IN THE SUPREME COURT OF PENNSYLVANIA

NO. 10 MAP 2018

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

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

Reply Brief for Appellant

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

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CHILDREN'S FAST TRACK APPEAL

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I. SUMMARY OF ARGUMENT

The brief from Appellee Clinton County Children and Youth Social Services Agency (CYS) fails to even mention several of Appellant A.A.R.'s central substantive arguments and advances flawed arguments of its own. In particular, CYS drastically overreads one small phrase within the mandatory reporting provision of the Child Protective Services Law (CPSL) to mean that the General Assembly intended to re-write the entire definition of "child abuse." CYS also misuses two studies to claim, against all evidence and expert recommendations to the contrary, that a child abuse finding promotes public health. In doing so, CYS ignores the statutory requirement that A.A.R. be a "perpetrator" and the broad implications of its position.

Accordingly, A.A.R. urges this to reverse the Superior Court decision.

II. ARGUMENT

A. Petitioner A.A.R.'s Restatement of the Questions Presented is Appropriate for a Case of Statutory Interpretation.

As a preliminary matter, CYS presents this Court with a cramped understanding of appellate review when it claims that A.A.R.'s restatement of the questions presented "expands the scope of this Court's grant of allocator" beyond drug addiction and alcohol use during pregnancy and that this expansion is

"impermissible." Br. Appellee 1-2. As this Court has very recently recognized regarding the scope of review in cases of statutory interpretation:

> [A] Court of last resort must have some leeway to make rational judgments and pronouncements that are not strictly confined according to the precise letter of parties' arguments. Otherwise, the law would be shaped according to the nuances of the litigants' presentations[.] Such latitude is particularly appropriate in matters involving statutory construction, where the language of the governing statute ultimately must remain the polestar for rulings having widespread application.

Duffey v. Workers' Compensation Appeal Board, 152 A.3d 984, 993 (2017).

In other words, what the Court decides in this case of statutory construction will have "widespread application" to other cases involving pregnant women's (and others') actions that allegedly harm newborns, the "nuances of the litigants' presentations" notwithstanding. The Superior Court concurring opinion recognized as much, writing that "although the Majority limits its decision to illegal drug use during pregnancy[,] its construction of the statute supports no such limitation. We should not delude ourselves into thinking that our decision does not open the door to interpretations of the statute that intrude upon a woman's private decisionmaking as to what is best for herself and her child." *In re L.B.*, 177 A.3d 308, 314 (Pa. Super. Ct. 2017) (Strassburger, J., concurring). Even the author of the main Superior Court opinion agrees that the question this case presents is broader than illegal drug use, as Judge Moulton joined the concurring opinion in its entirety.

Thus, although the original questions presented to this Court in A.A.R.'s Petition for Allowance of Appeal specifically mentioned only drug addiction and alcoholism, the statutory language at issue in this case has no such limitation, which means the question presented must also be broader.

B. Based Solely on Prenatal Drug Exposure, the Plain Language of the CPSL's Mandatory Reporting Section Mandates a *Determination* of Whether Child Protective Services Are Warranted, But in No Way Permits an *Actual Finding* of Child Abuse Absent Other Circumstances That Fit the Statutory Definition.

The crux of CYS's argument is that 23 Pa. C.S.A. § 6386(b)'s inclusion of the words "child protective services" permits a finding of child abuse solely based on a case falling within § 6386(a). There is no doubt that, in situations that fall within § 6386(a), § 6386(b) requires the county to perform a safety or risk assessment and also to determine whether child protective or general protective services are warranted. There is also no doubt that "child protective services" are defined under the CPSL as those services provided for child abuse cases. 23 Pa. C.S.A. § 6303. To this extent, CYS's reading of the statute is entirely correct.

However, in arguing that this provision permits a *finding* of child abuse based solely on withdrawal from prenatal drug exposure, CYS drastically overreads subsection § 6386(b). This provision does no such thing. Rather, what it requires is that the county agency "determine whether child protective services or

general protective services are warranted." In other words, the statute requires the county agency to make a *decision* about the level of services to apply in any particular case. By focusing its argument almost entirely on the inclusion of the words "child protective services," CYS ignores this key part of § 6386(b).

In practice, what this subsection means is that when a newborn is identified as falling within § 6386(a) – affected by maternal illegal substance abuse, withdrawal symptoms from prenatal drug exposure not related to professional treatment, or fetal alcohol spectrum disorder – the county agency must then make a determination about whether the infant is in need of services and if so, which type. If services are needed, § 6386(b) gives the county agency the option of child protective or general protective services. 23 Pa. C.S.A. § 6386(b) ("The county agency shall . . . determine whether child protective services *or* general protective services are warranted." (emphasis added)).

If, as CYS claims, a finding of child abuse were permitted *solely* based on newborn withdrawal, the county would not have been given this option. If CYS were correct, withdrawal would have been enough to constitute child abuse *by itself*, thus requiring the county to provide child protective services in *every* instance, not giving it a choice. That the General Assembly included the option of general protective services – or no services at all if the county agency deems them unnecessary – indicates that it rejected CYS's position in this case.

Rather, what the General Assembly has done with § 6386(b) is indicate that newborn withdrawal (as well as maternal substance use and fetal alcohol spectrum disorder) is a risk factor that should prompt further inquiry to ensure the child's current environment is safe. If that inquiry reveals that the child is the victim of child abuse by a perpetrator as defined by the CPSL – for instance, if the mother is causing bodily harm to the child by beating her or if someone in the household is sexually abusing the child – then a child abuse finding will be appropriate. However, if the inquiry reveals there is no child abuse by a perpetrator based on the statutory definitions, nothing in § 6386 permits a finding to the contrary based solely on newborn withdrawal symptoms.

CYS's interpretation relies on language that does not appear in the statute. The General Assembly could easily have permitted a child abuse finding based solely on the factors listed in § 6386(a) by stating that all cases that fit within that subsection are considered "child abuse," but it did not. Rather, it provided a set of risk factors that would launch an *inquiry* into whether any services are warranted for a particular child. The General Assembly did not specify which services to provide – child protective or general protective – and certainly did not specify the *outcome* of that inquiry.

If § 6386(b) were to be read to permit a finding of child abuse as CYS argues, then there would be no escaping the conclusion that every situation listed

in § 6386(a) would result in a child abuse determination, not just prenatal drug exposure. Thus, every child under one year old with a mother who abuses illegal drugs would result in that mother being found to be a child abuser, and every child born with fetal alcohol spectrum disorder would result in the same. If the General Assembly wanted to radically expand the CPSL to apply based on all of these situations without more, it certainly would have done so explicitly. It would not have, as CYS argues to this Court, done so simply by tucking the words "child protective services" into § 6386(b) while leaving the definition of "child abuse" untouched.

C. CYS's Claim That a Child Abuse Finding for Prenatal Drug Exposure Furthers Public Health Is Contrary to the Evidence.

Contrary to CYS's arguments, a child abuse determination in cases of prenatal conduct harms children, pregnant women, and public health. A.A.R.'s initial brief as well as the supporting amicus briefs explain this in depth.[1] As a

[1] A new forthcoming article further proves this point. The article concludes that states that have policies that consider prenatal alcohol use a form of child abuse have worse outcomes than states that do not. Newborns are at greater risk of low birthweight, prematurity, and low APGAR score, and pregnant women are less likely to utilize any prenatal care. Meenakshi S. Subbaraman et al., *Associations Between State-level Policies Regarding Alcohol Use Among Pregnant Women, Adverse Birth Outcomes, and Prenatal Care Utilization: Results From 1972-2013 Vital Statistics*, 42 Alcoholism: Clinical & Experimental Research (forthcoming June 2018). (The article is not yet available publicly, but a presentation about the findings from the authors is available at http://bit.ly/subbaraman2018.)

result, as also detailed in A.A.R.'s initial brief, every major medical and public health organization has issued strong statements against punishing pregnant women for prenatal conduct that might harm their newborns. Br. Appellant 34-40. CYS has not produced a single organization or individual that argues otherwise.

What CYS has produced are two articles by one doctor, neither of which disproves the public health harms of a child abuse finding. Rather, one is a non-systematic literature review that explains how various substances used during pregnancy produce adverse outcomes. Ariadna Forray, *Substance Use During Pregnancy*, F1000 Faculty Reviews (2016). The article reviews the literature on, among other things, alcohol use, smoking, exposure to second-hand smoke, and marijuana use during pregnancy and for each goes into depth about the adverse effects they produce. *Id.* at 3-4. If this Court were to adopt CYS' position in this case and credit the article CYS cites in its brief, the result would be that every pregnant woman who drinks, smokes, or is near someone who smokes should be found to have abused her child, a radical expansion of the CPSL that would dramatically change the state's child protective services system, as well as the lives of countless Pennsylvania families.

The second article CYS cites is an original study that compares two different types of drug treatment – motivational enhancement therapy and cognitive behavioral therapy compared with brief advice from a medical practitioner.

Ariadna Forray et al., *Perinatal Substance Use: A Prospective Evaluation of Abstinence and Relapse*, 150 Drug & Alcohol Dependence 147 (2015). Most importantly, the study did not involve women, like A.A.R., who used opiates during pregnancy because these forms of drug treatment are not appropriate for opiate users, as the authors of the study acknowledge. *Id.* at 148 ("Women with primary use of opiates were not offered participation in the parent trial, as the standard of care for opiate use in pregnancy is opiate agonist treatment through centers that provide counseling.") Thus, as a study about the comparison of two different types of drug treatment, neither of which is appropriate for opiate users, this article is only tangentially related, if that, to A.A.R.'s case.

Moreover, this study says absolutely nothing about the use of a state's child abuse system to punish pregnant women for drug use. CYS's claim that the study "suggests" that the CPSL "may well act as a catalyst" to deter pregnant women from using drugs, *see* Br. Appellee 14, is not supported by any reading of the article. Rather, CYS misreads what "contingency management" treatment protocols, those studied in the article, consist of. Contingency management involves giving positive rewards – like vouchers, chances to win money, or other goods – to drug users who abstain from one treatment visit to the next and withholding those rewards for failing to abstain. *See* Michael Prendergast et al., *Contingency Management for Treatment of Substance Use Disorders: A Meta-*

analysis, 101 Addiction 1546 (2006). While contingency management involves withholding rewards, there is nothing about contingency management that involves a negative consequence for failing to abstain, such as a judicial determination of child abuse that results in being listed on a statewide registry with vast implications for employment and other opportunities. CYS's attempt to equate a child abuse finding, such as in this case, with contingency management demonstrates a misunderstanding of this treatment protocol.

Fundamentally, the underlying assumption in CYS's public health argument is that women who use drugs during pregnancy simply "choose not to discontinue substance abuse." Br. Appellee 14. This is a dangerous error about how drug addiction works and demonstrates a stunning lack of empathy for people struggling with the disease of addiction. *See Robinson v. California*, 370 U.S. 660, 667 (1962) (recognizing drug addiction as an "illness"). As explained in depth in the Amicus Curiae Brief from the Drug Policy Alliance and other experts on drug addiction, substance use disorders result in physical dependence, and treatment for this dependence almost inevitably involves cycles of relapse. Br. Amici Curiae Drug Policy Alliance et al. at 19-22.

In other words, there is no evidence that drug users who do not succeed in abstaining during pregnancy are simply "choos[ing] not to discontinue." Rather, they are in the midst of a serious physical illness that, even with the best medical

treatment, is difficult to cure without repeated attempts. Bringing the weight of the child abuse system down on individuals in the throes of this illness is contrary to everyone's interests – children, pregnant women, and public health.

D. CYS Failed to Even Respond to A.A.R.'s Central Arguments.

Perhaps most important, CYS's brief completely fails to address, let alone refute, two of A.A.R.'s key arguments – that she was not a perpetrator under the CPSL at the time of the actions giving rise to this case and that ruling against her would have broad implications for all sorts of pre-birth behavior by both women and men. As CYS itself argued to the trial court in this case, A.A.R. must be a perpetrator in order to be a child abuser under the CPSL. R. 51a. But CYS has made no argument that A.A.R. is, in fact, a perpetrator as defined by the CPSL, entirely failing to mention this issue in its brief to this Court. As A.A.R. has argued, she is not a perpetrator because at the time she was pregnant and took drugs, she did not fall within the statutory definition of the term. Br. Appellant 13-21. CYS's brief does not claim otherwise because it is entirely silent on this point.

CYS is also silent on the broad implications of its position. Its brief contains no principle or argument that would limit its position to illegal drug use during pregnancy. In fact, as mentioned above, the study cited by CYS demonstrates how dangerous CYS's position really is. If, as CYS writes, only 32% of smokers

abstain during pregnancy, Br. Appellee 13, and, as the literature review CYS cites mentions, cigarette smoking during pregnancy "exerts direct adverse effects on birth outcomes, including damage to the umbilical cord structure, miscarriage, increased risk for ectopic pregnancy, low birthweight, placental abruption, preterm birth, and increased infant mortality," Forray, *Substance Use During Pregnancy*, *supra*, at 3, then there would be a pressing need, according to CYS's argument, for all pregnant women who smoke to be found to be child abusers. In CYS's own words, doing so "may well act as a catalyst" for women to stop smoking.

But smoking is just the tip of the iceberg. Judge Strassburger's concurring opinion (joined by Judge Moulton, the author of the main opinion) details many other circumstances that would be considered child abuse if this Court agrees with CYS. *In re L.B.*, 177 A.3d at 313-14. A.A.R.'s brief to this Court outlines a host of others, including actions by women and men before conception. Br. Appellant 40-55. Interpreting the CPSL to apply this broadly would result in policing women's behavior during pregnancy (as well as women's and men's behavior before conception) in a way that would have disastrous implications for pregnant women's autonomy and would also raise serious constitutional issues. As with the issue of whether A.A.R. is a perpetrator, CYS does not refute this argument because CYS is completely silent on the issue.

III. CONCLUSION

CYS fails to even address A.A.R.'s main arguments and reads too much into the CPSL's mandatory reporting provision. Moreover, CYS's position is contrary to public health, as every expert recognizes, and nothing in its brief proves otherwise. Accordingly, this Court should reverse the Superior Court's decision and hold that A.A.R. is not a perpetrator of child abuse under the CPSL.

Dated: June 5, 2018

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 2135(d)

The Brief for Appellants complies with the word count limitation of Pa. R.A.P. 2135 because it contains 2740 words, excluding the parts exempted by section (b) of this Rule. This Certificate is based upon the word count of the word processing system used to prepare this Brief.

Date: June 5, 2018

By: /s/ David S. Cohen

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 4th day of June, 2018, a true and correct copy of the foregoing Reply Brief for Appellants was served via electronic mail and United States mail, first class, postage prepaid, addressed:

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