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In the Courts:

In re L.J.B.— Illegal Drug Use While Pregnant Not Considered Child Abuse

By: Jennifer Karr

I. INTRODUCTION

On December 28, 2018, the Supreme Court of Pennsylvania ruled in a case of first impression, *In Re. L.J.B.*, that a mother’s use of opioids while pregnant is not child abuse under the Child Protective Services Law (“CPSL”), 23 Pa.C.S. §§ 6301-6386. Based on statutory interpretation, the Court concluded that the definition of “child” under the CPSL does not include a fetus or unborn child, and a person is not a perpetrator of child abuse unless there is a “child” at the time of the act.

The Pennsylvania General Assembly enacted the CPSL after finding that child victims of abuse urgently need effective services to prevent further injury and impairment. The CPSL’s many purposes include encouraging more complete reporting of suspected child abuse; involving law enforcement agencies in responding to child abuse; establishing protective services in each county to investigate reports of child abuse; providing protection for children and rehabilitative services for both children and parents; and assessing and responding to the risk of harm to a child. Under the CPSL, a person found to have committed child abuse would be included in a statewide database that serves to protect children from further abuse. Inclusion in the statewide database affects one’s ability to obtain certain employment, housing, and the ability to participate in certain volunteer activities.

The CPSL defines “child abuse” as intentionally, knowingly or recklessly causing bodily harm to a child, or creating a reasonable likelihood of bodily harm to a child, through a recent act or failure to act. A “recent act” is any act committed within two years of the dated report to the department or county agency. While not every person who harms or injures a child is a perpetrator of “child abuse,” a parent who has abused his or her child meets the definition under the CPSL. Finally, the CPSL defines a “child” as an individual under 18 years old.

The first section of this article will explore the facts of the case, *In Re. L.J.B.*, the procedural history, holding, and reasoning used by the Pennsylvania Supreme Court. Next, the article will discuss the practical significance of the case and policy implications of the decision, especially in a time of increasing rates of opioid addiction. Finally, the article will

examine the reactions of certain groups like anti-abortion, child welfare, and addiction groups, and the effect such a holding may have on other children's legal rights issues.

II. IN RE. L.J.B.

In Re. L.J.B. is a case of first impression that addresses whether a woman's use of opioids while pregnant, which results in a child born suffering from neonatal abstinence syndrome ("NAS"), is considered "child abuse." In 2016, following her release from incarceration, A.A.R. ("Mother") relapsed into using opioids and marijuana. After learning that she was approximately four months pregnant, Mother sought treatment for her addiction. Later into her pregnancy, Mother relapsed again.

On January 27, 2017, Mother gave birth to L.J.B. ("Child") at Williamsport Hospital, about 175 miles northwest of Philadelphia. At the time of Child's birth, Mother tested positive for marijuana and subutex, a prescription pill used to treat opioid dependence. Three days after birth, Child began showing symptoms of NAS. According to reports from hospital personnel, Mother left Child in the hospital and did not consistently stay with or check on her. Hospital personnel communicated this information to the Clinton County Children and Youth Social Services Agency ("CYS"), who sought and was granted emergency protective custody of Child.

CYS subsequently filed a dependency petition alleging that: 1) Child was without proper parental care or control as required by law; and that 2) Child was a victim of child abuse by a perpetrator as defined by the CPSL because Mother's use of illegal drugs while pregnant caused or created a reasonable likelihood of bodily injury to Child. CYS' abuse allegation was based on Child's hospitalization for nineteen days, during which Child suffered from withdrawal due to substances Mother ingested while pregnant.

By party agreement, the Juvenile Court adjudicated Child dependent under the Juvenile Act due to a lack of proper prenatal care or control. However, with respect to the second basis for dependency, Mother asserted that the CPSL does not protect a fetus or unborn child, and thus her actions could not constitute child abuse as a matter of law. The Juvenile Court agreed with Mother that the law does not provide for a finding of abuse due to actions taken by an individual upon a fetus.

CYS appealed to the Pennsylvania Superior Court, which reversed the Juvenile Court's decision. Based on the plain language of the statute, the Superior Court held that although the CPSL definition of "child" does not include a fetus or unborn child, a mother's use of illegal drugs while pregnant may be child abuse under the CPSL if CYS shows that a mother intentionally, knowingly, or recklessly caused, or created a reasonable likelihood of, bodily injury to a child after birth. As applied to this case, the Superior Court concluded

Mother's drug use constitutes a "recent act or failure to act," and her conduct caused or was reasonably likely to cause injury to Child, who, now born, constituted a "child." Mother appealed and the Pennsylvania Supreme Court granted review.

The Pennsylvania Supreme Court reviewed two issues de novo: 1) Whether the CPSL allows a mother to be found a perpetrator of "child abuse" if she is a drug addict while her child is a fetus; and 2) whether the intent of 23 Pa. C.S. §6386 is limited to administering protective services to addicted newborns and their families and not so extensive as to allow alcoholic or addicted mothers to be found to have committed child abuse while pregnant.

Examining the plain language of the CPSL, the Pennsylvania Supreme Court held that Mother's act of ingesting opioids while pregnant did not constitute child abuse. The court reasoned that had the General Assembly intended to include a fetus or unborn child under the protections of the CPSL, it would have done so, just as in other statutory schemes. The court rejected the Superior Court's creation of a statutory relationship between a pregnant woman and a fetus—one that the CPSL fails to recognize. Instead, the court considered omission of this relationship as indicative of legislative intent, and read the statutory language to require the existence of a child at the time of the allegedly abusive act in order for the actor to be a "perpetrator," and for the act to constitute "child abuse." The court found it insufficient that the actor, at a later date, becomes a person who meets one of the statutorily defined categories of "perpetrator."

The Pennsylvania Supreme Court also rejected CYS' argument that a finding of abuse under the circumstances of this case will protect future children from abuse. The court explained that labeling a woman as a perpetrator of child abuse does not prevent her from becoming pregnant, or protect a later conceived child while in utero. Nor does it ensure that the same woman will not use illegal drugs if she again becomes pregnant. The court also reasoned that such a label would conflict with the goal of preserving family unity and a supportive environment for the child, because it would challenge a new mother's ability to assimilate into the workforce and participate in her child's life. Accordingly, the court reversed the Superior Court's decision and remanded the case for reinstatement of the trial court's order.

III. PRACTICAL SIGNIFICANCE AND POLICY IMPLICATIONS

In Re. L.J.B. carries important practical significance and policy implications, especially for a nation in which opioid addiction has reached a crisis level. According to recent statistics, Pennsylvania is among the states with the highest rates of drug overdose deaths, with opioid-related overdose deaths taking place at a rate of 18.5 per 100,000 persons. On January 18, 2018, in an unprecedented step to combat opioid addiction,

Pennsylvania Governor, Tom Wolf, proclaimed the heroin and opioid epidemic to be a statewide disaster emergency. The issues addressed by the Pennsylvania Supreme Court in *In Re. L.J.B.* emerge from this epidemic.

In Re. L.J.B. explains that a mother's use of illegal drugs while pregnant should not be considered child abuse accompanied by inclusion in child abuse registries without clear and unambiguous statutory language to uphold such a finding. By determining that drug exposure in utero is not child abuse and highlighting the importance of supporting families in seeking help for addiction, the Pennsylvania Supreme Court sends a strong message about the goals of child welfare. A contrary finding by the court may penalize pregnant women for obtaining prenatal care, medical services, or addiction treatment.

Perhaps most importantly, stemming from a case of first impression, the Pennsylvania Supreme Court's finding can be instructive for other jurisdictions analyzing similar facts and applying similar statutory language. The decision is also important in the field of child law as a whole because it draws attention to the collateral consequences of inclusion in a child abuse registry, which may significantly impact a person's future employment, housing, and community participation.

IV. REACTIONS TO *IN RE. L.J.B.*

It may appear shocking that the most public reactions to *In Re. L.J.B.* are those in support of the Pennsylvania Supreme Court's ruling that a mother's use of drugs while pregnant cannot constitute child abuse under the CPSL. Four different amicus briefs in support of this position were filed with the Pennsylvania Supreme Court: 1) a child welfare brief from the Support Center for Child Advocates, 2) a public health and maternal welfare brief from Community Legal Services of Philadelphia and the National Advocates for Pregnant Women, 3) a drug policy brief from the Drug Policy Alliance, and 4) a constitutional law brief from the ACLU of Pennsylvania.

The child welfare brief was written by child advocates, medical professionals, and toxicologists to heighten the discourse concerning why prenatal substance exposure is not child abuse under the CPSL. Specifically, the brief emphasized that expansion of the CPSL was not necessary to protect children. The amici believed that instead, contravening prevailing standards of care for treatment of prenatal substance exposure and the imposition of lasting limitations on children and their families would harm children.

The public health and maternal welfare brief was filed by the Community Legal Services of Philadelphia and the National Advocates for Pregnant Women, who jointly represent experts in the fields of maternal and child health, child welfare, and law who are committed to the health and rights of pregnant and parenting women and their children.

The brief expressed concern that application of the CPSL to actions, decisions, and conditions of pregnant women would undermine their human rights and threaten maternal and fetal health by deterring pregnant women from seeking medical care.

The drug policy brief was filed by two nonprofit organizations, the Drug Policy Alliance and Families for Sensible Drug Policies. These organizations argued that broadening the definition of “child abuse” under the CPSL to include actions taken by a pregnant woman that may affect her newborn’s health was harmful to maternal, fetal, and child health. The brief further stated that the Superior Court’s holding was contrary to widely accepted medical, public health, and scientific evidence.

Finally, the ACLU of Pennsylvania and Feminist Majority Foundation filed a constitutional law brief asserting that *In Re. L.J.B.* was a case of statutory interpretation. The brief urged the Court to interpret the CPSL far more narrowly. The amici argued that the Superior Court’s decision—that any act or omission while pregnant that may affect the health of a child once born may constitute child abuse under the CPSL—violated a number of fundamental principles of statutory interpretation.

V. CONCLUSION

While questions regarding substance exposure in infants are not new to dependency courts, the Supreme Court of Pennsylvania’s decision in *In Re. L.J.B.* is timely since it addresses opioid exposure, which continues to become more prevalent in dependency cases across the nation. By holding that a mother’s use of opioids while pregnant is not child abuse under the CPSL, the Pennsylvania Supreme Court sends a strong message about the goals of child welfare. As a matter of first impression, *In Re. L.J.B.* carries important practical significance and policy implications for all of the United States. A contrary finding would be inconsistent with legislative intent and threaten maternal, fetal, and child health by deterring pregnant women from seeking medical care.

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