth -- and this basis alone.

On February 7, 2017, the Juvenile Court of Clinton County entered an Order for Emergency Protective Custody for L.J.B. while she was still at the Williamsport Hospital. R. 3a. On March 15, 2017, the same court entered an order finding L.J.B. dependent, keeping legal and physical custody with CYS. R. 38a-41a. In particular, the court noted that L.J.B. would be placed with foster care but that the placement goal was to return L.J.B. to her parent or guardian late in 2017. R. 39a-40a; R. 43a.

The court deferred a decision on whether L.J.B. was the victim of child abuse, R. 44a-45a, the sole issue that is the subject of this appeal. On May 9, 2017, the court heard argument on the matter, hearing from attorneys for CYS, mother A.A.R., the father, and L.J.B.'s appointed guardian ad litem. R. 68a-78a. On May 23, the court ruled that L.J.B. was not the victim of child abuse. President Judge Miller concluded:

> As noted by all parties, the child is defined by the Child Protective Services Law as an individual under eighteen (18) years of age. See 23 Pa. C.S.A. § 630[3]. Clearly, a fetus is not considered a child pursuant to the above definition. Further, the Legislature has seen fit to adopt the Newborn Protection Act at 23 Pa. C.S.A. § 6501 et. seq. in the year 2002 and in this Act there is no mention of any protection to be given to a fetus or that abuse may be found by a court after a live birth has occurred due to actions done to a fetus. Further, all counsel, along with the Guardian Ad Litem, had indicated that there are no appellate decisions and apparently no other county court decisions on this issue. Clearly, the law does not provide for finding of abuse due to actions taken by an individual upon a fetus. Therefore, the Court is constrained to hold that the Court is not able to find that Mother abused this child pursuant to the definitions in the Child Protective Services Law. 23 Pa. C.S.A. § 6301 et. seq.

R. 84a.

On May 25, 2017, CYS filed a timely notice of appeal on the sole issue of whether the Juvenile Court erred in finding that CYS cannot establish child abuse "on the actions committed by the Mother, reasoning that the child was a fetus and not considered a child" under the statute.[2] R. 88a. After hearing argument, the

[2] A.A.R. has not appealed the dependency and custody determinations.

Superior Court reversed. On December 27, 2017, in a two-judge reported opinion (authored by Judge Moulton, joined by Judge Stabile), the court concluded that "a mother's use of illegal drugs while pregnant may constitute child abuse under the [Child Protective Services Law] if CYS establishes that, by using the illegal drugs, the mother intentionally, knowingly, or recklessly caused, or created a reasonable likelihood of, bodily injury to a child **after** birth." *In re L.B.*, 177 A.3d 308, 309 (Pa. Super. Ct. 2017).

The Superior Court based its decision entirely on the language of the statute. Noting the statute's definition of "child" as an "individual under 18 years of age," the court concluded that a fetus does not fit within this definition, a conclusion that CYS did not oppose in its briefing to the Superior Court. *Id.* at 311. However, even though A.A.R. could not be found to have committed child abuse for actions taken while pregnant that might have affected her fetus, the court concluded that her drug use during pregnancy that caused or created a reasonable likelihood of causing bodily injury *after* birth could be the basis of a finding of child abuse under the statute. *Id.* The court reasoned that "once born," the baby is a "child" under the statute and a mother's actions while pregnant fit the statute's definition of a "recent act or failure to act" that caused or could have caused harm. *Id.*

The court's decision concluded by noting that it made "no determination as to whether CYS has met its burden in this case" and remanded for further

proceedings. *Id.* at 312-13. It also noted that it did not "address what other acts by a mother while pregnant may give rise to a finding of child abuse" and that prenatal conduct can support a finding of child abuse "only when the actor 'intentionally, knowingly, or recklessly' caused, or created a reasonable likelihood of, bodily injury to a child after birth." *Id.* at 313.

Judge Strassburger wrote a concurring opinion that agreed with the main opinion's interpretation of the statute,[3] but wrote separately to "question whether treating as child abusers women who are addicted to drugs results in safer outcomes for children." *Id.* at 313 (Strassburger, J., concurring). The opinion noted that federal law about reporting children exposed to substance abuse was never intended to treat prenatal drug use as child abuse; that doing so will drive women away from hospital care, prenatal care, and substance abuse treatment; and that the decision is not cabined to illegal drug use during pregnancy. *Id.* at 313-14. On this final point, Judge Strassburger wrote at length:

> In addition, although the Majority limits its decision to illegal drug use during pregnancy, its construction of the statute supports no such limitation. We should not delude ourselves into thinking that our decision does not open the door to interpretations of the statute that intrude upon a woman's private decisionmaking as to what is best for herself and her child. There are many decisions a pregnant woman makes that could be reasonably likely to result in bodily injury to her child after birth, which may vary depending on the advice of the

[3] Judge Strassburger is not listed in the case header or footer as having joined Judge Moulton's main opinion, but Judge Strassburger states in his concurring opinion that he "join[s] the Majority's opinion today." *In re L.B.*, 177 A.3d at 313.

> particular practitioner she sees and cultural norms in the country where she resides. Should a woman engage in physical activity or restrict her activities? Should she eat a turkey sandwich, soft cheese, or sushi? Should she drink an occasional glass of wine? What about a daily cup of coffee? Should she continue to take prescribed medication even though there is a potential risk to the child? Should she travel to countries where the Zika virus is present? Should she obtain cancer treatment even though it could put her child at risk? Should she travel across the country to say goodbye to a dying family member late in her pregnancy? Is she a child abuser if her partner kicks or punches her in her abdomen during her pregnancy and she does not leave the relationship because she fears for her own life? While it is true that the woman must act at least recklessly for her decision to constitute child abuse, reasonable people may differ as to the proper standard of conduct.

Id. at 314. The concurrence concluded that, under the court's opinion, "any act" by a pregnant woman could be child abuse if it "creates a reasonable likelihood of bodily injury to a child once he or she is born, so long as she consciously disregards a substantial and unjustifiable risk that such an injury may result." *Id.* at 315. Judge Strassburger poignantly ended this section, "This is quite broad indeed." *Id.* He then called upon this Court to review the case for these reasons. *Id.*

In a unique twist, Judge Moulton, the author of the court's main opinion, joined Judge Strassburger's concurrence in its entirety, even the part of the concurrence pointing out the dangers with Judge Moulton's opinion and calling it "quite broad." *Id.* at 315 ("Judge Moulton joins.").

On January 25, 2018, A.A.R. filed a Petition for Allowance of Appeal, which this Court granted on April 3, 2018.

VI. SUMMARY OF ARGUMENT

Drug use during pregnancy and its effect on newborns is a serious public health issue. One point of agreement among almost everyone who studies the issue -- whether child advocates, maternal health experts, public health professionals, or drug treatment specialists -- is that punishing pregnant women is not a beneficial way to address this problem, whether through the criminal justice system or the civil child abuse system. To the Pennsylvania General Assembly's credit, it has not taken the punitive approach to this issue and has instead chosen to provide services and care for newborns and their mothers. CYS's attempt to do otherwise by arguing that A.A.R. is a child abuser is contrary to both the plain language of the statute governing child abuse and the overall public health of our Commonwealth.

Under the Child Protective Services Law (CPSL), a pregnant woman's actions that affect her newborn cannot form the basis for a child abuse determination. As CYS stated in its brief to the trial court, under 23 Pa. C.S.A. § 6303, the person committing child abuse must be a "perpetrator." This word has a limited statutory definition that does not apply to A.A.R. because, as a pregnant woman, she was not, at the time of the behavior giving rise to the child abuse allegation, the parent of the child. This interpretation of the CPSL is consistent with the recent actions of the General Assembly, which has over the past decade-and-a-half considered the issue of drug use during pregnancy multiple times and

has, rather than choose the punitive approach of labeling pregnant women child abusers, chosen instead to provide services "to ensure the child is provided with proper parental care, control and supervision." *Id.* § 6386(c). The language of section 6386's mandatory reporting requirement says nothing about child abuse, and interpreting it to expand the definition of child abuse goes beyond any reasonable reading of the statutory language.

Beyond the fact that the CPSL as currently written does not allow for the child abuse finding in this case, there are important public policy reasons to conclude that A.A.R. did not commit child abuse here. Maternal and newborn health suffers when states punish the behavior of pregnant women that might harm their children. The evidence on this issue is clear -- when threatened with punishment for their drug use, whether criminal or civil, pregnant women avoid medical care, including prenatal care and substance abuse treatment. Because of this, every major medical and public health organization to address the issue of drug use during pregnancy has taken a position against punishing women.

Moreover, if the CPSL were applied to A.A.R.'s drug use during pregnancy, as the concurring opinion below noted, there would be no logical reason that it would not also apply to any actions taken by a woman during pregnancy. Drinking alcohol, smoking tobacco cigarettes, visiting countries with Zika or other diseases, exercising too much or too little, taking prescription drugs or undergoing other

treatments for pre-existing or pregnancy-related medical conditions, and an endless list of other things pregnant women might do could subject them to a child abuse finding. Even broader, because the CPSL defines child abuse as any action within the past two years, if the Superior Court's interpretation is affirmed in this court, seemingly countless actions of both women and men *before* conception could form the basis of a child abuse determination. The result would be a complex web of difficult constitutional problems related to autonomy, equality, and due process that this Court should avoid under the canon of constitutional avoidance.

For these reasons, this Court should reverse the decision of the Superior Court and hold that the CPSL does not apply to the behaviors of pregnant women like A.A.R.

VII. ARGUMENT

Appellant A.A.R. did not commit child abuse under the Child Protective Services Law (CPSL). Her actions that form the basis of the allegation in this case occurred before her child was born and thus were not covered by the statute. As this Court has recognized, the CPSL has at its heart the goal of preventing child abuse and protecting children from further abuse. *G.V. v. Dep't of Pub. Welfare*, 91 A.3d 667, 670 (Pa. 2014). Finding that mothers like A.A.R. are child abusers

because of their pre-birth conduct does nothing to further this goal and instead will harm parents and children alike.

A. Neither the Definition of Child Abuse in § 6303 Nor the Mandatory Reporting Provision of § 6386 Allows for a Pregnant Woman's Conduct Before Birth to Be the Basis of a Child Abuse Determination.

At the heart of this case is the CPSL's definition of "child abuse," which appears in 23 Pa. C.S.A. § 6303(b.1). Both the original Dependency Petition and the Amended Dependency Petition in this case alleged that A.A.R. committed child abuse under § 6303(b.1)(1). R. 19a; R. 35a. In its briefing and argument to the Juvenile Division and Superior Court, CYS also alleged that A.A.R.'s conduct fell under § 6303(b.1)(5). *See In re L.B.*, 177 A.3d at 309 n.1. These two provisions state:

> The term 'child abuse' shall mean intentionally, knowingly or recklessly doing any of the following:
>
> (1) Causing bodily injury to a child through any recent act or failure to act. . . .
>
> (5) Creating a reasonable likelihood of bodily injury to a child through any recent act or failure to act.

To discern the meaning of a statute, this Court will "ascertain and effectuate the intent of the General Assembly." 1 Pa. C.S.A. § 1921(a). As this Court has said repeatedly, the first step in doing so is "the language of the statute itself." *Mohamed v. Commonwealth, Dep't of Transp.*, 40 A.3d 1186, 1193 (Pa. 2012); 1

Pa. C.S.A. § 1921(b). If the words are not clear, other matters should be considered. *See* 1 Pa. C.S.A. § 1921(c). Engaging in this process of determining legislative intent makes it eminently clear that the General Assembly never intended the CPSL to apply to actions taken by pregnant women before their child is born.

1. A.A.R. was not a "perpetrator" under the CPSL at the time of the actions that form the basis of the child abuse allegation and thus cannot be found to have committed child abuse.

The CPSL requires that for someone to be a child abuser, that person must fit the statutory definition of "perpetrator" at the time of the alleged actions that give rise to the child abuse allegation. Under the CPSL, in order for someone to have a report of child abuse filed against them, they must first be a "perpetrator." *See* 23 Pa. C.S.A. § 6303(a) (defining "founded report" and "indicated report"). "Perpetrator" is defined generally as "[a] person who has committed child abuse as defined in this section," but has the following limitations:

> (1) The term includes only the following:
>
> (i) A parent of the child.
>
> (ii) A spouse or former spouse of the child's parent.
>
> (iii) A paramour or former paramour of the child's parent.
>
> (iv) A person 14 years of age or older and responsible for the child's welfare or having direct contact with children as an

> employee of child-care services, a school or through a program, activity or service.
>
> (v) An individual 14 years of age or older who resides in the same home as the child.
>
> (vi) An individual 18 years of age or older who does not reside in the same home as the child but is related within the third degree of consanguinity or affinity by birth or adoption to the child.
>
> (vii) An individual 18 years of age or older who engages a child in severe forms of trafficking in persons or sex trafficking, as those terms are defined under section 103 of the Trafficking Victims Protection Act of 2000 (114 Stat. 1466, 22 U.S.C. § 7102).

Id. These definitions of "perpetrator" anchor the CPSL to harm done in the context of family life or by others who care for children, rather than allowing the statute to capture all harms done to children.

a. Because there was no "child" under the CPSL at the time of the complained of behavior, A.A.R. was not a "perpetrator."

At the time of the complained of actions that form the basis of the child abuse allegation here – the time during which A.A.R. took drugs while pregnant -- A.A.R. did not fit within any part of the statutory definition of "perpetrator." Only two sub-parts of the "perpetrator" definition could possibly be relevant here: "(i) A parent of the child" and "(v) An individual 14 years of age or older who resides in the same home as the child." However, both of these sub-parts (as with each of the other five) require that there be a "child." As the Superior Court noted and CYS

did not challenge in the courts below or in this Court, the definition of "child" under the CPSL does not include a fetus. *In re L.B.*, 177 A.3d at 311.

Moreover, the General Assembly has proven in a related context that it knows how to distinguish between a child and a fetus, or in terms the General Assembly has used, an "unborn child." The Crimes Against the Unborn Child Act uses the language "unborn child," 18 Pa. C.S.A. §§ 2601-2609, and incorporates the definition of that term from the Abortion Control Act, which states that it includes "the species homo sapiens from fertilization until live birth." 18 Pa. C.S.A. § 3203. The General Assembly, knowing how to use language that explicitly applies before birth, did not do so in the CPSL.[4] Thus, at the time A.A.R. took the drugs at issue in this case, she was not a "perpetrator" under the CPSL because there was no "child" as required by the statute.

b. To commit "child abuse" under the CPSL, an individual must have been a "perpetrator," which A.A.R. was not.

Although the statutory definition of "child abuse" does not specifically indicate that the person who commits child abuse must be a "perpetrator," that is

[4] In the related context of a criminal prosecution for drug use during pregnancy, the Court of Common Pleas held that the words "child" and "person" do not include a fetus. *Commonwealth v. Kemp*, 18 Pa. D. & C. 4th 53 (C.P. 1992). That case presented a similar issue to this case in that the state sought to expand the reach of child endangerment protections to include conduct during pregnancy that affects fetal wellbeing, but based on the same statutory and policy considerations in this Brief, the court rejected this expansive reading. *Id.*

the only plausible reading of the CPSL. First, CYS reads the CPSL this way. In its trial court brief in this case, CYS asked the court to find A.A.R. was a child abuser under the definition of "founded report," which, as noted above, is a "child abuse report involving a perpetrator . . . ." R. 51a. Thus, CYS has acknowledged that A.A.R. must be a perpetrator in order to be found to have committed child abuse.

Second, other parts of the CPSL clearly state that child abuse conducted by someone who is not a perpetrator should be treated exclusively as a criminal matter, not as a matter for a child abuse proceeding or finding. The CPSL clearly states that when a "person who is not a perpetrator" commits child abuse, "law enforcement officials where the suspected child abuse is alleged to have occurred shall be *solely* responsible for investigating the allegation." 23 Pa. C.S.A. § 6334.1(3) (emphasis added). In a separate provision, the CPSL requires county agencies to transmit reports to law enforcement when a non-perpetrator is involved. This provision states that such reports "cannot be investigated under [the CPSL] because the person accused of the abuse is not a perpetrator within the meaning of section 6303." *Id.* § 6368(j). Thus, although not specifically delineated in the section of the CPSL that defines "child abuse," the plain language of the

CPSL requires the person accused of child abuse to be a "perpetrator" as defined by the statute.[5]

If a "child abuse" determination is independent of the "perpetrator" definition, there would be no requirement that the person alleged to have committed child abuse have any relation whatsoever to the child. Thus, if two friends aged 19 and 17 were to get into a fight, with the older one causing the other bodily injury, that person could be found to have committed "child abuse" under the CPSL because he intentionally "[c]aus[ed] bodily injury to a child through any recent act or failure to act." 23 Pa. C.S.A. § 6303(b.1)(1).[6] Such a reading would expand the CPSL beyond the context of the family and caretakers and into a generalized statute protecting children from all people, no matter the relation to the child. As laudable as it is to protect children from everyone, that is not the purpose of the CPSL, which is entirely about protecting children from family members or those who have a statutorily-defined care relationship to the child. *See* 23 Pa. C.S.A. § 6302(b) (stating among the law's purposes "to preserve, stabilize and

[5] Extant Department of Human Services regulations read the statute this way by incorporating the term "perpetrator" into the definition of "child abuse." *See* 55 Pa. Code § 3490.4. The relevant regulations have not been changed since the amendments to the CPSL in 2013 which modified the placement, but not the substance, of the "perpetrator" requirement. Nonetheless, "when the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation." *Banfield v. Cortes*, 110 A.3d 155, 174 (Pa. 2015) (quoting several cases).

[6] This fight would not fall within the statutory exclusion for "child-on-child contact," *see* 23 Pa. C.S.A. § 6304(f), because the 18-year old is not a "child" under the CPSL.

protect the integrity of family life wherever appropriate or to provide another alternative permanent family when the unity of the family cannot be maintained" as well as "to meet the needs of the family and child who may be at risk"). Requiring that the person committing the child abuse be a "perpetrator" as defined by the CPSL prevents the statute from becoming unmoored from family life or care settings and from turning into something more akin to general criminal law.

c. The CPSL requires that the individual accused of child abuse be a perpetrator at the time of the alleged actions, which A.A.R. was not.

The perpetrator must fit the statutory definition at the time of the actions underlying the allegations. Reading the CPSL any other way would lead to absurd results. When engaging in statutory interpretation, courts must avoid absurd results. *See, e.g.*, *Mission Funding Alpha v. Commonwealth*, 173 A.3d 748, 762 (Pa. 2017) (stating courts must avoid "nonsensical" results); *see also* 1 Pa. C.S.A. § 1922(1) ("In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.").

The CPSL only makes sense if interpreted to require the person committing child abuse to be a "perpetrator" *at the time the person acts* intentionally,

knowingly, or recklessly. Consider the following example. A 12-year old is walking down the street and is hit by a car recklessly driven by an adult who has no relationship whatsoever to the child. The accident does not cause any immediate bodily injury to the child. Months later, the driver and the child's parent start dating. Soon after they start dating, a latent bodily injury to the child from the car accident becomes apparent. Now, unlike at the time of the accident, the driver is a "paramour [] of the child's parent," the third definition of "perpetrator," 23 Pa. C.S.A. § 6303(a), and there is "bodily injury" to a "child" as well, *id.* It would be absurd to conclude that the act of dating the parent months after the event turned what had previously been a reckless car accident into an act of child abuse. The only sensible interpretation of the "child abuse" and "perpetrator" definitions is that the person must be a "perpetrator" at the time of the action causing bodily injury.

Further illustrating this point, imagine a situation the reverse of the car accident: a family that takes in an adult friend going through tough times. The family has a 12-year-old child who is then physically abused by this friend who now lives with the family. That friend is a "perpetrator" under the CPSL because she is "[a]n individual 14 years of age or older who resides in the same home as the child" and has committed "child abuse" because she intentionally caused bodily injury of the child. 23 Pa. C.S.A. § 6303(a); *id.* § 6303(b.1). If, because of the

abuse, the family kicks the friend out of the house, that friend is no longer a "perpetrator" because the friend no longer resides with the child. But, the only way to make sense of the statute is to conclude that the friend has still committed "child abuse" because the friend was a "perpetrator" at the time she abused the child. Moving out of the house cannot be a way to avoid a child abuse determination because the friend changing where she lives does not change the fact that she abused a child she was living with, as the "perpetrator" definition includes.[7]

Putting all of these components together, the only reasonable interpretation of the CPSL is that a person who commits child abuse must be a "perpetrator" at the time the person acts intentionally, knowingly, or recklessly. Interpreted this way, the CPSL does not apply to actions taken before the child is born because there is not yet a "child" under the CPSL, so there is no "perpetrator." Applied here, because the only actions that form the basis of the child abuse allegation are

[7] In an unpublished decision that illustrates this point, the Commonwealth Court recognized that the CPSL requires that a person must be a "perpetrator" at the time of the actions taken that constitute "child abuse." In *S.C. v. Dep't of Pub. Welfare*, the Commonwealth Court faced an expungement request from S.C., who claimed that he was not a "perpetrator" at the time he had sex with sixteen-year-old K.K. 2009 WL 9097080 (Pa. Commw. Ct. May 19, 2009). The court concluded that even though S.C. had lived with K.K.'s family the year before, S.C. did not live with K.K. when they had sex. *Id.* at *3-4. Because "the ALJ made no finding that they engaged in sexual intercourse while K.K. was under S.C.'s care," the court granted S.C.'s request to expunge the indicated report because S.C. was not a "perpetrator" at the time of the underlying acts. *Id.* at *4. Illustrative of this same point in the criminal context of corruption of minors, this Court has recognized that a minor must have been in the custody and control of the defendant at the time of the crime. *See Commonwealth v. Gerstner*, 656 A.2d 108 (Pa. 1995).

those A.A.R. took before L.J.B. was born, A.A.R. was not a "perpetrator" under the CPSL, and thus A.A.R. has not committed child abuse under that statute.

2. The General Assembly has considered the issue of drug use during pregnancy, including in 23 Pa. C.S.A. § 6386, but has never defined "child abuse" to include this behavior.

Over the course of the past decade and a half, the General Assembly has considered the issue of drug use during pregnancy multiple times. Yet, not once has it enacted a law or amended the CPSL to include drug use during pregnancy within the definition of child abuse. The only conclusion possible from this unbroken pattern is that the General Assembly does not intend drug use during pregnancy to be considered child abuse.

In 2006, the General Assembly amended the CPSL to comply with the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C.A § 5106a. That federal law provides that states are eligible for grants if they have a state plan that is consistent with CAPTA's objectives. In particular, 42 U.S.C.A. § 5106a(b)(2)(B)(ii) requires state plans to have policies and procedures that "address the needs of infants born with and identified as being affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure."

To comply with CAPTA, the General Assembly adopted a provision that requires mandatory reporting when a health care provider cares for a newborn

affected by "withdrawal symptoms resulting from prenatal drug exposure." 23 Pa. C.S.A. § 6386(a)(2). Contrary to CYS's contention in this case, nothing in the plain language of this provision indicates that such a situation constitutes "child abuse" under the CPSL. To comply with CAPTA, the General Assembly did not amend the CPSL definition of "child abuse" or the child abuse reporting provisions in CPSL Subchapter B, 23 Pa. C.S.A. § 6311-6320 (Provisions and Responsibilities for Reporting Suspected Child Abuse), but rather created a new section of the CPSL for this new and separate mandatory report. Possibly even more telling, § 6386 fails to mention the words "child abuse" at all.

Rather, the General Assembly created a system by which health care providers must report newborns identified as being affected by prenatal drug use for a county assessment of the *ongoing* risk posed to the child and determine if any actions were needed to protect the child in the future. This is evident in the subsequent provisions of this section.[8] Subsection (b) states that, once a report is filed, the county agency must conduct a "safety assessment or risk assessment" to determine if further protective services are necessary. *Id.* § 6386(b). Then,

[8] The original § 6386, passed in 2006, was just one provision: "Health care providers who are involved in the delivery or care of an infant who is born and identified as being affected by illegal substance abuse or as having withdrawal symptoms resulting from prenatal drug exposure shall immediately cause a report to be made to the appropriate county agency. The county agency shall provide or arrange for appropriate services for the infant." H.B. 2670 (Pa. 2006). In 2014 and 2015, the General Assembly amended § 6386 to contain the provisions described here. S.B. 29 (Pa. 2014); H.B. 1276 (Pa. 2015).

subsection (c) provides that the county agency shall do four things: immediately ensure the safety of the child if emergency protective custody is or might be required; physically see the child within 48 hours; contact the parents within 24 hours; and provide services "to ensure the child is provided with proper parental care, control and supervision." *Id.* § 6386(c).

Section 6386 is not about re-defining "child abuse." It does not state that the report will trigger a finding or even investigation of "child abuse"; it does not label the behavior "child abuse" or expand the CPSL definition of "child abuse"; nor does it provide for placing the mother's name on the statewide child abuse registry. As it was specifically considering the issue of "prenatal drug exposure," the General Assembly could have done any or all of these things -- in 2006 when § 6386 was first adopted or in 2014 or 2015 when it was twice amended -- but never did, instead choosing to take a different approach that does not involve a "child abuse" determination.

Reading § 6386 as authorizing a child abuse determination would mean that every child born with fetal alcohol spectrum disorder or whose mother abuses an illegal drug would give rise to a child abuse finding, a result that is hard to believe the General Assembly intended because of its broad consequences. Section 6386 covers not only prenatal drug exposure, but also maternal illegal drug use and fetal alcohol spectrum disorder. *Id.* § 6386(a)(1) & (3). If CYS's interpretation of this

statute is adopted by this Court with respect to § 6386 (a)(2) and prenatal drug exposure, the same conclusion must be reached with respect to these other provisions.

Using the latter as an example, according to estimates from the Pennsylvania Department of Human Services, between 3,983 to 6,830 children were born in Pennsylvania in 2014 with fetal alcohol spectrum disorder, and every day between 11 to 19 babies are born in the state with fetal alcohol spectrum disorder. Department of Human Services, *Fetal Alcohol Spectrum Disorders*, https://goo.gl/XryJHJ. As fetal alcohol spectrum disorder impairs the child's physical condition, it could be considered a form of "bodily injury" under 23 Pa. C.S.A. § 6303. Thus, the inescapable conclusion from CYS's position in this case is that all of these children's mothers -- as well as possibly illegal drug users -- would be child abusers under the CPSL. This massive transformation of the CPSL and its implementation is one that this Court should not undertake without clear language from the General Assembly indicating as such.

This reading of § 6386 is confirmed by multiple statements from CAPTA's author, former Pennsylvania Congressman James Greenwood (also formerly of the Pennsylvania Senate and House of Representatives). As part of his Congressional remarks about CAPTA, Congressman Greenwood said that treating prenatal drug use as child abuse would be "problematic" and would result in driving women

away from medical care. 149 Cong. Rec. H2313, H2362 (daily ed. Mar. 26, 2003). Instead of making prenatal drug use child abuse, he stated that this provision is intended to prevent future harm to children. *Id.*

Earlier this year, Congressman Greenwood reiterated this sentiment. In a letter to the editor to the *Lock Haven Express*, he wrote at length about CAPTA and this issue:

> Until we remove the stigma and enlist public health strategies; pregnant women will live in fear and may well fail to disclose their substance use, refuse prenatal care or keep their pregnancy hidden delivering a baby outside a health care facility. . . .
>
> In crafting the federal law, I never envisioned that the "referral" from a health care provider was the same as a child abuse report.
>
> Congress' CAPTA amendment in 2003 did not provide the legal authority for a state or county children and youth agency to label a woman a child abuser if she used drugs during pregnancy.
>
> Instead the required notice was intended to trigger collaboration between health care providers, child welfare professionals, other social service agencies, the courts (if needed) and families. The goal of a plan of safe care was to ensure the mother was connected to drug and alcohol treatment, the infant connected to early intervention services and evidence-based home visiting services and that the family had access to stable and safe housing.

James C. Greenwood, Letter to the Editor, *The Lockhaven Express*, Jan. 13, 2018, https://goo.gl/Qcf3vK.

In 2011, the General Assembly once again had the opportunity to define "child abuse" as including drug use during pregnancy but failed to do so. That

year, Senate Bill 753 would have amended the definition of "child abuse" to include the following:

> It shall be considered child abuse if a child tests positive at birth for a controlled substance as defined in section 2 of the act of April 14, 1971 (P.L.233, No. 64), known as the Controlled Substances, Drug, Device and Cosmetic Act, unless the child tests positive for a controlled substance as a result of the mother's lawful intake of the substance as prescribed.

S.B. 753 (Pa. 2011). This bill was introduced in 2011, but it was never even considered by the Senate Committee on Aging and Youth.

In 2012 and 2013, the General Assembly was presented with yet another opportunity to amend the "child abuse" definition to cover the actions at issue here but, once again, did not. As part of the fallout from the Penn State/Jerry Sandusky horror, in December 2011, the General Assembly established the "Task Force on Child Protection." This Task Force was charged with conducting "a comprehensive review of the laws and procedures relating to the reporting of child abuse and the protection of the health and safety of children." Joint State Government Commission, *Child Protection in Pennsylvania: Proposed Recommendations, Report of the Task Force on Child Protection* 1 (Nov. 2012), https://goo.gl/VAfgDN. After studying the issue for almost a year, the Task Force sent its report to the General Assembly along with a comprehensive list of proposed policy and statutory changes. *Id.* at 1-6 (reviewing the overall recommendations).

As part of this extensive report, the Task Force proposed several changes to the CPSL. In its own words, "[t]he primary and driving principle of these amendments is to afford children greater protection from abuse." *Id.* at 29. The changes would accomplish this goal by making the law "child-centered," providing "[g]reater protection" for children, and "expanding the definition" of child abuse. *Id.* Yet, despite the goal of broadening the CPSL to capture more child abuse, the Task Force was unequivocal on the issue now before this Court: "The mere existence of drug or alcohol abuse by a pregnant woman is not considered child abuse." *Id.* at 30. As authority for that conclusion, the Task Force cited and reviewed the provisions of § 6386. *Id.*[9]

Responding to the Task Force, in 2013 the General Assembly completely re-wrote the definition of "child abuse" under § 6303. The changes struck the entirety of the previous definition of "child abuse" under § 6303(b) and re-wrote it as the new § 6303(b.1). The new definitions of "child abuse" went into effect December 31, 2014. These new definitions include several that cover very specific actions that were not separated out in the old provision, including forcefully shaking a child under one year of age; kicking, biting, or stabbing a child; and bringing a child into a methamphetamine laboratory. § 6303(b.1)(8).

[9] The report labels this provision § 6317.1, its suggested re-numbering for § 6386. *Id.* at 262.

In re-writing this definition in 2013, the General Assembly could have -- but did not -- include any specific language regarding drug use during pregnancy. The General Assembly failed to do so despite a) there being a bill covering this behavior introduced in the immediately preceding General Assembly; b) the Task Force report specifically mentioning that drug use during pregnancy was not child abuse, providing notice to the General Assembly if it wanted to make a change; c) the new child abuse definition specifically addressing an issue of children being exposed to drugs in covering the limited circumstance of children being present in methamphetamine laboratories; and d) the new provision, unlike the old provision, enumerating specific defined instances of child abuse, which could have but did not include drug use during pregnancy.

The General Assembly's failure over this extended timeframe to change the definition of child abuse to include drug use during pregnancy did not take place in a vacuum. Rather, the issue of whether a pregnant woman can face civil or criminal liability for her drug use during pregnancy has been a pressing issue for over three decades. *See generally* Lynn Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DePaul J. Health Care L. 461 (2005). In light of this ongoing national conversation, given the General Assembly's history regarding this issue, it is hard to conclude anything other than that the General Assembly, as Congressman Greenwood and the Task Force both

make clear, does not intend the CPSL to consider drug use during pregnancy as child abuse.

3. Labeling women as "child abusers" based solely on actions taken during pregnancy is not consistent with the intent of the CPSL.

CYS's attempt to label A.A.R. a child abuser based on her actions while pregnant is wholly inconsistent with the purposes of the CPSL. The language of the CPSL makes its purpose entirely clear -- preventing future child abuse. In the "Findings" section of the CPSL, the General Assembly wrote that "[a]bused children are in urgent need of an effective child protective service to prevent them from suffering further injury and impairment." 23 Pa. C.S.A. § 6302(a). In the "Purpose" section of the law, the General Assembly also explained that the CPSL is designed to, among other things, "provid[e] protection for children from further abuse." *Id.* § 6302(b).

The General Assembly could not have been clearer. The CPSL is about protecting children from harm that might happen again in the future. *G.V. v. Dep't of Pub. Welfare*, 91 A.3d 667, 670 (Pa. 2014). Given that A.A.R.'s complained-of actions that allegedly harmed L.J.B. took place in the unique and non-repeatable context of A.A.R. being pregnant with L.J.B., concluding that she is a child abuser is inconsistent with the purpose of the CPSL. Doing so will not protect L.J.B. from

further abuse because the situation in which A.A.R. allegedly abused L.J.B. will not reoccur: A.A.R. will never again be pregnant with L.J.B.

Thus, she will never "further abuse" L.J.B. in any way similar to what she is alleged to have done here. CYS's sought-after child abuse finding, hence, is not at all forward-looking and preventative, as the CPSL intends such findings to be, but rather is completely backward-looking and punitive. Therefore, the allegation against A.A.R. here is wholly outside the scope of the law at issue in this case.

4. If applied to actions taken during pregnancy, the CPSL's causation language in the definition of "child abuse" would be irredeemably vague and would radically change child abuse determinations in a way that the General Assembly could not have intended.

Even if A.A.R. somehow fits within the definition of "perpetrator" under the CPSL and this Court determines that the General Assembly did not intend to preclude a child abuse determination in this situation, if the term "child abuse" were to apply to actions taken before a child is born, the law's causation language would become irredeemably vague. When choosing between a broad interpretation of a statute that would raise vagueness concerns and a narrow interpretation of a statute that would not, this Court has recently held that the narrow interpretation should be chosen. *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017). The uncertainty created by the causation language in this context, along with the massive change to child abuse determinations that would result from this

uncertainty, is yet another indication that the General Assembly never intended the CPSL to apply to actions taken during pregnancy.

Under 23 Pa. C.S.A. § 6303(b.1)(1), "child abuse" consists of intentionally, knowingly, or recklessly "[c]ausing" bodily injury to a child. The word "causing" is not defined in the statute itself, creating uncertainty about what level of causation is required. Courts in Pennsylvania have applied multiple different definitions of causation depending on the legal context, such as the familiar distinction between "but for" causation and "legal or proximate" causation. *See, e.g.*, *Whitner v. Von Hintz*, 263 A.2d 889 (Pa. 1970). For instance, in *Hatwood v. Hosp. of the Univ. of Pa.*, the Superior Court noted that "but for" causation was not necessary for a professional negligence case; rather, the plaintiff only need show "proximate cause," which the court defined in this type of case as "increased risk of harm." 55 A.3d 1229, 1241-42 (Pa. Super. Ct. 2017).

Nothing in the CPSL indicates which of these (or any other) causation standards applies in the context of "child abuse." Typically, where a parent or caretaker harms a child, distinguishing among the different types of causation largely does not matter. But, if the CPSL were to be applied to A.A.R. and actions taken by pregnant women, this distinction will make a difference. Do we look at the but-for causation of a child suffering an injury at birth? In that case, the pregnant woman would likely always be the but-for cause because without her

carrying the pregnancy to term, the child would not be injured. Or do we look at the proximate cause, and possibly, as in *Hatwood*, whether the pregnant woman's actions increased the risk of harm to the child at birth? Using this standard in the context of a pregnant woman's actions that might affect her newborn would create a different analysis for child abuse cases. Regardless, the language of the CPSL, if applied to the actions of pregnant women, does not answer these questions and would be rendered irredeemably vague.

The same is true for the definition of "child abuse" in 23 Pa. C.S.A. § 6303(b.1)(5). Under that subsection, "child abuse" consists of intentionally, knowingly, or recklessly "[c]reating a reasonable likelihood of" bodily injury to a child. Like the word "causing" in § 6303(b.1)(1) the phrase "creating a reasonable likelihood of" is not defined in the CPSL. Nothing in the CPSL explains what "creating a reasonable likelihood of" bodily injury is in the case of the behavior of women during pregnancy. As with the definition of "causing," in the context of a parent or caretaker and a child, this is a standard inquiry for courts.

In the context of women's behavior during pregnancy, however, determining what behavior creates a reasonable likelihood of bodily injury is extremely difficult because it is unclear how to translate medical science and advice during pregnancy into the language of "creating a reasonable likelihood of." *See generally* U.S. Dep't of Health & Human Services, Office of Disease Prevention & Health Promotion,

Maternal, Infant, and Child Health – Life Stages & Determinants, https://goo.gl/foHWjh ("A range of biological, social, environmental, and physical factors have been linked to maternal, infant, and child health outcomes."). For instance, in the context of alcohol use during pregnancy and its relationship with fetal alcohol syndrome (discussed further *infra* Section VII.C.), a recent global meta-analysis found that one in every 67 pregnant women who consumed alcohol during their pregnancy gave birth to a newborn with fetal alcohol syndrome. Swetlana Popova, *Estimation of National, Regional, and Global Prevalence of Alcohol Use During Pregnancy and Fetal Alcohol Syndrome: A Systematic Review and Meta-Analysis*, 5 Lancet Global Health e290 (2017). Under the CPSL, does that 1-in-67 likelihood constitute a "reasonable likelihood"? Nothing in the CPSL would give a judge any guidance on how to make this complicated determination in the area of newborn health consequences resulting from behavior during pregnancy.

Moreover, applying either of these causation requirements in the context of behavior during pregnancy would turn child abuse determinations into protracted battles of experts along the lines of high-stakes birth defect litigation. The amount of time and money spent on litigating the effects of drugs like Bendectin, Accutane, and Thalidomide presage the future of child abuse determinations if the CPSL were to apply to pre-birth actions taken by pregnant women. The ever-

changing, always contested, and legally complicated science behind how pregnant women's actions affect children at birth, *see, e.g.*, *Blum v. Merrell Dow Pharms., Inc.*, 764 A.2d 1 (Pa. 2000); Joseph Sanders, *From Science to Evidence: The Testimony on Causation in Bendectin Cases*, 46 Stan. L. Rev. 1 (1993), would become a standard part of child abuse cases for those mothers who have the resources to venture down this path, while those without resources would be forced to accept whatever notion of causation local judges and county youth services officials think is true based on their non-expert understanding of birth defect science. In other words, if applied to the unique context of pregnancy, the CPSL's causation language would either radically transform child abuse cases or subject mothers to child abuse determinations based on potentially faulty science.

The General Assembly certainly did not intend child abuse determinations to be this expansive and complicated, nor did it intend the statute to be as vague as it would be if applied in this context. Thus, this Court should avoid these problems and hold that the CPSL does not apply in this context.

B. Applying the CPSL to Pregnant Women's Actions Would Gravely Harm Maternal and Neonatal Health.

The consequences of a child abuse determination for a parent are severe. Under the CPSL, the state of Pennsylvania has a central state registry for child abuse determinations. 23 Pa. C.S.A. § 6331. The information contained in this

registry can be released to particular government officials and private individuals under certain circumstances. *Id.* § 6340. As this Court has forcefully stated, "identifying someone as a child abuser can profoundly impact that person's reputation," *P.R. v. Dep'. of Pub. Welfare*, 801 A.2d 478, 483 (Pa. 2002), and a person's reputation in the context of a child abuse determination is a "recognized and protected interest under Pennsylvania's Constitution." *G.V. v. Dep't of Pub. Welfare*, 91 A.3d 667, 672 (Pa. 2014). Moreover, people listed in the database as a perpetrator of a founded report of child abuse are banned for five years from working in jobs related to child care or in schools. 23 Pa. C.S.A. § 6344(c). Individuals are also required to submit information about whether they are named in any reports on the registry, founded or indicated, for certain employment or volunteer opportunities. *Id.* § 6344(b).

Because of these severe consequences, many women with substance abuse disorders will avoid health care during their pregnancies so as to avoid contact with mandatory reporters. *See* Sarah Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 Maternal & Child Health J. 333, 338-39 (2011) ("[L]ate or limited prenatal care may be better understood as one rational response to public health messages and [Child Protective Services] reporting practices . . . ."); *see also* Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 Health &

Justice 1, 7 (2015) ("The most common strategy employed by women afraid of detection was avoidance of medical care."). As a result, if this Court holds that A.A.R.'s actions constitute child abuse, maternal and neonatal health in Pennsylvania will be gravely harmed.

Almost every major medical and public health organization has recognized that punishing women for drug use during their pregnancies is counterproductive to public and private health. The rationale here is simple -- women with a substance abuse disorder during pregnancy need treatment, both for their drug use and their prenatal care, and the threat of serious negative consequences from the state, whether with criminal charges or a civil child abuse determination, will drive women away from treatment, thus risking their own and their child's health.

The organizations speaking out against punishing women in this regard mostly focus their attention on using the criminal law to punish women. However, many include broad statements about punishment generally. For instance, the March of Dimes, one of the leading non-profit organizations committed to the health of mothers and babies, has stated unequivocally: "The March of Dimes opposes policies and programs that impose punitive measures on pregnant women who use or abuse drugs." March of Dimes, *Fact Sheet: Policies and Programs to Address Drug-Exposed Newborns* (2014), https://goo.gl/7Wqgna. The statement explains further that "[p]regnant women who are addicted to opioids often do not

seek prenatal care until late in pregnancy because they are worried that they will be stigmatized or that their newborn will be taken away. The March of Dimes supports policy interventions that enable women to access services in order to promote a healthy pregnancy and build a healthy family." *Id.*

The American Academy of Pediatrics (AAP), a national organization of professionals working in children's healthcare, also has a clear statement about this issue, specifically in response to the recent increase in the use of opioids. The statement reads: "The AAP reaffirms its position that punitive measures taken toward pregnant women are not in the best interest of the health of the mother-infant dyad." American Academy of Pediatrics, *A Public Health Response to Opioid Use in Pregnancy* 4 (2017), https://goo.gl/nZ8qS2. The reason the AAP opposes punitive responses is that they "are ineffective and may have detrimental effects on both maternal and child health." *Id.* at 3.

The National Perinatal Association (NPA) is the leading voice of professionals who care for newborns immediately after birth. This organization has also cautioned against punitive approaches through either the criminal or child welfare system because of its adverse effect on maternal and child health:

> Treating this personal and public health issue [perinatal substance use] as a criminal issue -- or a deficiency in parenting that warrants child welfare intervention -- results in pregnant and parenting people avoiding prenatal and obstetric care and putting the health of themselves and their infants at increased risk. Parents are rightly and

> understandably fearful that seeking prenatal care, disclosing substance use, and initiating treatment for a Substance Use Disorder may result in harmful and punitive child welfare involvement. This, unfortunately, increases the risk of obstetrical complications, preterm birth, and delivery of low birth weight infants.

National Perinatal Association, *Position Statement 2017: Perinatal Substance Use* 2 (2017), https://goo.gl/iExP4L.

The American College of Obstetricians and Gynecologists, the leading organization of women's health care physicians, has taken a position that explicitly denounces both criminal and civil sanctions for pregnant women:

> Seeking obstetric–gynecologic care should not expose a woman to criminal *or civil penalties*, such as incarceration, involuntary commitment, loss of custody of her children, or loss of housing. These approaches treat addiction as a moral failing. Addiction is a chronic, relapsing biological and behavioral disorder with genetic components. The disease of substance addiction is subject to medical and behavioral management in the same fashion as hypertension and diabetes.

American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, *Committee Opinion 473, Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (2011, reaffirmed 2014) (emphasis added), https://goo.gl/bzCa3E.

The American Medical Association, perhaps the leading generalist medical organization in the country, agrees. In a revised 2017 policy statement, the organization wrote that "[t]ransplacental drug transfer should not be subject to

criminal sanctions or civil liability." American Medical Association, *Perinatal Addiction - Issues in Care and Prevention H-420.962* (2017), https://goo.gl/JrxsNd. Instead, the organization recommends that "[p]regnant and breastfeeding patients with substance use disorders should be provided with physician-led, team-based care that is evidence-based and offers the ancillary and supportive services that are necessary to support rehabilitation." *Id.*

Finally, the American Society of Addiction Medicine, a professional medical society representing health care professionals in the field of addiction medicine, has a clear statement about child abuse determinations in this context. In a statement that focuses on opioid use, the organization concluded: "State and local governments should avoid any measures defining alcohol or other drug use during pregnancy as 'child abuse or maltreatment,' and should avoid prosecution, jail, or other punitive measures as a substitute for providing effective health care services for these women." American Society of Addiction Medicine, *Public Policy Statement on Substance Use, Misuse, and Use Disorders During and Following Pregnancy, with an Emphasis on Opioids* 5 (2017), https://goo.gl/wzGACv.

These organizations that have taken broad positions against the power of the state to punish women -- both criminally and civilly -- for drug use during pregnancy are joined in spirit by the organizations that have taken positions against criminal approaches to the problem without explicitly mentioning civil child abuse

penalties. Among these organizations are the American Academy of Family Physicians, the American Public Health Association, the American Nurses Association, the American Psychiatric Association, and the American Psychological Association. National Advocates for Pregnant Women, *Medical and Public Health Statements Addressing Prosecution and Punishment of Pregnant Women*, https://goo.gl/UgHnRH. Although these organizations do not mention civil penalties, the rationales behind their statements apply just as clearly to this case -- taking action against pregnant women who use drugs will deter them from getting the treatment they need for healthy pregnancies.

C. Applying the CPSL to Actions Taken Before a Child Is Born Has Monumental Implications for Women During Pregnancy and for Women and Men Before Conception.

As the two concurring Superior Court judges in this case noted, applying the CPSL to actions taken during pregnancy will have a grave effect on pregnant women. Moreover, because the CPSL defines "recent act or failure to act" to include actions taken up to two years before the harm to the child, affirming the Superior Court's decision would have broad implications not only for pregnant women but also for all women and men with the potential to conceive. This broad application of the child abuse definition would also raise serious constitutional issues. By interpreting the CPSL here as not applying to actions taken by both men

and women before birth, this Court will avoid both constitutional problems and unjustifiably ensnaring countless men and women of child-bearing age in the child abuse system.

1. As explained by the concurring judges in the Superior Court, applying the CPSL here would lead to policing pregnant women for all sorts of actions taken during pregnancy.

It would be impossible to cabin a ruling in favor of CYS here to the facts of this case -- illegal drug use during pregnancy. In its lead opinion, the Superior Court wrote that "[t]he sole question before us is whether a mother's illegal drug use while pregnant may constitute child abuse under the CPSL if it caused, or created a reasonable likelihood of, bodily injury to a child after birth. [We do not] address what other acts by a mother while pregnant may give rise to a finding of child abuse." *In re L.B.*, 177 A.3d at 312-13. Disagreeing with this attempt to limit the decision, the concurring opinion noted that any such limitation is illusory. The concurrence wrote, "[A]lthough the Majority limits its decision to illegal drug use during pregnancy[,] its construction of the statute supports no such limitation. We should not delude ourselves into thinking that our decision does not open the door to interpretations of the statute that intrude upon a woman's private decisionmaking as to what is best for herself and her child." *Id.* at 314 (Strassburger, J., concurring).

The concurrence is correct. If the CPSL applies to A.A.R.'s conduct during pregnancy, it also applies to *any* conduct during pregnancy that intentionally, knowingly, or recklessly caused bodily injury to a child after birth or created a reasonable likelihood of doing so. There is nothing in the language of the CPSL that would limit its application to illegal drug use, such as the conduct at issue here. In an odd twist to this case, even Judge Moulton, the author of the main Superior Court opinion, agrees (despite writing the limitation in the main opinion), as he joined the concurring opinion on this point.

The concurring opinion canvassed only a small sampling of actions a pregnant woman could take during pregnancy that might cause bodily injury (or a reasonable likelihood of bodily injury) to a newborn (or beyond): too much or too little physical activity; eating turkey sandwiches, soft cheeses, or sushi; drinking wine or coffee; taking prescribed medication; traveling to a country with Zika or long-distance to see a dying family member; obtaining cancer treatment; and staying in a physically abusive relationship. *Id.* at 314 (Strassburger, J., concurring).

Two common behaviors received passing or no attention from the concurring opinion but are worth further discussion here - alcohol and tobacco use. There are several known risks to children associated with maternal alcohol and tobacco use during pregnancy. As previously discussed, fetal alcohol spectrum

disorder, which affects thousands of Pennsylvania babies every year, is one. *See* Section VII.A.2. *supra*. Binge drinking increases the risk of congenital heart defects, and tobacco use along with binge drinking increases that risk even more. Walter A. Mateja, *The Association Between Maternal Alcohol Use and Smoking in Early Pregnancy and Congenital Cardiac Defects*, 21 J. Women's Health 26 (2012). Tobacco use alone during pregnancy can lead to premature birth, low birth weight, and small birth size (and the complications associated with each). Dennis Mook-Kanamori et al., *Risk Factors and Outcomes Associated with First-Trimester Fetal Growth Restriction*, 303 JAMA 527 (2010). According to the Centers for Disease Control and Prevention, the list of risks from maternal tobacco use also includes miscarriage, Sudden Infant Death Syndrome, birth defects including cleft lip or palate, and infant death. Centers for Disease Control and Prevention, *Tobacco Use and Pregnancy*, https://goo.gl/UKzh58.

Given these harms, interpreting the CPSL to cover a woman's behavior during pregnancy that leads to harm to her newborn could ensnare a huge number of Pennsylvania women. A study published last year that looked at the habits of over 80,000 adolescent women and 152,000 adult women in the United States found that 11.5% of adolescent pregnant women and 8.7% of adult pregnant women used alcohol in the past month, while 23.0% of adolescent pregnant women and 14.9% of adult pregnant women used tobacco in the past month. Sehun

Oh et al., *Prevalence and Correlates of Alcohol and Tobacco Use Among Pregnant Women in the United States: Evidence from the NSDUH 2005-2014*, 97 Preventive Medicine 93 (2017). If these numbers hold for Pennsylvania, of the almost 138,000 births to adult women in 2016 (the last year for which the Department of Health has published statistics), *see* Department of Health, *Resident Live Births by Age of Mother, Counties and Pennsylvania, 2016*, https://goo.gl/RNMhhe, over 12,000 of the pregnant women used alcohol during their pregnancy and over 20,500 used tobacco. Adopting the definition of child abuse from the Superior Court and advocated by CYS to this Court would mean that each of these women (and their counterparts in every other year) might have committed child abuse, regardless of whether their child was injured at birth. *See* 23 Pa. C.S.A. § 6303(b.1)(5) (defining child abuse to include creating a "reasonable likelihood of bodily injury").

Because of these concerns and those like them, pregnant women are constantly bombarded with advice related to the issues discussed in the Superior Court concurring opinion and in this Brief -- about how best to eat, drink, and behave during pregnancy. If this Court were to affirm the Superior Court ruling and adopt CYS's interpretation of the CPSL, lurking behind each of these pieces of advice a pregnant woman receives will be the threat of a child abuse allegation. After all, if she eats the wrong food or does not follow the doctor's health regimen or misses a medication and her newborn suffers (or even *might* have suffered)

bodily injury as a result, she will have acted recklessly and would be a child abuser. In other words, the result of ruling against A.A.R. here will be that every pregnant woman will be walking on eggshells for nine months, scared that one misstep will not only be a health issue for her and her newborn but also that this misstep will turn her into a child abuser.

It is impossible to believe that the General Assembly intended the CPSL to police pregnancy in this extreme way, turning any behavior during pregnancy into possible child abuse and consequently threatening almost every pregnant woman in Pennsylvania with being captured by the child abuse system.

2. Because the CPSL defines "recent" to include actions within the past two years, applying the CPSL here would lead to women and men being found to be child abusers for their pre-conception behavior.

The Superior Court concurrence focused on the decision's implications for pregnant women. However, the implications are far broader. The CPSL's definition of "child abuse" requires the action giving rise to the child abuse to be a "recent act or failure to act." 23 Pa. C.S.A. § 6303(b.1)(1), (5). The statute defines the term "recent act or failure to act" as "[a]ny act or failure to act committed within two years of the date of the report to the department or county agency." *Id.* § 6303(a). Thus, for a child suffering, or being put at reasonable likelihood of suffering, a bodily injury at birth, under the Superior Court's interpretation of the

CPSL, the action giving rise to the child abuse could have occurred at any time two years prior.

Under this definition, all sorts of behaviors of women and men *before conception* could give rise to a child abuse determination. As one example, one of the most common forms of advice most women of child-bearing age receive from their doctor is to take folic acid. According to the Centers for Disease Control and Prevention (CDC), women of child-bearing age are supposed to take folic acid before they get pregnant to prevent spina bifida and anencephaly. The CDC's advice reads: "All women between 15 and 45 years of age should consume folic acid daily because half of U.S. pregnancies are unplanned and because these birth defects occur very early in pregnancy (3-4 weeks after conception), before most women know they are pregnant." Centers for Disease Control and Prevention, *Folic Acid: Recommendations*, https://goo.gl/EMKfWR. If a woman who is not pregnant recklessly ignores this advice from her doctor and then gives birth to a baby with spina bifida or anencephaly, she will fall squarely within the language of § 6303(b.1)(1) as interpreted by the lower court here. There is no way to find that A.A.R. committed child abuse in this case without also finding that women who failed to take folic acid and, *up to two years later*, gave birth to a baby with spina bifida or anencephaly did not also commit child abuse. In fact, given the breadth of § 6303(b.1)(5), which only requires creating a "reasonable likelihood of bodily

injury," women who fail to take folic acid might be child abusers under the CPSL *even if their baby is completely healthy*.

Taking folic acid is just one of countless pieces of advice that are given to non-pregnant women of childbearing age to help with eventually having a healthy pregnancy. There are others -- obtain genetic screening, eat healthy, lower your weight, reduce environmental toxins, and more. *See generally* American Academy of Family Physicians, *Preconception Care (Position Paper)*, https://goo.gl/F9HnGD. Women who ignore this voluminous amount of advice and then give birth to a baby with some kind of bodily injury that a doctor or judge can trace back to ignoring the advice will, if this Court adopts CYS's reasoning, now be at risk of being accused of child abuse under the CPSL.

Moreover, research indicates that men's behaviors before conception can also have an impact on the health of newborns. Like smoking in pregnant women, preconception smoking by men can harm newborns. Preconception smoking increases the risk that a child has leukemia by 25% and 44% for smoking 20 or more cigarettes per day. Boukje van der Zee, et al., *Ethical Aspects of Paternal Preconception Lifestyle Modification,* 209 Am. J. Obstetrics & Gynecology 11, 13 (2013). It also increases the risk of harm to the newborn by exposing the man's female partner – both pre- and post-conception – to second-hand smoke and reducing the likelihood that she quits smoking. *Id.* Although the specific details

might not be common knowledge, the advice for men to quit smoking because of pregnancy-related harms is well known. *See* Centers for Disease Control and Prevention, *Before Pregnancy: Information for Men*, https://goo.gl/muKMnb. For men who ignore this information, any harm to a child that can be traced back to this behavior could result in the man being found to have committed child abuse based on smoking before even conceiving the child.

Men who travel to a Zika endemic country also risk being child abusers, even if the trip is before long before conception. Such men risk Zika infection, which can then be passed to a woman during intercourse, which can then have an effect on the health of the newborn. If the child is infected with Zika, the child can have many different types of neural abnormalities. Dana Meaney-Delman, et al., *Zika Virus and Pregnancy: What Obstetric Health Care Providers Need to Know*, 127 Obstetrics & Gynecology 642 (2016). If this were to happen and a man traveled to a Zika endemic country in spite of this known risk within two years prior to the birth of the infected child, under CYS's argument, he has acted recklessly and caused bodily injury to a child. In other words, he is a child abuser based solely on his travel long before conception.

Other behaviors by men before conception could also lead to bodily injury of the child at birth. For instance, when men continue to work at a job that exposes them to pesticides and other environmental toxins during the period just before and

after conception, they can increase the risk that a child is born with neural tube defects, nervous system tumors, and leukemia. Jean D. Brender, et al., *Maternal Pesticide Exposure and Neural Tube Defects in Mexican Americans*, 20 Annals Epidemiology 16 (2010); Maria Feychting, et al., *Paternal Occupational Exposures and Childhood Cancer*, 109 Env. Health Persps. 193 (2001); Helen Bailey, et al., *Parental Occupational Pesticide Expsosure and the Risk of Childhood Leukemia in the Offspring*, 135 Int'l J. Cancer 2157 (2014). Also, untreated sexually transmitted diseases in men, such as gonorrhea, chlamydia, herpes, hepatitis B, and HIV, that are then transmitted to women before, during, or after conception can lead to birth defects, disease, and even death. *See generally* National Institutes of Health, *How Do Sexually Transmitted Diseases and Sexually Transmitted Infections (STDs/STIs) Affect Pregnancy*, https://goo.gl/wh3CTq.

As one study in the journal *Reproductive Health* summarized the literature, "paternal preconception smoking, exposure to environmental substances, medication use, [being] overweight and [of] advanced age have been proved to be associated with low birth weight, congenital cardiac and anorectal malformations, infant cancers and neural tube defects." Eleonora Agricola, *Investigating Paternal Preconception Risk Factors for Adverse Pregnancy Outcomes in a Population of Internet Users*, 13 Reproductive Health 1, 2 (2016). In other words, men's actions or failure to act during the two years prior to birth could cause bodily injury to a

newborn. Under CYS's interpretation of the CPSL, they would also be child abusers.

3. By refusing to apply the CPSL to A.A.R.'s actions before birth, this Court can avoid difficult constitutional issues of reproductive rights, equal protection, and due process.

One of the basic principles of statutory interpretation is the "canon of constitutional avoidance." Under this canon, "when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n*, 844 A.2d 1239, 1249-50 (Pa. 2004). As argued in Section VII.A., Appellant does not believe that the CPSL is "susceptible of two constructions" because the language of the statute does not apply to her conduct. However, to the extent this Court might believe that the law is so susceptible, this Court is duty-bound to rule in A.A.R.'s favor and thereby avoid the tangle of constitutional problems that a contrary ruling would inevitably raise. *See* 1 Pa. C.S.A. § 1922(3) ("In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: . . . (3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.").

First and foremost, the constitutional right to reproductive autonomy would be compromised if this Court were to hold that the CPSL applies to actions taken before childbirth. As the Superior Court held and CYS has not challenged in this Court, a pregnant woman cannot be found to have committed "child abuse" under the CPSL for actions taken during her pregnancy that affect her fetus, only those that affect her newborn. *In re L.B.*, 177 A.3d at 311. Under this holding, which was not appealed by CYS, a pregnant woman who does not give birth is not at risk of a child abuse determination because whatever she does during pregnancy will only affect her fetus, not her child. Thus, in order to avoid a child abuse investigation and its consequences, a pregnant woman who has used any amount of drugs during her pregnancy (or taken any of the actions discussed above, such as drinking alcohol, smoking tobacco, eating sushi, etc.) could reasonably believe her only option to avoid a child abuse finding is to have an abortion. Stated differently, applying the Superior Court's interpretation of the CPSL in this situation will pressure pregnant women to have an abortion.

Not only will such a decision pressure women to have an abortion, but it will also punish childbirth. Under *Roe v. Wade* and its progeny, women have a constitutional right to decide to terminate their pregnancies *and* a constitutional right to decide to carry their pregnancies to term and give birth to a child. 410 U.S. 113, 153 (1973) (holding that the right to privacy under the Fourteenth

Amendment is "broad enough to encompass a woman's decision whether *or not* to terminate her pregnancy" (emphasis added)). Pregnant women who use drugs or consume alcohol or tobacco or engage in any other behavior that might risk bodily injury to their newborn would be punished for choosing to continue their pregnancies because doing so, rather than choosing abortion, would subject them to a child abuse investigation and finding. Just as much as punishing a woman for choosing abortion, punishing a woman for choosing to give birth is a violation of basic constitutional principles of reproductive autonomy. *See generally* Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 Hastings L.J. 569, 600-01 (1992).

Constitutional principles of equality are also at stake. If drug use during pregnancy can form the basis of a child abuse finding, experience shows that women of color will most likely be the targets of child abuse investigations and determinations. At this point, it is uncontroversial to state that implicit racial biases function at every level of the legal system (just as they do throughout society). *See generally, e.g.*, Adam Benforado, *Unfair: The New Science of Criminal Injustice* (2015). Particularly when it comes to punishments for drug use, racial minorities are targeted more often than white people. The result of a decision allowing a child abuse finding for drug use during pregnancy will likely be that women of color will be subject to a finding of child abuse and the consequences thereof more than

others, raising important issues of constitutional equality. *See generally* Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 172-180 (2d ed. 2017); Joanne E. Brosh & Monica K. Miller, *Regulating Pregnancy Behaviors: How the Constitutional Rights of Minority Women are Disproportionately Compromised*, 16 Am. U. J. Gender Soc. Pol'y & L. 437 (2008); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv. L. Rev. 1419 (1991). The American College of Obstetricians and Gynecologists has recognized as much based on its expertise and experience, stating that policies such as the one at issue in this case "may unjustly single out the most vulnerable, particularly women with low incomes and women of color." American College of Obstetricians and Gynecologists, *Committee Opinion 473*, *supra*.

Finally, this case also implicates important constitutional principles of due process vagueness and notice. At its heart, the Due Process Clause and its Pennsylvania equivalent require fairness, and one of the most important aspects of fairness is that a law clearly define its prohibitions. As the United States Supreme Court has said:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair

> warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, . . . [u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (internal citations and quotation marks omitted); *see also Commonwealth v. Herman*, 161 A.3d 194, 204-05 (Pa. 2017).

Here, applying § 6303(b.1)(1) and (5) in the context of behaviors before birth creates great ambiguity. As the District Court for the Western District of Wisconsin recognized just last year in the context of prenatal drug exposure, the application of a punitive child abuse law raises several levels of uncertainty -- what level of drug use is problematic, how exactly do we know that harm was caused by the woman's actions, what other actions by the pregnant woman might be punished, and more. *See Loertscher v. Anderson*, 259 F. Supp. 3d 902, 915-22 (W.D. Wis. 2017). The statute at issue in that case differs from § 6303 in many important ways, but the underlying principles of the court's decision are identical -- when a statute punishes drug use during pregnancy, questions of due process vagueness inevitably arise.

Due process requires not only that a statute be clear, but also that the person being punished by the state have sufficient notice of the allegations being levied against her. As this Court has stated, "[n]otice is the most basic requirement of due process. . . . 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Pa. Coal Min. Ass'n v. Ins. Dept.*, 370 A.2d 685, 692 (Pa. 1977) (quoting *Goss v. Lopez*, 419 U.S. 565, 579 (1975)). Pennsylvania courts have applied this basic principle of due process in the context of civil child abuse determinations. *See, e.g., J.P. v. Dep't of Human Servs.*, 150 A.3d 173 (Pa. Commw. Ct. 2016). Here, CYS initially claimed that A.A.R. violated § 6303(b.1)(1) in both the dependency and amended dependency petitions, R19, R35; however, in both the Juvenile Court and Superior Court, CYS argued that A.A.R. violated both § 6303(b.1)(1) and § 6303(b.1)(5). *In re L.B.*, 177 A.3d at 309 n.1. To the extent that the Superior Court determination relied on the broader language in § 6303(b.1)(5), Appellant A.A.R.'s due process right to notice has been violated.

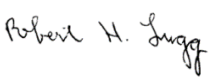
Under the canon of constitutional avoidance, this Court should avoid all of these complicated constitutional issues by interpreting the CPSL according to its most natural reading: under the CPSL, behavior before birth cannot give rise to a child abuse determination.

VIII. CONCLUSION

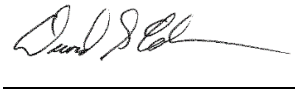
Drug use during pregnancy is a serious public health issue. One thing almost every expert who has studied the issue agrees upon is that punishment – whether by criminal charges or civil child abuse determinations – is not the solution. Thankfully, the General Assembly agrees. Nothing in the CPSL indicates that a woman like A.A.R., who used drugs during pregnancy, can be considered a perpetrator of child abuse. Thus, to avoid the almost endless problems that would result if pre-birth behavior can be considered abuse under the CPSL, this Court should reverse the Superior Court's decision and hold that A.A.R. is not a perpetrator of child abuse under the CPSL.

Dated: May 3, 2018

Respectfully submitted,



Robert H. Lugg
(Pa. Bar No. 41262)
LUGG & LUGG
350 East Water Street
Lock Haven, PA 17745
(570) 748-2481



David S. Cohen
(Pa. Bar No. 88811)
DREXEL KLINE SCHOOL OF LAW
3320 Market St., Suite 232
Philadelphia, PA 19104
(215) 571-4714

Carol Tracy
(Pa. Bar No. 40258)
WOMEN'S LAW PROJECT
125 S. Ninth St., Suite 300
Philadelphia, PA 19107
(215) 928-5770

CERTIFICATION OF COMPLIANCE WITH RULE 2135(d)

The Brief for Appellants complies with the word count limitation of Pa. R.A.P. 2135 because it contains 13,951 words, excluding the parts exempted by section (b) of this Rule. This Certificate is based upon the word count of the word processing system used to prepare this Brief.

Date: May 3, 2018

By: /s/ David S. Cohen

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 3rd day of May, 2018, a true and correct copy of the foregoing Brief for Appellants was served via electronic mail and United States mail, first class, postage prepaid, addressed:

Amanda Beth Browning
Clinton County Children and Youth Social Services Agency
232 East Main Street
P.O. Box 787
Lock Haven, PA 17745
abrowning@clintoncountypa.com
Counsel for Appellee

C. Rocco Rosamilia
Rosamilia, Brungard & Rosamilia
241 West Main Street
Lock Haven, PA 17745
roccorosamilia@gmail.com
Guardian Ad Litem

Trisha Hoover Jasper
Protasio & Jasper PC
325 Market St.
Williamsport, PA 17701
Trisha@pj-law.org
Counsel for Father

David S. Cohen (Pa. Bar No. 88811)
3320 Market St., Suite 232
Philadelphia, PA 19104
(215) 571-4714
dsc39@drexel.edu
Counsel for Appellant

ADDENDUM A

2017 PA Super 411

IN THE INTEREST OF: L.B., A MINOR	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
APPEAL OF: CCCYS	:	
	:	
	:	
	:	
	:	
	:	No. 884 MDA 2017

Appeal from the Order Entered May 24, 2017
In the Court of Common Pleas of Clinton County Juvenile Division at
No(s): CP-18-DP-0000009-2017

BEFORE: STABILE, MOULTON, and STRASSBURGER*, JJ.

OPINION BY MOULTON, J.: **FILED DECEMBER 27, 2017**

Clinton County Children and Youth Services ("CYS") appeals from the order entered May 24, 2017 finding that CYS cannot establish child abuse under the Child Protective Services Law ("CPSL"), 23 Pa.C.S. §§ 6301 *et seq.*, based "on the actions committed by" A.A.R. ("Mother") while she was pregnant with L.B. ("Child"). We conclude that a mother's use of illegal drugs while pregnant may constitute child abuse under the CPSL if CYS establishes that, by using the illegal drugs, the mother intentionally, knowingly, or recklessly caused, or created a reasonable likelihood of, bodily injury to a child **after** birth. We therefore vacate the order and remand for further proceedings.

The trial court summarized the relevant procedural and factual history as follows:

---

* Retired Senior Judge assigned to the Superior Court.

> On February 7, 2017, [CYS] filed an Application for Emergency Protective Custody indicating that [Child] was born [in] January [] 2017 at the Williamsport Hospital, that Mother had tested positive for marijuana and suboxone and that Mother on January 27, 2017 while pregnant had completed a drug test and was positive for opiates, benzodiazepines and marijuana. [CYS] also alleged that [Child] was suffering from withdrawal symptoms and was undergoing treatment at the Williamsport Hospital.
>
> This Court issued an Order for Emergency Protective Custody on February 7, 2017. On February 10, 2017, the Honorable Michael F. Salisbury conducted a 72 hour Shelter Care Hearing due to this Court's unavailability and continued legal and physical custody of the child with [CYS]. [CYS] timely filed a Dependency Petition on February 13, 2017 alleging that the child was without proper parental care or control and further alleged that the child was a victim of child abuse as defined by 23 Pa. C.S.A. § 6303. Specifically, [CYS] alleged and has continued to argue that under Subsection 6303(b.1)(1) . . . the parent, specifically Mother, caused bodily injury to the child through a recent act or failure to act.[1] [CYS] alleged in the Dependency Petition that the child had been in Williamsport Hospital for a period of nineteen (19) days suffering from drug dependence withdrawal due to the substances Mother ingested while Mother was pregnant with the child and that Mother tested positive for marijuana, opiates and benzodiazepines at the time of the child's birth. Mother had no prescription for any of these medications.
>
> . . .
>
> [T]his Court entered an Order finding the child dependent on March 15, 2017, maintaining legal and physical custody of the child with [CYS] and deferring a decision on the issue whether the child was a victim of abuse until the Dispositional Hearing which was agreed to by all of the parties.

---

[1] The dependency petition alleged Mother committed child abuse under subsection 6303(b.1)(1). At argument and in its briefs before both the trial court and this Court, CYS argued that Mother committed child abuse under subsections 6303(b.1)(1) or (5).

> On March 16, 2017, this Court entered an Order directing the Solicitor for [CYS], the attorney for Mother and the attorney for Father to file an appropriate Memorandum of Law on the issue of whether Mother may be found to have committed abuse of this child as alleged by [CYS]. Mother's attorney and Father's attorney, along with [CYS's] Solicitor filed said Memorandums of Law timely and at the Dispositional Hearing on March 30, 2017, this Court continued legal and physical custody of the child with [CYS]. This Court also at the Dispositional Hearing directed the Office of Court Administrator to schedule a further hearing concerning the abuse issue as insufficient time was allotted at that March 30, 2017 proceeding to receive sufficient evidence to decide that issue. The Office of Court Administrator scheduled the issue of abuse for an extended hearing on May 26, 2017. Further, a Permanency Review Hearing was also scheduled for May 26, 2017. The Guardian Ad Litem filed a request for argument on April 4, 2017 regarding the issue of abuse, indicating that the Guardian Ad Litem believed that it would be advantageous for this Court and the parties for this Court to decide the legal issue before receiving testimony and evidence at an extended hearing. This Court scheduled argument for May 9, 2017.

Trial Court Opinion, 5/24/17, at 1-4 ("Rule 1925(a) Op.").

The trial court heard argument from all counsel and the guardian ad litem on May 9, 2017 to determine whether Mother had committed child abuse within the meaning of section 6303(b.1) of the CPSL. On May 24, 2017, the trial court filed an order finding that CYS "cannot establish child abuse . . . on the actions committed by Mother while the child was a fetus." Order, 5/23/17; ***see also*** Rule 1925(a) Op. at 4 ("[T]he law does not provide for finding of abuse due to actions taken by an individual upon a fetus."). On May 25, 2017, CYS timely filed a notice of appeal.

On appeal, CYS raises the following issue for our review: "Whether the Trial Court erred by finding that [CYS] cannot establish child abuse in the

matter of the actions committed by Mother, reasoning that the child was a fetus and not considered a child pursuant to 23 Pa.C.S. § 630[3]." CYS's Br. at 4.

CYS argues that Mother's prenatal drug use was a "recent act or failure to act" that "caus[ed]," or "creat[ed] a reasonable likelihood of," bodily injury under section 6303(b.1)(1) or (5) because that drug use caused Child to be born with withdrawal symptoms. The trial court rejected this argument, concluding that the CPSL does not permit a finding of child abuse based on Mother's actions before Child was born.

"A challenge to the court's interpretation and application of a statute raises a question of law." ***In re A.B.***, 987 A.2d 769, 773 (Pa.Super. 2009) (*en banc*). Our standard of review is *de novo*, and our scope of review is plenary. ***D.K. v. S.P.K.***, 102 A.3d 467, 471 (Pa.Super. 2014). This Court has set forth the following principles for statutory interpretation:

> [O]ur Court has long recognized the following principles of statutory construction set forth in the Statutory Construction Act, 1 Pa.C.S.A. § 1501 *et seq.:*
>
> > The goal in interpreting any statute is to ascertain and effectuate the intention of the General Assembly. Our Supreme Court has stated that the plain language of a statute is in general the best indication of the legislative intent that gave rise to the statute. When the language is clear, explicit, and free from any ambiguity, we discern intent from the language alone, and not from the arguments based on legislative history or 'spirit' of the statute. We must construe words and phrases in the statute according to their common and approved usage. We also must construe a statute in such a way as to give effect to all its

> provisions, if possible, thereby avoiding the need to label any provision as mere surplusage.

Id. at 471-72 (quoting ***C.B. v. J.B.***, 65 A.3d 946, 951 (Pa.Super. 2013)).

"As part of [a] dependency adjudication, a court may find a parent to be the perpetrator of child abuse," as defined by the CPSL. ***In re L.Z.***, 111 A.3d 1164, 1176 (Pa. 2015). The CPSL defines "child abuse" in relevant part as follows:

> The term "child abuse" shall mean intentionally, knowingly or recklessly doing any of the following:
>
> (1) Causing bodily injury to a child through any recent act or failure to act.
>
> . . .
>
> (5) Creating a reasonable likelihood of bodily injury to a child through any recent act or failure to act.

23 Pa.C.S. § 6303(b.1)(1), (5). The CPSL defines "child" as "[a]n individual under 18 years of age," 23 Pa.C.S. § 6303(a), and "bodily injury" as "[i]mpairment of physical condition or substantial pain." ***Id.*** at 6303(a).[2]

Under the plain language of the statute, Mother's illegal drug use while pregnant may constitute child abuse if the drug use caused bodily injury to Child. We agree with Mother that a "fetus" or "unborn child" does not meet

---

[2] The question whether Child suffered "bodily injury" within the meaning of the CPSL is not before us on this appeal.

the definition of "child" under the CPSL.[3] CYS does not appear to disagree.[4] Once born, however, the infant is a "child" – "[a]n individual under 18 years of age" – as defined by the statute. Further, Mother's drug use is a "recent act or failure to act" under 6303(b.1)(1) and (5). Therefore, if CYS establishes that through Mother's prenatal illegal drug use she "intentionally, knowingly or recklessly" caused, or created a reasonable likelihood of, bodily injury to Child after birth, a finding of "child abuse" would be proper under section 6303(b.1)(1) and/or (5).

A finding of "child abuse" under the CPSL is not a finding of criminal conduct.[5] The Pennsylvania Supreme Court has described the purpose of the CPSL as follows:

---

[3] We note that the CPSL also includes a definition of "newborn," providing that a "newborn" is "[a] child less than 28 days of age as reasonably determined by a physician." 23 Pa.C.S. § 6303(a) (incorporating definition of newborn contained in section 6502); 23 Pa.C.S. § 6502. Further, the Pennsylvania General Assembly included in other statutes a definition of, and provided protections for, "fetus" and "unborn child." For example, the Pennsylvania Abortion Control Act defines "unborn child" and "fetus," stating "[e]ach term shall mean an individual organism of the species homo sapiens from fertilization until live birth," 18 Pa.C.S. § 3203, and the Crimes Against the Unborn Child Act adopts the definition of "unborn child" found in the Abortion Control Act, 18 Pa.C.S. § 2602. The CPSL includes no such definitions.

[4] Rather, CYS argues that a mother's actions while pregnant may result in a finding of child abuse "once the fetus is born and a child as defined by 23 Pa.C.S. § 6303." CYS's Br. at 17.

[5] The Pennsylvania General Assembly has not created a distinct crime of "child abuse." Instead, crimes that specifically address child victims are

> The need to prevent child abuse and to protect abused children from further injury is critical. The legislature sought to encourage greater reporting of suspected child abuse in order to prevent further abuse and to provide rehabilitative services for abused children and their families.[6] The Act also establishes a statewide central registry for the maintenance of indicated and founded reports of child

---

found in various parts of the crimes code. ***See, e.g.,*** 18 Pa.C.S. § 3122.1 (statutory sexual assault); 18 Pa.C.S. § 3121(c) (rape of a child); 18 Pa.C.S. § 3121(d) (rape of a child with serious bodily injury); 18 Pa.C.S. § 2901(a.1) (kidnapping of a minor); 18 Pa.C.S. § 2702(a)(8) (defining aggravated assault to include "to cause or intentionally, knowingly or recklessly causes bodily injury to a child less than six years of age, by a person 18 years of age or older"); and 18 Pa.C.S. § 2701(b) (grading simple assault as a misdemeanor of the first degree if committed against a child under the age of 12 by a person over the age of 18).

[6] Section 6386 of the CPSL requires mandatory reporting with respect to children under one year of age, under the following circumstances:

> **(a) When report to be made.--**A health care provider shall immediately make a report or cause a report to be made to the appropriate county agency if the provider is involved in the delivery or care of a child under one year of age who is born and identified as being affected by any of the following:
>
> (1) Illegal substance abuse by the child's mother.
>
> (2) Withdrawal symptoms resulting from prenatal drug exposure unless the child's mother, during the pregnancy, was:
>
> (i) under the care of a prescribing medical professional; and
>
> (ii) in compliance with the directions for the administration of a prescription drug as directed by the prescribing medical professional.
>
> (3) A Fetal Alcohol Spectrum Disorder.

23 Pa.C.S. § 6386(a).

> abuse, as identifying perpetrators of abuse serves to further protect children. Recognizing that identifying someone as a child abuser can profoundly impact that person's reputation, the release of such information is advocated only in certain limited venues. [R]eports of indicated and founded abuse identifying the perpetrator can be released to law enforcement, social work agencies, employers in child care services and other related venues[].

G.V. v. Dep't of Public Welfare, 91 A.3d 667, 670-71 (Pa. 2014) (quoting ***P.R. v. Dept. of Pub. Welfare***, 801 A.2d 478, 483 (2002)) (alterations in original). Further, "[a]n individual can . . . petition to expunge the founded report[7] from ChildLine through a Department of Public Welfare administrative process that would eventually be subject to appeal in Commonwealth Court." ***In re L.Z.***, 111 A.3d at 1177.

The sole question before us is whether a mother's illegal drug use while pregnant may constitute child abuse under the CPSL if it caused, or created a reasonable likelihood of, bodily injury to a child after birth. We make no determination as to whether CYS has met its burden in this case. Nor do we address what other acts by a mother while pregnant may give rise to a finding of child abuse. We emphasize, however, that prenatal conduct supports such a finding only when the actor "intentionally, knowingly, or recklessly" caused, or created a reasonable likelihood of, bodily injury to a child after birth.

---

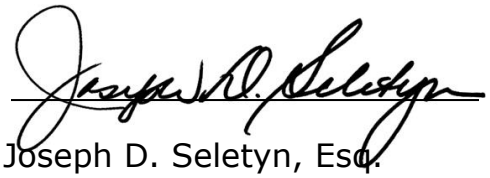
[7] If a trial court finds a parent to be a perpetrator of child abuse as part of a dependency adjudication, the CYS agency would file a "founded report" with the Department of Public Welfare, which would trigger inclusion on the ChildLine Registry. ***In re L.Z.***, 111 A.3d at 1176-77. Inclusion on the ChildLine Registry also can be triggered outside of the dependency process. ***Id.*** at 1177.

Order vacated. Case remanded for further proceedings. Jurisdiction relinquished.

Judge Stabile joins the opinion.

Judge Strassburger files a concurring opinion in which Judge Moulton joins.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/27/17

J-S62019-17

2017 PA Super 411

IN THE INTEREST OF: L.B., A MINOR	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: CCCYS	:	No. 884 MDA 2017

Appeal from the Order Entered May 24, 2017
In the Court of Common Pleas of Clinton County Juvenile Division at No(s): CP-18-DP-0000009-17

BEFORE: STABILE, MOULTON, and STRASSBURGER,* JJ.

CONCURRING OPINION BY STRASSBURGER, J.:**FILED DECEMBER 27, 2017**

There is no doubt that prenatal drug use is affecting adversely increasing numbers of our Commonwealth's children. Fueled in part by the opiate drug epidemic, the rate of neonatal hospital stays related to substance use increased by 250% between fiscal years 2000 and 2015. PA Healthcare Cost Containment Council, NEONATAL AND MATERNAL HOSPITALIZATIONS RELATED TO SUBSTANCE USE, (2016). Nearly 1 in 50 neonatal hospital stays in fiscal year 2015 involved a substance-related condition. ***Id.***

There is also no doubt that most pregnant women who use illegal drugs during their pregnancies do so not because they wish to harm their child, but because they are addicted to the drugs. While I join the Majority's opinion today based upon the language of the statute, I question whether

*Retired Senior Judge assigned to the Superior Court.

treating as child abusers women who are addicted to drugs results in safer outcomes for children.

The Child Protective Services Law (CPSL) contains explicit provisions allowing child welfare agencies to intervene in certain instances where a child is affected by maternal drug use at birth. ***See*** 23 Pa.C.S. § 6386 (requiring health care providers to report to the appropriate county agency instances of children who are under one year of age and affected by certain types of substance abuse and mandating the agency to conduct an assessment of risk to the child, ensure the child's safety, and provide services to the family as needed). Pennsylvania added these requirements to the CPSL in 2006 in response to a 2003 amendment to the federal Child Abuse Prevention and Treatment Act (CAPTA).

When addressing Congress during the debate of the 2003 amendment to CAPTA, Congressman James Greenwood, a former child services caseworker who authored the amendment, stated that the goal was to intervene after birth and prevent future harm to children who are at risk of child abuse and neglect due to their parents' drug use. 149 Cong. Rec. H2313, H2362 (daily ed. March 26, 2003) (statement of Congressman James Greenwood). Congressman Greenwood noted, however, that treating prenatal drug use as child abuse is "problematic" because the drug use typically results from a woman's substance abuse problem. ***Id.*** Furthermore, he described how treating prenatal drug use as child abuse

may result in further unintended harm to the child because it "may even drive [the mother] away from the hospital if she knows she is going to face [being treated as a child abuser], and she may choose to deliver at home in a dangerous situation."[1] ***Id.***

Not only may it cause a woman to avoid the hospital, in my view, labeling a woman as a child abuser may make it less likely that the woman would choose to seek help for her addiction during pregnancy or receive prenatal care. Moreover, because the CPSL permits the agency to intervene when a newborn is affected by prenatal drug use, and the agency may even seek to remove the child or have the child adjudicated dependent if continued drug use poses an ongoing risk to the child, determining that a woman is a child abuser solely based upon her prenatal drug use does little to ensure the safety of the child.[2]

In addition, although the Majority limits its decision to illegal drug use during pregnancy, ***see*** Majority Opinion at 8, its construction of the statute

[1] CAPTA explicitly specifies that the requirement that health care providers notify child protective services "shall not be construed to – (I) establish a definition under Federal law of what constitutes child abuse or neglect; or (II) require prosecution for any illegal action[.]" 42 U.S.C. § 5106a(b)(2)(B)(ii).

[2] L.B.'s guardian *ad litem* did not take a position on this issue in the trial court and did not file a brief before this Court. Although the issue primarily affects Mother, it does affect L.B. indirectly; therefore, in my view, the guardian *ad litem* should have determined whether it was in L.B.'s best interest to make a finding of child abuse against Mother and advanced the corresponding position.

supports no such limitation. We should not delude ourselves into thinking that our decision does not open the door to interpretations of the statute that intrude upon a woman's private decisionmaking as to what is best for herself and her child. There are many decisions a pregnant woman makes that could be reasonably likely to result in bodily injury to her child after birth,[3] which may vary depending on the advice of the particular practitioner she sees and cultural norms in the country where she resides. Should a woman engage in physical activity or restrict her activities? Should she eat a turkey sandwich, soft cheese, or sushi? Should she drink an occasional glass of wine? What about a daily cup of coffee? Should she continue to take prescribed medication even though there is a potential risk to the child? Should she travel to countries where the Zika virus is present? Should she obtain cancer treatment even though it could put her child at risk? Should she travel across the country to say goodbye to a dying family member late in her pregnancy? Is she a child abuser if her partner kicks or punches her in her abdomen during her pregnancy and she does not leave the relationship because she fears for her own life? While it is true that the

[3] Child abuse may exist even when the child does not suffer bodily injury as long as there is a reasonable likelihood of bodily injury. ***See*** 23 Pa.C.S. § (b.1)(5).

woman must act at least recklessly for her decision to constitute child abuse, reasonable people may differ as to the proper standard of conduct.[4]

Although the legislature expanded the definition of child abuse in 2013 to capture more instances where children are placed at risk, I am not certain that the legislature really intended the CPSL's child abuse definition to apply to decisions that pregnant women make. However, based upon the language of the statute, what we have decided today is that the legislature intended that a woman be found to be a child abuser when she engages in any act, or fails to engage in any act, prior to a child's birth, if that act creates a reasonable likelihood of bodily injury to a child once he or she is

[4] The CPSL incorporates the following definition of recklessness:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

23 Pa.C.S. § 6303(a) (incorporating 18 Pa.C.S. § 302). The CPSL emphasizes that "conduct that causes injury or harm to a child or creates a risk of injury or harm to a child shall not be considered child abuse if there is no evidence that the person acted intentionally, knowingly or recklessly when causing the injury or harm to the child or creating a risk of injury or harm to the child." 23 Pa.C.S. § 6303(c).

born, so long as she consciously disregards a substantial and unjustifiable risk that such an injury may result.[5] This is quite broad indeed.

This case presents an issue of first impression. In my opinion, it also presents an issue of substantial public importance that should be reviewed by this Court *en banc* or our Supreme Court. I respectfully concur.

Judge Moulton joins.

[5] I note, as the Majority does, that the dependency petition in this case alleged only that Mother committed child abuse under subsection 6303(b.1)(1). CYS did not begin to rely upon subsection 6303(b.1)(5), which is broader than subsection 6303(b.1)(1), until CYS presented argument and briefs before the juvenile court. It does not appear that Mother objected to inclusion of subsection 6303(b.1)(5). However, parents are entitled to notice of the allegations being pled against them and CYS should have requested permission to amend its dependency petition.

ADDENDUM B

May 24, 2017 Opinion and Order

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA
JUVENILE

In the Interest of:	)	
	)	No. DP-9-2017
L.J.B.	)	
DOB: 1/26/2017	)	

FILED CLINTON COUNTY PA
2017 MAY 24 AM 11:18
JUVENILE DIVISION

OPINION AND ORDER

OPINION

On February 7, 2017, the Clinton County Children and Youth Social Services Agency (hereinafter referred to as the Agency) filed an Application for Emergency Protective Custody indicating that L.J.B., was born January 26, 2017 at the Williamsport Hospital, that Mother had tested positive for marijuana and suboxone and that Mother on January 27, 2017 while pregnant had completed a drug test and was positive for opiates, benzodiazepines and marijuana. The Agency also alleged that the child was suffering from withdrawal symptoms and was undergoing treatment at the Williamsport Hospital.

This Court issued an Order for Emergency Protective Custody on February 7, 2017. On February 10, 2017, the Honorable Michael F. Salisbury conducted a 72 hour Shelter Care Hearing due to this Court's unavailability and continued legal and physical custody of the child with the Agency. The Agency timely filed a Dependency Petition on February 13, 2017 alleging that the child was without proper parental care or control and further alleged that the child was a victim of child abuse as defined by 23 Pa. C.S.A. § 6303. Specifically, the Agency alleged and has continued to argue that under Subsection 6303(b.1)(1) that the parent, specifically Mother, caused bodily injury to the

CRAIG P. MILLER
PRESIDENT JUDGE
COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURTHOUSE
LOCK HAVEN, PA 17745

child through a recent act or failure to act. The Agency alleged in the Dependency Petition that the child had been in Williamsport Hospital for a period of nineteen (19) days suffering from drug dependence withdrawal due to the substances Mother ingested while Mother was pregnant with the child and that Mother tested positive for marijuana, opiates and benzodiazepines at the time of the child's birth. Mother had no prescription for any of these medications.

On February 15, 2017, an Adjudication Hearing was scheduled, but it appeared that Mother and Father had not been given appropriate notice and therefore, the hearing was continued by the Honorable Michael F. Salisbury to Wednesday, March 15, 2017. In the meantime, this Court entered an Order adjudicating Jeffrey W. Brennan as the father of the child after appropriate testing had been completed by the Domestic Relations Section of this Court. Said Order was uncontested by any of the parties. This Court entered an Order finding the child dependent on March 15, 2017, maintaining legal and physical custody of the child with the Agency and deferring a decision on the issue whether the child was a victim of abuse until the Dispositional Hearing which was agreed to by all of the parties.

On March 16, 2017, this Court entered an Order directing the Solicitor for the Agency, the attorney for Mother and the attorney for Father to file an appropriate Memorandum of Law on the issue of whether Mother may be found to have committed abuse of this child as alleged by the Agency. Mother's attorney and Father's attorney, along with the Agency's Solicitor filed said Memorandums of Law timely and at the Dispositional Hearing on March 30, 2017, this Court continued legal and physical

CRAIG P. MILLER
PRESIDENT JUDGE
COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURTHOUSE
.OCK HAVEN, PA 17745

custody of the child with the Agency. This Court also at the Dispositional Hearing directed the Office of Court Administrator to schedule a further hearing concerning the abuse issue as insufficient time was allotted at that March 30, 2017 proceeding to receive sufficient evidence to decide that issue. The Office of Court Administrator scheduled the issue of abuse for an extended hearing on May 26, 2017. Further, a Permanency Review Hearing was also scheduled for May 26, 2017. The Guardian Ad Litem filed a request for argument on April 4, 2017 regarding the issue of abuse, indicating that the Guardian Ad Litem believed that it would be advantageous for this Court and the parties for this Court to decide the legal issue before receiving testimony and evidence at an extended hearing. This Court scheduled argument for May 9, 2017. This Court received argument from all counsel and the Guardian Ad Litem that date and is now prepared to issue an appropriate Order.

As indicated above, the Agency relies on the definition of abuse found in 23 Pa. C.S.A. § 6301(b.1)(1) which indicates that child abuse could be found if an individual intentionally, knowingly or recklessly caused bodily injury to a child through any recent act or failure to act. The Agency claims that Mother's actions prior to the birth are a recent act which caused the child to have bodily injury. The Agency has claimed and no party contests that the child had been hospitalized after birth for a period of nineteen (19) days due to suffering from withdrawal due to substances Mother ingested while Mother was pregnant with the child and that the child's symptoms of withdrawal included tremors, increased muscle tone, excessive suck and loose stools. Mother and Father argue that any actions of Mother occurred before

CRAIG P. MILLER
PRESIDENT JUDGE
COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURTHOUSE
.OCK HAVEN, PA 17745

the child was born and that there is no legal authority for this Court to find any abuse due to the child being a fetus when Mother's actions occurred. The Agency argues that although the actions took place prior to the child being born, that this Court still may and should find that Mother abused this child.

As noted by all parties, the child is defined by the Child Protective Services Law as an individual under eighteen (18) years of age. See 23 Pa. C.S.A. § 6302(a) Clearly, a fetus is not considered a child pursuant to the above definition. Further, the Legislature has seen fit to adopt the Newborn Protection Act at 23 Pa. C.S.A. § 6501 et. seq. in the year 2002 and in this Act there is no mention of any protection to be given to a fetus or that abuse may be found by a court after a live birth has occurred due to actions done to a fetus. Further, all counsel, along with the Guardian Ad Litem, had indicated that there are no appellate decisions and apparently no other county court decisions on this issue. Clearly, the law does not provide for finding of abuse due to actions taken by an individual upon a fetus. Therefore, the Court is constrained to hold that the Court is not able to find that Mother abused this child pursuant to the definitions in the Child Protective Services Law. 23 Pa. C.S.A. § 6301 et. seq.

In no way, should this decision be seen as the Court condoning the actions of Mother. Mother's actions were deplorable but this Court must follow the law. This Court deems this an issue for the Legislature to resolve and not for this Court to reach a decision by interpreting the legislation to mean something that the legislation clearly does not state.

This Court will issue an appropriate Order.

CRAIG P. MILLER
PRESIDENT JUDGE

COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURTHOUSE
LOCK HAVEN, PA 17745

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA
JUVENILE

In the Interest of:	)	
	)	No. DP-9-2017
L.J.B.	)	
DOB: 1/26/2017	)	

ORDER

AND NOW, this 23rd day of May, 2017, pursuant to the above Opinion, IT IS HEREBY ORDERED as follows:

1. This Court finds that the Agency cannot establish child abuse in this matter on the actions committed by Mother while the child was a fetus.

2. The hearing scheduled for May 26, 2017 at 8:30 A.M. concerning testimony on the child abuse issue is CANCELLED.

3. The Permanency Review Hearing scheduled for May 26, 2017 at 8:30 A.M. shall remain scheduled.

BY THE COURT:

P.J.

cc: C. Rocco Rosamilia, III, Esquire
Robert H. Lugg, Esquire
Trisha Hoover Jasper, Esquire
Amanda B. Browning, Esquire
[redacted] foster parents
[redacted], mother
[redacted], father

CRAIG P. MILLER
PRESIDENT JUDGE
COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURTHOUSE
LOCK HAVEN, PA 17745

President Judge Craig P. Miller
Judge Michael F. Salisbury
Senior Judge J. Michael Williamson
Ann Marie Hunsinger, Children and Youth
Court Administrator

CRAIG P. MILLER
PRESIDENT JUDGE

COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURTHOUSE
LOCK HAVEN, PA 17745

1925(a) Opinion

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA
JUVENILE

FILED CLINTON COUNTY PA
2017 MAY 31 AM 11:33
JUVENILE DIVISION

In the Interest of:	)	
	)	No. DP-9-2017
L.J.B.	)	
DOB: 1/26/2017	)	

OPINION PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURE NO. 1925(a)

The Clinton County Children and Youth Social Services Agency has filed a timely appeal to this Court's Opinion and Order filed May 24, 2017 in which this Court found that Mother did not "abuse" the child pursuant to Child Protective Services Law 23 Pa. C.S.A. 6301 et. seq. This Court relies upon this Court's Opinion filed May 24, 2017.

The Agency has requested a transcript and filed the appropriate request form. Therefore, this Court will direct the Official Court Reporter to prepare said transcript.

CRAIG P. MILLER
PRESIDENT JUDGE
COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURTHOUSE
LOCK HAVEN, PA 17745