

IN THE SUPREME COURT OF PENNSYLVANIA

No. _____ Allocatur Docket 2018

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

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

Petition for Allowance of Appeal from the final Order of the Superior Court of Pennsylvania entered December 27, 2017 at Nos. 884 MDA 2017, vacating the Final Order of the Court of Common Pleas of Clinton County, Pennsylvania, Juvenile at DP-9-2017

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CHILDREN'S FAST TRACK APPEAL

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REPORTS OF OPINIONS

The Opinion of the Superior Court of Pennsylvania entered December 27, 2017 at No. 884-MDA 2017 – attached as Appendix “A”.

The Opinion of the Court of Common Pleas of Clinton County, Pennsylvania, Juvenile Division No. DP-9-2017 – attached as Appendix “B”.

TEXT OF 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.”

Slip op. at 1.

QUESTIONS PRESENTED FOR REVIEW

1. Does 23 Pa. C.S.A. § 6303 et seq. allow a mother be found a perpetrator of “child abuse” in the event she is a drug addict while her child is a fetus.

2. Is the intent of 23 Pa. C.S.A. § 6386 limited to providing “protective services” to addicted newborns and their families and not so expansive to permit alcoholic or addicted mothers be found to have committed child abuse while carrying a child in her womb.

STATEMENT OF THE FACTS

The Superior Court opinion set forth the relevant facts by directly quoting from the trial court opinion:

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. 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.

Slip op. at 2-3.

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 (“The 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 raised the following issue for 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. Sec. 630[3].” CYS’s Br. at 4.

CYS argued that Mother’s prenatal drug use was a “recent act or failure to act” that “caused” or “created” a reasonable likelihood of, “bodily injury under Sec. 6303(b.1)(1) or (5) because that drug used 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.

On appeal to the Superior Court, the Superior Court agreed with CYS that a mother’s use of illegal drugs while pregnant may constitute as child abuse if it is established the mother

intentionally, knowingly or recklessly caused or created a reasonable likelihood of bodily injury to a child after birth.

Judge Strassburger files a concurring opinion, but questioned whether the Pennsylvania Legislature intended 23 Pa. C.S. Sec. 6386 to label women as “child abusers” for decisions they make while pregnant.

It is this issue the Petitioner is requesting be considered by the Supreme Court.

REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

Pursuant to Rule 1114(b) of the Pennsylvania Rules of Appellate Procedure, a petition for allowance of appeal may be granted where:

(3) the question is one of first impression; [or]

(4) the question presented is one of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court

Pa. R.A.P. § 1114(b).

This case clearly fits within both of these sections. This Court has never addressed the issue of how the Child Protective Services Law applies to pregnant women who use drugs. Moreover, there are substantial legal and policy concerns raised by this issue that require a thorough analysis from this Court -- due process, public health, women's reproductive rights, statutory interpretation, and more.

Two of the three judges on the panel below recognized as much in the concurring opinion in this case, which concluded: "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." Slip op. at 6 (Strassburger, J., concurring). For the reasons stated below, Petitioner requests that this Court heed the call from Judges Strassburger and Moulton and grant her Petition for Allowance of Appeal.

I. THIS CASE PRESENTS AN ISSUE OF FIRST IMPRESSION BECAUSE THIS COURT HAS NEVER ADDRESSED THE CHILD PROTECTIVE SERVICES LAW'S APPLICATION TO PREGNANT WOMEN WHO USE DRUGS.

As this Court has recognized, the Child Protective Services Law has at its heart the goal of preventing child abuse and protecting children from further abuse. It does so by encouraging reporting of child abuse and also creating a central state registry of indicated and founded reports. *G.V. v. Dep't of Public Welfare*, 91 A.3d 667, 670-71 (Pa. 2014). As this Court has recognized that “identifying someone as a child abuser can profoundly impact that person’s reputation,” *id.*, it is vital that this Court carefully consider the definition of child abuse so that parents are not swept into the child abuse system without proper basis in law.

A. This Court Has Never Addressed This Issue.

The definition of “child abuse” in the Child Protective Services Law comes from 23 Pa. C.S.A. § 6303(b.1). Here, the dependency petition alleged that Petitioner committed child abuse under § 6303(b.1)(1). This provision states: “The term ‘child abuse’ shall mean intentionally, knowingly or recklessly [] causing bodily injury to a child through any recent act or failure to act.” It is undisputed that this Court, nor any reported lower court decision, has never interpreted this language in the context of a pregnant woman’s actions that allegedly cause harm to her child after birth. On that basis alone, this Court should grant this petition for allowance of appeal.

Moreover, to the Superior Court panel, the “plain language of the statute” answered this question; however, nothing could be further from the truth. Without a definitive ruling from this Court, it is unclear whether the language means what the Superior Court thought it meant, in particular whether it applies to conduct before the birth of the child.

For instance, does “recent act or failure to act” include actions before the child is born? The statute defines “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). However, does this language presuppose that the child is already alive? If not, it would be possible to reach back two years before birth to any of the parents’ actions that might have an effect after birth, such as moving to a dangerous neighborhood, having sex with a man with a known genetic disorder, or drinking the water in a community facing clean water issues. These possibly reckless actions taken long before the child is alive could, if the Superior Court panel’s interpretation of the statute is correct, cause bodily injury to the child. This Court must determine whether “recent act or failure to act” includes pre-birth activity, something it never has before.

Other language in the bill needs interpretation from this court as well, such as the word “causing.” That word is not even defined in the statute itself, creating an even greater gap that this Court must fill. Specific to this case, does a pregnant woman who takes actions during her pregnancy “caus[e]” bodily injury to her child once born given that there are complex bodily and environmental mechanisms that the leading scientists continue to debate regarding whether and how they create different conditions at birth? Without this Court answering the question of what “caus[e]” means in the context of pregnancy, lower courts will be left to attribute causation in haphazard, possibly medically unsound ways.

Although not originally mentioned in the dependency petition, Clinton County Children and Youth Services also argued to both courts below that L.B. also fell within § 6303(b.1)(5). That section defines “child abuse” to include “intentionally, knowingly or recklessly [] causing

a reasonable likelihood of bodily injury to a child through any recent act or failure to act.”

This Court has not interpreted this provision in the context of pregnancy either, and for all the reasons § 6303(b.1)(1) needs to be addressed by this Court, this section does as well.

B. The Legislature Has Not Expanded the Child Protective Services Law to Include Actions Taken During Pregnancy.

Complicating this matter further is that the legislature has in the past considered an expansion to this law to explicitly include drug use by pregnant women as child abuse but never adopted that change. In 2011, several Senators introduced Senate Bill 753, which 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.

This bill was considered in 2011 but never progressed beyond the Senate Committee on Aging and Youth.

It is likely that the General Assembly failed to take action on this bill because it had already addressed drug use during pregnancy in 2006. When it did, it did *not* amend the definition of “child abuse” under § 6303. Rather, the General Assembly created a system by which health care providers could report children they believe were affected by prenatal drug use. Once the report is filed, the county agency will conduct an assessment of the *ongoing* risk posed to the child and determine if any actions were needed to protect the child in the future. 23 Pa. C.S.A. § 6386. Importantly, nowhere in this provision is there any mention of the term “child abuse.” This section does not state that such a report will trigger a finding of “child abuse”; it does not label the behavior “child abuse”; nor does it provide for placing the

mother's name on the statewide child abuse registry. The General Assembly could have done any or all of these things, but instead it chose to take a different approach that does not involve a "child abuse" determination.

Furthermore, in 2013, the General Assembly completely re-wrote the definition of "child abuse" under § 6303. That bill, 2013 H.B. 726, 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 are much more specific than the old ones, including forcefully shaking a child under one year of age; kicking, biting, or stabbing a child; and having a child in a methamphetamine laboratory. § 6303(b.1)(8).

In re-writing this definition in 2013, the General Assembly did not include any specific language regarding drug use during pregnancy. The General Assembly failed to do so despite a) a bill covering this behavior being introduced in the immediately preceding General Assembly; b) language in the new definition addressing the issue of children being exposed to drugs; and c) the new language being much more specific than the old language. It is an issue of first impression for this Court to determine the meaning of the General Assembly's failure to address drug use by pregnant women in this context.

C. The Legislature Never Intended the Child Protective Services Law to Apply to Actions Taken During Pregnancy.

As this Court has stated repeatedly, "[t]he purpose of statutory interpretation is to ascertain the General Assembly's intent and to give it effect." *Trust Under Agreement of Taylor*, 164 A.3d 1147, 1155 (Pa. 2017). It is an issue of first impression whether the General

Assembly intended to include pregnant women's actions under the definition of "child abuse" in § 6303(b.1)(1), (5).

The issue of whether a pregnant woman can be charged civilly or criminally with child abuse for her drug use during pregnancy has been a pressing issue of American law and politics for almost 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). Except for a small number of states, most states have taken a non-punitive approach to the issue. *Id.* As noted above, the General Assembly has updated its definition of "child abuse" in the midst of this national conversation, including as recently as 2014.

Given the ambiguity identified above with respect to actions taken by women before their child is born as well as the history of the General Assembly's actions with respect to this provision in light of an ongoing national conversation about drug use during pregnancy, it is reasonable to conclude that the General Assembly's intent in creating its new definition of "child abuse" in 2013 was to pursue the public health approach of being non-punitive toward pregnant women who use drugs. It is very hard, based on language and legislative history, to conclude the opposite -- that the legislature intended this new definition of "child abuse" to cover pregnant women who use drugs. This Court must take this case to definitively resolve this issue of first impression.

II. THIS CASE RAISES SEVERAL ISSUES OF SUBSTANTIAL PUBLIC IMPORTANCE BECAUSE PUNISHING PREGNANT WOMEN FOR PRENATAL DRUG USE IS CONTRARY TO PUBLIC HEALTH, TOUCHES UPON IMPORTANT CONSTITUTIONAL ISSUES, AND COULD HAVE BROAD IMPLICATIONS FOR ALL PREGNANT AND CHILD-BEARING-AGED WOMEN.

As the concurring opinion in the court below recognized, the issue presented in this case is one of broad public importance because the approach taken by the lower court raises many compelling issues beyond the novel issue of statutory interpretation discussed above. Ultimately, because almost every action a pregnant woman takes could have some effect on her child after birth, the scope of this decision could have consequences that reach far beyond Petitioner's particular case and could violate countless women's constitutional rights. This Court should take this case to avoid the broad harms the lower court's opinion will cause.

A. As Almost Every Health Organization in This Country Has Recognized, Punishing Pregnant Women for Drug Use During Pregnancy is Contrary to Public and Private Health.

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 being punished by the state 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-profits committed to the health of mothers and babies, has stated unequivocally: "Punitive approaches to drug addiction may be harmful to pregnant women because they interfere with access to appropriate health care. Fear of punishment may cause women most in need of

prenatal services to avoid health care professionals.” March of Dimes, *Statement on Maternal Drug Use* (1990).

The National Perinatal Association is the leading voice of professionals who care for newborns immediately before and after birth. This organization has also cautioned against punitive approaches:

NPA opposes punitive measures that deter women from seeking appropriate care during the course of their pregnancies. . . . NPA supports comprehensive drug treatment programs for pregnant women that are family-centered and work to keep mothers and children together whenever possible. The most successful treatment models will include access to quality prenatal and primary medical care, child development services, crisis intervention, drug counseling, family planning, family support services, life skills training, mental health services, parent training, pharmacological services, relapse strategies, self-help groups, stress management, and vocational training.

National Perinatal Association, *Position Statement, Substance Abuse Among Pregnant Women* (updated as of December 2013).

The American College of Obstetricians and Gynecologists, the leading organization of women’s health care physicians, has taken a position against 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 Ethics, *Committee Opinion 473, Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (Jan. 2011). The organization has written further:

Pregnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.

American College of Obstetricians and Gynecologists Committee on Ethics, *Committee Opinion 321, Maternal Decision Making, Ethics, and the Law* (Nov. 2005).

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. Among these organizations are the American Medical Association, the American Academy of Pediatrics, the American Public Health Association, the American Nurses Association, the American Society of Addiction Medicine, 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*, available at <http://goo.gl/NA1z7d>. Although these organizations do not mention civil penalties, the rationales behind their statements apply just as clearly -- taking action against pregnant women will deter them from getting the treatment they need.

Given these statements from such an important and influential list of organizations advocating for maternal and child health, it should be clear that the issue raised by this case is one of such substantial public importance that it requires resolution by this Court.

B. Punishing Pregnant Women for Drug Use During Pregnancy Would Open the Door to Punishing Pregnant Women for All Sorts of Other Behaviors.

The lower court's interpretation of § 6303(b.1)(1) and § 6303(b.1)(5) will lead to child abuse determinations against pregnant women in an almost unlimited set of contexts. Moreover, because the definition of "recent" in the statute includes actions taken within two years of the child abuse petition, the lower court's interpretation could very well capture actions taken by women who are not even pregnant nor even contemplating getting pregnant. As the concurring opinion below stated, "[w]e 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." Slip op. at 4 (Strassburger, J., concurring).

The list of actions that could cause harm to a pregnant woman and her child at birth is virtually limitless. The concurring opinion mentions eating turkey, soft cheese, and sushi; drinking wine and coffee; taking prescription medicine; traveling to countries that potentially have Zika; being treated for cancer; traveling by plane late in the pregnancy; and being beaten by an abusive partner. *Id.* at 4. These are all important examples of actions a pregnant woman can take that may impact her child.

But there are more. For instance, it is well known that smoking cigarettes during pregnancy can lead to childhood medical issues. Will a woman who smokes while pregnant now be subject to a child abuse determination? It is also well known that living in poverty and the stresses that come with it can have a negative effect on newborn health. Developing research indicates the same about living with racism. Will women living in low-income neighborhoods and/or women of color now be subject to child abuse determinations because a court believes they have recklessly acted to continue their pregnancies despite what we know

about these risks? These examples may seem absurd, but they are absurd only because, as the concurring opinion recognizes, the interpretation given the statute by the lower court in this case is so broad as to inevitably lead to these absurd results.

Given that the Child Protective Services Law defines “recent” to include actions taken in the past two years, the absurdity grows ever larger. The examples on this point are almost limitless, as the discussion above in section I.A. indicates. However, another example proves the point even more clearly. According to the Centers for Disease Control and Prevention, women of child-bearing age are supposed to take folic acid *before* they get pregnant to prevent spina bifida and anencephaly: “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*, available at <https://www.cdc.gov/ncbddd/folicacid/recommendations.html>. 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 squarely fall within the language of § 6303(b.1)(1) and § 6303(b.1)(5) as interpreted by the lower court here.

Folic acid is just one of countless pieces of advice that are given to women of childbearing age to help with having a healthy pregnancy. There are others -- obtain genetic screening, eat healthy, lower your weight, reduce environmental toxins, and more. Moreover, some research indicates that men’s behaviors before conception can have an impact on the health of subsequently born children -- such as tobacco use, folic acid intake, and more. All of these might be part of the advice women of child-bearing age and their possible male partners

receive from their doctors. All of these could be knowingly ignored by women who then get pregnant or men who they conceive with. And all of these could cause harm to a baby once born. Will § 6303(b.1)(1) and § 6303(b.1)(5) and the broad definition of “recent” that includes actions within the past two years catch these women and men as well as Petitioner?

Such a broad interpretation of § 6303(b.1)(1) and § 6303(b.1)(5) would lead to an incredible financial burden on the Commonwealth. Under the Child Protective Services Law, every report of child abuse has to be investigated promptly and services provided, all of which takes time of multiple actors within the system, including juvenile court judges. Investigating every case involving a pregnant woman’s actions during pregnancy, as well as a woman of child-bearing age’s and the conceiving man’s actions during the two years before birth would take valuable resources away from actual cases of child abuse and threaten to overload the juvenile courts, child protective services workers, and the child abuse system more generally.

Interpreting § 6303(b.1)(1) and § 6303(b.1)(5) in such a broad manner will ensnare countless Pennsylvania women and men, both pregnant and not. Doing so would create a massive child welfare problem in the state of Pennsylvania. This Court needs to step in to prevent this problem of “substantial public importance.” Pa. R.A.P. § 1114(b)(4).

C. Punishing Pregnant Women for Drug Use During Pregnancy Raises Important Issues of Reproductive Rights, Equal Protection, and Due Process.

The Superior Court decision threatens many different constitutional rights. First and foremost, the constitutional right to reproductive autonomy is compromised by this decision. Under the decision below, a pregnant woman cannot be found to have committed “child abuse” for actions taken during her pregnancy that affect her fetus, only those that affect her child

after birth. 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, including prescribed treatment, could reasonably believe her only option to avoid a child abuse finding is to have an abortion. Stated differently, the lower court decision will encourage pregnant women to have an abortion and punish them for deciding to carry their pregnancies to term, in 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, we know from past experience in other jurisdictions that it is more likely that women of color will be caught in the system. Racial biases function at every level of the legal system. Particularly when it comes to drug use, racial minorities are targeted more often than white people. The result 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).

Finally, this case also implicates constitutional principles of due process. At its heart, the Due Process Clause requires fairness, and one of the most important aspects of fairness is that a law clearly define its prohibitions. As the 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 quotations omitted).

Here, applying § 6303(b.1)(1) in the context of prenatal drug exposure creates great ambiguity. As the District Court for the Western District of Wisconsin recognized just last year in this context, 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. *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 915-922 (W.D. Wis. 2017). The statute at issue in that case differs from § 6303(b.1)(1) in many ways, but the underlying principles of the court's decision are very similar -- when a statute punishes drug use during pregnancy, questions of due process vagueness and notice inevitably arise.

Due process requires not only that a statute be clear, but also that the person being punished by the state have notice of the charges 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. Dept. of*

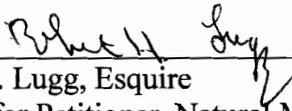
Human Svcs., 150 A.3d 173 (Pa. Commw. Ct. 2016). Here, Petitioner was initially charged with violating § 6303(b.1)(1) in the dependency petition; however, in court, County Youth Services argued that Petitioner violated both § 6303(b.1)(1) and § 6303(b.1)(5). To the extent that the lower court determination relied on the broader language in § 6303(b.1)(5), significant due process notice concerns are raised here that this Court should address.

In sum, this case raises a plethora of important constitutional issues and is thus a case “of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court.” Pa. R.A.P. § 1114(b)(4).

CONCLUSION

For the reasons set forth above, Petitioner, Natural Mother prays that this Honorable Court will grant the instant petition for allowance of appeal.

Respectfully submitted,



Robert H. Lugg, Esquire
Counsel for Petitioner, Natural Mother

David S. Cohen
Co-Counsel for Petitioner, Natural Mother

Carol Tracy
Co-Counsel for Petitioner, Natural Mother

Date: 1/25/2018

CERTIFICATE OF SERVICE

This 25th day of January, 2018, I Robert H. Lugg, Esquire, Counsel for Petitioner, Natural Mother, hereby certify that a true and correct copy of the foregoing document was served upon the persons and in the manner indicated below, in compliance with Pa.R.A.P. 121:

Service in Person:

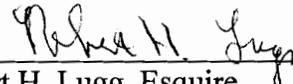
Amanda B. Browning, Esquire
232 East Main Street
Lock Haven, PA 17745
Clinton County CYS

C. Rocco Rosamilia, Esquire
241 West Main Street
Lock Haven, PA 17745
Guardian Ad Litem

Service by email with agreement of:

Trisha Hoover Jasper, Esquire
Trisha@pj-law.org
325 Market Street
Williamsport, PA 17701
Counsel for Father

Respectfully Submitted,



Robert H. Lugg, Esquire
Counsel for Petitioner, Natural Mother
Attorney ID No. 41262
350 East Water Street
Lock Haven, PA 17745
570-748-2481

APPENDIX A

Superior Court Opinion
Dated December 27, 2017
No. 884 MDA 2017

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.

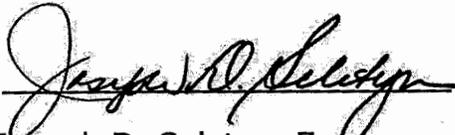
⁷ If a trial court finds a parent to be a perpetrator of child abuse as part of a dependency adjudication, the CYS agency would file a "founded report" with the Department of Public Welfare, which would trigger inclusion on the ChildLine Registry. **In re L.Z.**, 111 A.3d at 1176-77. Inclusion on the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

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/27/17

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.

APPENDIX B

Lower Court Opinion
Dated May 23, 2017
No. DP-9-2017

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

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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
LOCK HAVEN, PA 17745

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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
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COURTHOUSE
LOCK 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

84a

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

In the Interest of:

L.J.B.

DOB: 1/26/2017

)
) No. DP-9-2017
)
)

ORDER

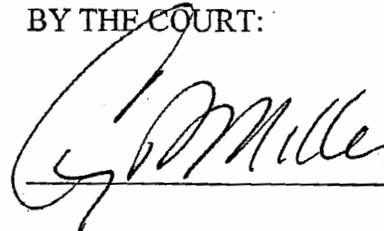
AND NOW, this 23rd day of May, 2017, pursuant to the above Opinion, IT IS
HEREBY ORDERED as follows:

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
Buynak foster parents
Alycia A. Rose, mother
Jeffery Brennan, father

CRAIG P. MILLER
PRESIDENT JUDGE

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

APPENDIX C

Relevant Statutory Law

§ 6302. Definitions.

(a) **General rule.**--The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"**Accept for service.**" Decide on the basis of the needs and problems of an individual to admit or receive the individual as a client of the agency or as required by a court order entered under 42 Pa.C.S. Ch. 63 (relating to juvenile matters).

"**Adult.**" An individual 18 years of age or older.

"**Adult family member.**" A person 18 years of age or older who has the responsibility to provide care or services to an individual with an intellectual disability or chronic psychiatric disability.

"**Bodily injury.**" Impairment of physical condition or substantial pain.

"**Child.**" An individual under 18 years of age.

"**Child-care services.**" Includes any of the following:

- (1) Child day-care centers.
- (2) Group day-care homes.
- (3) Family child-care homes.
- (4) Foster homes.
- (5) Adoptive parents.
- (6) Boarding homes for children.
- (7) Juvenile detention center services or programs for delinquent or dependent children.
- (8) Mental health services for children.
- (9) Services for children with intellectual disabilities.
- (10) Early intervention services for children.
- (11) Drug and alcohol services for children.
- (12) Day-care services or programs that are offered by a school.
- (13) Other child-care services that are provided by or subject to approval, licensure, registration or certification by the department or a county social services agency or that are provided pursuant to a contract with the department or a county social services agency.

The term does not apply to services provided by administrative or other support personnel unless the administrative or other support personnel have direct contact with children.

"**Child protective services.**" Those services and activities provided by the department and each county agency for child abuse cases.

"**Children's advocacy center.**" A local public agency in this Commonwealth or a not-for-profit entity incorporated in this Commonwealth which:

- (1) is tax exempt under section 501(c)(3) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 501(c)(3)); and
- (2) operates within this Commonwealth for the primary purpose of providing a child-focused, facility-based program dedicated to coordinating a formalized multidisciplinary response to suspected child abuse that, at a minimum, either onsite or through a partnership with another entity or entities, assists county agencies, investigative teams and law enforcement by providing services, including forensic interviews, medical evaluations, therapeutic interventions, victim support and advocacy, team case reviews and a system for case tracking.

"**Cooperation with an investigation or assessment.**" Includes, but is not limited to, a school or school district which permits authorized personnel from the department or county agency to interview a student while the student is in attendance at school.

"**County agency.**" The county children and youth social service agency established pursuant to section 405 of the act of June 24, 1937 (P.L.2017, No.396), known as the County Institution District Law, or its successor, and supervised by the department under Article IX of the act of June 13, 1967 (P.L.31, No.21), known as the Public Welfare Code.

"**Department.**" The Department of Human Services of the Commonwealth.

"**Direct contact with children.**" The care, supervision, guidance or control of children or routine interaction with children.

"**Direct volunteer contact.**" The care, supervision, guidance or control of children and routine interaction with children.

"**Education enterprise.**" An educational activity in this Commonwealth:

(1) for which college credits or continuing education units are awarded, continuing professional education is offered or tuition or fees are charged or collected; and

(2) that is sponsored by a corporation, entity or institution that is incorporated or authorized by other means in a state other than this Commonwealth and authorized to operate in this Commonwealth under 15 Pa.C.S. Pt. II Subpt. B (relating to business corporations) or C (relating to nonprofit corporations) and 24 Pa.C.S. Ch. 65 (relating to private colleges, universities and seminaries).

"**Electronic technologies.**" The transfer of information in whole or in part by technology having electrical, digital, magnetic, wireless, optical, electromagnetic, photo-electronic or photo-optical systems, or similar capabilities. The term includes, but is not limited to, e-mail, Internet communication or other means of electronic transmission.

"**Expunge.**" To strike out or obliterate entirely so that the expunged information may not be stored, identified or later recovered by any mechanical or electronic means or otherwise.

"**Family child-care home.**" A residence where child day care is provided at any time to no less than four children and no more than six children who are not relatives of the caregiver.

"**Family members.**" Spouses, parents and children or other persons related by consanguinity or affinity.

"**Founded report.**" A child abuse report involving a perpetrator that is made pursuant to this chapter, if any of the following applies:

- (1) There has been a judicial adjudication based on a finding that a child who is a subject of the report has been abused and the adjudication involves the same factual circumstances involved in the allegation of child abuse. The judicial adjudication may include any of the following:
 - (i) The entry of a plea of guilty or nolo contendere.
 - (ii) A finding of guilt to a criminal charge.
 - (iii) A finding of dependency under 42 Pa.C.S. § 6341 (relating to adjudication) if the court has entered a finding that a child who is the subject of the report has been abused.
 - (iv) A finding of delinquency under 42 Pa.C.S. § 6341 if the court has entered a finding that the child who is the subject of the report has been abused by the child who was found to be delinquent.
- (2) There has been an acceptance into an accelerated rehabilitative disposition program and the reason for the acceptance involves the same factual circumstances involved in the allegation of child abuse.
- (3) There has been a consent decree entered in a juvenile proceeding under 42 Pa.C.S. Ch. 63 (relating to juvenile matters), the decree involves the same factual circumstances involved in the allegation of child abuse and the terms and conditions of the consent decree include an acknowledgment, admission or finding that a child who is the subject of the report has been abused by the child who is alleged to be delinquent.
- (4) A final protection from abuse order has been granted under section 6108 (relating to relief), when the child who is a subject of the report is one of the individuals protected under the protection from abuse order and:
 - (i) only one individual is charged with the abuse in the protection from abuse action;
 - (ii) only that individual defends against the charge;
 - (iii) the adjudication involves the same factual circumstances involved in the allegation of child abuse; and
 - (iv) the protection from abuse adjudication finds that the child abuse occurred.

"**Founded report for school employee.**" (Deleted by amendment).

"**General protective services.**" Those services and activities provided by each county agency for cases requiring protective services, as defined by the department in regulations.

"**Health care facility.**" As defined in section 802.1 of the act of July 19, 1979 (P.L.130, No.48), known as the Health Care Facilities Act.

"**Health care provider.**" A licensed hospital or health care facility or person who is licensed, certified or otherwise regulated to provide health care services under the laws of this Commonwealth, including a physician, podiatrist, optometrist, psychologist, physical therapist, certified nurse practitioner, registered nurse, nurse midwife, physician's assistant, chiropractor, dentist, pharmacist or an individual accredited or certified to provide behavioral health services.

"**Immediate vicinity.**" An area in which an individual is physically present with a child and can see, hear, direct and assess the activities of the child.

"**Independent contractor.**" An individual who provides a program, activity or service to an agency, institution, organization or other entity, including a school or regularly established religious organization, that is responsible for the care, supervision, guidance or control of children. The term does not apply to administrative or other support personnel unless the administrative or other support personnel have direct contact with children.

"**Indicated report.**"

- (1) Subject to paragraphs (2) and (3), a report of child abuse made pursuant to this chapter if an investigation by the department or county agency determines that substantial evidence of the alleged abuse by a perpetrator exists based on any of the following:
 - (i) Available medical evidence.
 - (ii) The child protective service investigation.
 - (iii) An admission of the acts of abuse by the perpetrator.
- (2) A report may be indicated under paragraph (1) (i) or (ii) for any child who is the victim of child abuse, regardless of the number of alleged perpetrators.
- (3) A report may be indicated under paragraph (1) (i) or (ii) listing the perpetrator as "unknown" if substantial evidence of abuse by a perpetrator exists, but the department or county agency is unable to identify the specific perpetrator.

"**Indicated report for school employee.**" (Deleted by amendment).

"**Individual residing in the same home as the child.**" (Deleted by amendment).

"**Institution of higher education.**" Any of the following:

- (1) A community college which is an institution now or hereafter created pursuant to Article XIX-A of the act of March 10, 1949 (P.L.30, No.14), known as the Public School Code of 1949, or the act of August 24, 1963 (P.L.1132, No.484), known as the Community College Act of 1963.
- (2) An independent institution of higher education which is an institution of higher education located in and incorporated or chartered by the Commonwealth, entitled to confer degrees as set forth in 24 Pa.C.S. § 6505 (relating to power to confer degrees) and entitled to apply to itself the designation "college," "university" or "seminary" as provided for by standards and qualifications prescribed by the State Board of Education under 24 Pa.C.S. Ch. 65.
- (3) A State-owned institution.
- (4) A State-related institution.
- (5) An education enterprise.

"**Intentionally.**" The term shall have the same meaning as provided in 18 Pa.C.S. § 302 (relating to general requirements of culpability).

"**Knowingly.**" The term shall have the same meaning as provided in 18 Pa.C.S. § 302 (relating to general requirements of culpability).

"**Law enforcement official.**" The term includes the following:

- (1) The Attorney General.
- (2) A Pennsylvania district attorney.
- (3) A Pennsylvania State Police officer.
- (4) A municipal police officer.

"**Mandated reporter.**" A person who is required by this chapter to make a report of suspected child abuse.

"**Matriculated student.**" A student who is enrolled in an institution of higher education and pursuing a program of study that results in a postsecondary credential, such as a certificate, diploma or degree.

"**Near fatality.**" A child's serious or critical condition, as certified by a physician, where that child is a subject of the report of child abuse.

"**Newborn.**" As defined in section 6502 (relating to definitions).

"**Nonaccidental.**" (Deleted by amendment).

"**Parent.**" A biological parent, adoptive parent or legal guardian.

"**Perpetrator.**" A person who has committed child abuse as defined in this section. The following shall apply:

- (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).

(2) Only the following may be considered a perpetrator for failing to act, as provided in this section:

(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 18 years of age or older and responsible for the child's welfare.

(v) A person 18 years of age or older who resides in the same home as the child.

"Person affiliated with." A person that directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with a specified person.

"Person responsible for the child's welfare." A person who provides permanent or temporary care, supervision, mental health diagnosis or treatment, training or control of a child in lieu of parental care, supervision and control.

"Police department." A public agency of a political subdivision having general police powers and charged with making arrests in connection with the enforcement of criminal or traffic laws.

"Police officer." A full-time or part-time employee assigned to criminal or traffic law enforcement duties of a police department of a county, city, borough, town or township. The term also includes a member of the State Police Force.

"Police station." The station or headquarters of a police department or a Pennsylvania State Police station or headquarters.

"Private agency." A children and youth social service agency subject to the requirements of 55 Pa. Code Ch. 3680 (relating to administration and operation of a children and youth social service agency).

"Program, activity or service." Any of the following in which children participate and which is sponsored by a school or a public or private organization:

(1) A youth camp or program.

(2) A recreational camp or program.

(3) A sports or athletic program.

(4) A community or social outreach program.

(5) An enrichment or educational program.

(6) A troop, club or similar organization.

"Protective services." Those services and activities provided by the department and each county agency for children who are abused or are alleged to be in need of protection under this chapter.

"Recent act." Any act committed within two years of the date of the report to the department or county agency.

"Recent act or failure to act." Any act or failure to act committed within two years of the date of the report to the department or county agency.

"Recklessly." The term shall have the same meaning as provided in 18 Pa.C.S. § 302 (relating to general requirements of culpability).

"Resource family." A family which provides temporary foster or kinship care for children who need out-of-home placement and may eventually provide permanency for those children, including an adoptive family.

"Risk assessment." A Commonwealth-approved systematic process that assesses a child's need for protection or services based on the risk of harm to the child.

"Routine interaction." Regular and repeated contact that is integral to a person's employment or volunteer responsibilities.

"Safety assessment." A Commonwealth-approved systematic process that assesses a child's need for protection or services, based on the threat to the safety of the child.

"School." A facility providing elementary, secondary or postsecondary educational services. The term includes the following:

(1) Any school of a school district.

(2) An area vocational-technical school.

(3) A joint school.

(4) An intermediate unit.

(5) A charter school or regional charter school.

(6) A cyber charter school.

(7) A private school licensed under the act of January 28, 1998 (P.L.24, No.11), known as the Private Academic Schools Act.

(8) A private school accredited by an accrediting association approved by the State Board of Education.

(9) A nonpublic school.

(10) An institution of higher education.

(11) (Deleted by amendment).

(12) (Deleted by amendment).

(13) (Deleted by amendment).

(14) A private school licensed under the act of December 15, 1986 (P.L.1585, No.174), known as the Private Licensed Schools Act.

(15) The Hiram G. Andrews Center.

(16) A private residential rehabilitative institution as defined in section 914.1-A(c) of the Public School Code of 1949.

"School employee." An individual who is employed by a school or who provides a program, activity or service sponsored by a school. The term does not apply to administrative or other support personnel unless the administrative or other support personnel have direct contact with children.

"Secretary." The Secretary of Human Services of the Commonwealth.

"Serious bodily injury." Bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of function of any bodily member or organ.

"Serious mental injury." A psychological condition, as diagnosed by a physician or licensed psychologist, including the refusal of appropriate treatment, that:

(1) renders a child chronically and severely anxious, agitated, depressed, socially withdrawn, psychotic or in reasonable fear that the child's life or safety is threatened; or

(2) seriously interferes with a child's ability to accomplish age-appropriate developmental and social tasks.

"Serious physical injury." (Deleted by amendment).

"Serious physical neglect." Any of the following when committed by a perpetrator that endangers a child's life or health, threatens a child's well-being, causes bodily injury or impairs a child's health, development or functioning:

(1) A repeated, prolonged or egregious failure to supervise a child in a manner that is appropriate considering the child's developmental age and abilities.

(2) The failure to provide a child with adequate essentials of life, including food, shelter or medical care.

"Sexual abuse or exploitation." Any of the following:

(1) The employment, use, persuasion, inducement, enticement or coercion of a child to engage in or assist another individual to engage in sexually explicit conduct, which includes, but is not limited to, the following:

(i) Looking at the sexual or other intimate parts of a child or another individual for the purpose of arousing or gratifying sexual desire in any individual.

(ii) Participating in sexually explicit conversation either in person, by telephone, by computer or by a computer-aided device for the purpose of sexual stimulation or gratification of any individual.

(iii) Actual or simulated sexual activity or nudity for the purpose of sexual stimulation or gratification of any individual.

(iv) Actual or simulated sexual activity for the purpose of producing visual depiction, including photographing, videotaping, computer depicting or filming.

This paragraph does not include consensual activities between a child who is 14 years of age or older and another person who is 14 years of age or older and whose age is within four years of the child's age.

(2) Any of the following offenses committed against a child:

(i) Rape as defined in 18 Pa.C.S. § 3121 (relating to rape).

(ii) Statutory sexual assault as defined in 18 Pa.C.S. § 3122.1 (relating to statutory sexual assault).

(iii) Involuntary deviate sexual intercourse as defined in 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).

(iv) Sexual assault as defined in 18 Pa.C.S. § 3124.1 (relating to sexual assault).

(v) Institutional sexual assault as defined in 18 Pa.C.S. § 3124.2 (relating to institutional sexual assault).

(vi) Aggravated indecent assault as defined in 18 Pa.C.S. § 3125 (relating to aggravated indecent assault).

(vii) Indecent assault as defined in 18 Pa.C.S. § 3126 (relating to indecent assault).

(viii) Indecent exposure as defined in 18 Pa.C.S. § 3127 (relating to indecent exposure).

(ix) Incest as defined in 18 Pa.C.S. § 4302 (relating to incest).

(x) Prostitution as defined in 18 Pa.C.S. § 5902 (relating to prostitution and related offenses).

(xi) Sexual abuse as defined in 18 Pa.C.S. § 6312 (relating to sexual abuse of children).

(xii) Unlawful contact with a minor as defined in 18 Pa.C.S. § 6318 (relating to unlawful contact with minor).

(xiii) Sexual exploitation as defined in 18 Pa.C.S. § 6320 (relating to sexual exploitation of children).

"Student." An individual enrolled in a public or private school, intermediate unit or area vocational-technical school who is under 18 years of age.

"Subject of the report." Any child, parent, guardian or other person responsible for the welfare of a child or any alleged or actual perpetrator in a report made to the department or a county agency under this chapter.

"Substantial evidence." Evidence which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion.

"Substantiated child abuse." Child abuse as to which there is an indicated report or founded report.

"Under investigation." A child abuse report pursuant to this chapter which is being investigated to determine whether it is "founded," "indicated" or "unfounded."

"Unfounded report." Any report made pursuant to this chapter unless the report is a "founded report" or an "indicated report."

(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.
- (2) Fabricating, feigning or intentionally exaggerating or inducing a medical symptom or disease which results in a potentially harmful medical evaluation or treatment to the child through any recent act.
- (3) Causing or substantially contributing to serious mental injury to a child through any act or failure to act or a series of such acts or failures to act.
- (4) Causing sexual abuse or exploitation of a child through any act or failure to act.
- (5) Creating a reasonable likelihood of bodily injury to a child through any recent act or failure to act.
- (6) Creating a likelihood of sexual abuse or exploitation of a child through any recent act or failure to act.
- (7) Causing serious physical neglect of a child.
- (8) Engaging in any of the following recent acts:
 - (i) Kicking, biting, throwing, burning, stabbing or cutting a child in a manner that endangers the child.
 - (ii) Unreasonably restraining or confining a child, based on consideration of the method, location or the duration of the restraint or confinement.
 - (iii) Forcefully shaking a child under one year of age.
 - (iv) Forcefully slapping or otherwise striking a child under one year of age.
 - (v) Interfering with the breathing of a child.
 - (vi) Causing a child to be present at a location while a violation of 18 Pa.C.S. § 7508.2 (relating to operation of methamphetamine laboratory) is occurring, provided that the violation is being investigated by law enforcement.
 - (vii) Leaving a child unsupervised with an individual, other than the child's parent, who the actor knows or reasonably should have known:
 - (A) Is required to register as a Tier II or Tier III sexual offender under 42 Pa.C.S. Ch. 97 subch. H (relating to registration of sexual offenders), where the victim of the sexual offense was under 18 years of age when the crime was committed.
 - (B) Has been determined to be a sexually violent predator under 42 Pa.C.S. § 9799.24 (relating to assessments) or any of its predecessors.
 - (C) Has been determined to be a sexually violent delinquent child as defined in 42 Pa.C.S. § 9799.12 (relating to definitions).
- (9) Causing the death of the child through any act or failure to act.
- (10) Engaging a child in a severe form 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).

Code.

§ 6386. Mandatory reporting of children under one year of age.

(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.

(b) **Safety or risk assessment.**--The county agency shall perform a safety assessment or risk assessment, or both, for the child and determine whether child protective services or general protective services are warranted.

(c) **County agency duties.**--Upon receipt of a report under this section, the county agency for the county where the child resides shall:

- (1) Immediately ensure the safety of the child and see the child immediately if emergency protective custody is required or has been or shall be taken or if it cannot be determined from the report whether emergency protective custody is needed.
- (2) Physically see the child within 48 hours of receipt of the report.
- (3) Contact the parents of the child within 24 hours of receipt of the report.
- (4) Provide or arrange reasonable services to ensure the child is provided with proper parental care, control and supervision.

(Nov. 9, 2006, P.L.1358, No.14, eff. 180 days; Jan. 22, 2014, P.L.6, No.4, eff. 90 days; July 1, 2015, P.L.94, No.15, eff. imd.)