

CHILDREN'S FAST TRACK APPEAL

IN THE SUPREME COURT OF PENNSYLVANIA

No. 11 EAP 2019

In re: N.B.-A.

Petition of E.A., Mother

BRIEF FOR APPELLANT

Appeal from the Opinion Dated February 19, 2019,
of the Superior Court of Pennsylvania,
893 EDA 2018,
affirming in part and reversing in part the Philadelphia Court of Common Pleas
Opinion Dated May 21, 2018, CP-51-DP-0002607-2016

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I. Statement of Jurisdiction

The Supreme Court has jurisdiction over this matter pursuant to its authority to review a final order of the Superior Court by allowance of appeal under 42 Pa.C.S. § 724(a).

On May 6, 2019, this honorable Court issued an Order granting appellant's petition for allowance of appeal. This Order is attached as Appendix A.

II. Orders in Question

The trial court order, dated March 16, 2018 and signed by the Honorable Lyris F. Younge, states, in relevant part:

THE COURT MAKES A FINDING OF CHILD ABUSE AS TO MOTHER. CPS REPORT 11/18/16 IS FOUNDED AND MAY ONLY BE CHALLENGED BY APPEAL OF THIS ORDER.

The trial court issued an opinion on May 21, 2018 ("T.C.O") supporting its finding that E.A. (hereinafter "Mother") is a perpetrator of child abuse. This opinion is attached as Appendix B.

On February 19, 2019, the Superior Court issued a non-precedential opinion affirming the trial court's finding that Mother is a perpetrator of child abuse. In re N.B.-A., 893 EDA 2018, slip op. (Pa. Super. 2019). This opinion is attached as Appendix C.

III. Statement of the Scope and Standard of Review

The scope of appellate review in child welfare cases is “of the broadest type.” In re Donna W., 472 A.2d 635, 642 (Pa. Super. 1984) (en banc).

Appellate courts review a trial court’s finding of child abuse for abuse of discretion. In re L.Z., 111 A.3d 1164, 1174 (Pa. 2015). The reviewing court must generally accept the facts as found by the trial court. In re E.P., 841 A.2d 128, 131 (Pa. Super. 2003) (internal citations omitted). However, the reviewing court is not bound by any findings of fact which are not fully supported by competent evidence, nor is the reviewing court bound by the inferences and deductions of the trial court. In re R.W.J., 826 A.2d 10, 12 (Pa. Super. 2003); In re Frank, 423 A.2d 1229, 1239 (Pa. Super. 1980). Similarly, a reviewing court is not bound by the trial court’s conclusions of law. In re L.Z., 111 A.3d at 1174.

While the reviewing court “cannot nullify or usurp the fact-finding function of the trial court,” it must “exercise... independent judgment...in reviewing the determination of the lower court” and must order “whatever right and justice dictate.” In re H.V., 37 A.3d 588, 593 (Pa. Super. 2012) (citations omitted); In re Donna W., 472 A.2d at 637 (citations omitted); see also, Donna W., 472 A.2d at 643 (“An appellate Court is not bound to accept so-called findings of fact which are in reality deductions, inferences and conclusions found by the lower court...”).

In addition, when reviewing for abuse of discretion, the appellate court has a “duty to ensure that the trial court has satisfactorily fulfilled the requirements of examining all evidentiary resources, conducting a full hearing and setting forth its decision in a full discursive opinion.” In re K.P., 872 A.2d 1227, 1231 (Pa. Super. 2005) (internal citations omitted). It is the reviewing court’s responsibility “to ensure that the record represents a comprehensive inquiry and that the hearing judge has applied the appropriate legal principles to that record.” In re R.W.J., 826 A.2d at 12.

Issues involving statutory construction and interpretation present questions of law. In re Jacobs, 936 A.2d 1156, 1163 (Pa. Super. 2007). When reviewing questions of law, the standard of review is *de novo* and the scope is plenary. In re S.J.H., 78 A.3d 1158, 1160 (Pa. Super. 2013).

IV. Questions Presented for Review

1. Did the Superior Court err by affirming the trial court’s finding that Mother was a perpetrator of child abuse in the absence of clear and convincing evidence that she intentionally, knowingly, or recklessly caused or created a likelihood of sexual abuse through a recent act or failure to act?

2. Did the Superior Court commit an error of law by applying 23 Pa.C.S. § 6381(d) to find that DHS established a *prima facie* case that Mother was

responsible for the abuse perpetrated against N.B.-A. where another individual had been identified as the direct perpetrator?

3. Did the Superior Court commit an abuse of discretion by finding that Mother failed to rebut the *prima facie* presumption that she was a perpetrator of child abuse pursuant to 23 Pa.C.S. § 6381(d)?

V. Statement of the Case

On November 17, 2016, Mother took her then six-year-old daughter, N.B.-A., to the hospital because N.B.-A. was experiencing vaginal discharge. Notes of Testimony (“N.T.”), 3/16/18 at 13. When further testing revealed that N.B.-A. had contracted chlamydia, a sexually transmitted infection, a child protective services (CPS) report was made to the Philadelphia Department of Human Services (hereinafter “DHS”). N.T., 3/16/18 at 13.

DHS interviewed Mother, who reported that her husband and his two adult sons resided in the home, along with N.B.-A.’s maternal grandmother. N.T., 3/16/18 at 16. Before being made aware of N.B.-A.’s diagnosis, Mother had reported to the hospital staff that only she and maternal grandmother resided in the home with N.B.-A. N.T., 3/16/18 at 31-32. DHS requested that all household members submit to testing for sexually transmitted infections. N.T., 3/16/18 at 13, 19. Results revealed that Mother and N.B.-A.’s adult stepbrother also tested

positive for chlamydia. N.T., 3/16/18 at 19. Upon learning of his test results, N.B.-A.'s adult stepbrother fled the hospital and returned to the Dominican Republic. N.T., 3/16/18 at 34. A detective attempted to locate the adult stepbrother for questioning, without success. N.T., 3/16/18 at 34-35.

N.B.-A. was removed from Mother and placed in foster care via an Order of Protective Custody on November 21, 2016. List of Record Documents, CP-51-DP-2607-2016 ("List of Rec. Docs."), No. 20. N.B.-A. was adjudicated dependent on December 5, 2016. List of Rec. Docs., No. 16. The CPS report was "indicated"¹ on January 7, 2017, relying on available medical evidence to identify N.B.-A.'s adult stepbrother as the perpetrator of abuse. N.T., 3/16/18 at 7, 39. The CPS report was additionally "indicated" against Mother as a perpetrator of abuse by omission,² based on the agency's investigation. N.T., 3/16/18 at 7, 39.

¹ No court hearing is required before a CPS report can be "indicated." The Child Protective Services Law (CPSL) defines an "indicated report," in relevant part, as:

- (a) ... 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.

23 Pa.C.S. § 6303(a).

² Although not defined in the CPSL, "perpetrator by omission" refers to someone who is held responsible for abuse due to an alleged failure to protect the victim child from the abuse that occurred, as opposed to someone who is held responsible for directly causing the harm that occurred.

Three permanency review hearings regarding N.B.-A. were held between March 2017 and December 2017. List of Rec. Docs., No. 12, 14, 15. Permanency review hearings scheduled for July 6, 2017 and December 18, 2017 were continued with no action taken. List of Rec. Docs., No. 10, 13. Mother was found to be in full compliance with her single case plan objectives at permanency review hearings held on June 5, 2017 and March 16, 2018. List of Rec. Docs. No., 5, 6, 14.

At the March 16, 2018 child abuse hearing, the DHS investigator testified that Mother did not appear to be concerned about the results of N.B.-A.'s testing and that Mother denied any knowledge of how N.B.-A. had contracted chlamydia. N.T., 3/16/18 at 15-16. Mother posited that perhaps N.B.-A. had contracted the infection during childbirth, because Mother had a friend whose child had been born with an infection contracted during childbirth. N.T., 3/16/18 at 18-19. Mother, grappling with this devastating news, stated to the DHS investigator that the test results had to be a misunderstanding and that it could not be possible that N.B.-A. had been sexually abused. N.T., 3/16/18, at 38-39.

The DHS investigator interviewed N.B.-A. with the assistance of a Spanish interpreter. N.T., 3/16/18, at 25. At that time, N.B.-A. was able to identify her body parts by name, and "knew the difference between good touch and bad touch." N.T., 3/16/18 at 24. The DHS investigator asked N.B.-A. if anyone "touched her in a bad way," and N.B.-A. replied: "no." N.T., 3/16/18 at 25. DHS also asked N.B.-A. "if

she was ever touched in a bad way by her stepfather or her stepfather's sons, and she replied 'no.'" N.T., 3/16/18 at 26. N.B.-A. was additionally interviewed by hospital staff, and completed a forensic interview at the Philadelphia Children's Alliance; in all three interviews, N.B.-A. denied abuse or inappropriate contact with any adult. N.T., 3/16/18 at 25-26, 30, 68-69.

Dr. Maria McColgan, who testified as an expert in child abuse pediatrics, concluded that N.B.-A.'s infection was the result of sexual contact. N.T., 3/16/18 at 50. Dr. McColgan testified that while transmission during childbirth is possible, given N.B.-A.'s age, this mode of transmission could be ruled out as a possibility. N.T., 3/16/18 at 47-48. Because N.B.-A. was already in foster care at the time of Dr. McColgan's examination of N.B.-A., Dr. McColgan had no interaction with Mother. N.T., 3/16/18 at 53.

Throughout the investigation, Mother consistently denied having any knowledge of what happened to N.B.-A., and testified that N.B.-A. never disclosed the abuse to her. N.T., 3/16/18 at 18, 62, 64. Mother, as N.B.-A.'s primary caregiver, made appropriate arrangements for N.B.-A.'s grandmother or great aunt to watch N.B.-A. when Mother was not personally available to care for her due to work or other obligations. N.T., 3/16/18 at 63-64. Mother never left N.B.-A.'s adult stepbrother in charge of N.B.-A.'s care. N.T., 3/16/18 at 64.

Mother explained that it was very difficult to accept that N.B.-A. had been

abused because “it was just hard...to believe that something could have happened to her because my mom was always with her and I was always with her.” N.T., 3/16/18 at 65. Mother testified that she and N.B.-A. share a close relationship, and that “[N.B.-A.] always tells me everything.” N.T., 3/16/18 at 64. This strong bond made it all the more incomprehensible to Mother that N.B.-A. had been sexually abused and had not disclosed to her. N.T., 3/16/18 at 64. Mother also testified that she believed N.B.-A.’s eventual disclosure of abuse was truthful, and that she was going to therapy to independently process her feelings about this. N.T., 3/16/18 at 64.

Mother and maternal grandmother moved out of the home they had shared with Mother’s husband and his adult sons shortly after N.B.-A. was removed. N.T., 3/16/18 at 63. Mother thereafter divorced her husband, and testified that she no longer maintained any relationship with him or his sons. N.T., 3/16/18 at 62-63.

N.B.-A., who was eight years old at the time of the child abuse hearing that is the subject of this appeal, remained outside of the courtroom for the duration of the hearing and was not called to testify. The trial court found the testimony of the DHS investigator and Dr. McColgan to be credible. N.T., 3/16/18 at 85. The trial court did not find Mother to be credible, based on her initially discrepant reporting of household members and initial reluctance to believe that N.B.-A. had been abused. N.T., 3/16/18 at 82-85.

At the conclusion of testimony and argument, upon the joint request of counsel for DHS and N.B.-A.'s guardian *ad litem*,³ the trial court made a finding of child abuse against Mother.⁴ This finding was affirmed by the Superior Court in a non-precedential opinion. In re N.B.-A., 893 EDA 2018, slip op. (Pa. Super. 2019).

VI. Summary of Argument

The Superior Court abused its discretion by affirming the trial court's finding that Mother is a perpetrator of child abuse in the absence of clear and convincing evidence that Mother intentionally, knowingly, or recklessly caused or created a likelihood of sexual abuse through a recent act or failure to act.

While Mother does not contest that N.B.-A. was the victim of sexual abuse perpetrated by her adult stepbrother, the evidence was insufficient to establish that

³ At the time of the hearing giving rise to this appeal, In re J'K.M., 191 A.3d 907 (Pa. Super. 2018), which extended the requirements of this Court's decision in In re Adoption of L.B.M. and its progeny to "dependency actions generally," had not yet been decided. See, Interest of Q.R., 199 A.3d 458, n.5 (Pa. Super. 2018). The wishes of N.B.-A., who was eight years old at the time of this hearing, were never placed on the record. Thus, it is not possible to discern whether a conflict of interest existed between N.B.-A.'s preferred outcome and the position of her guardian *ad litem*. See also, 42 Pa.C.S. § 6311(b)(9) (requiring the guardian *ad litem* to advise the court of the child's wishes and present to the court whatever evidence exists to support the child's wishes). The issue of N.B.-A.'s right to counsel was not raised below – however, Mother would welcome the opportunity to submit supplemental briefing on the issue should this Court find it helpful.

⁴ Upon the joint request of DHS and the guardian *ad litem*, the trial court also made a finding of "aggravated circumstances" against Mother pursuant to 42 Pa.C.S. § 6302(2), and relieved DHS of its obligation to provide reasonable efforts to Mother to help her reunify with N.B.-A. These findings were reversed by the Superior Court as against the weight of the evidence, and thus are not encompassed within the scope of this appeal. See, In re N.B.-A., 893 EDA 2018, slip op., (Pa. Super. 2019).

Mother was responsible for this abuse. DHS relies on evidence of Mother's "flat affect" after being informed that N.B.-A. had contracted chlamydia and Mother's initial reluctance to believe that N.B.-A. was sexually abused to insinuate that Mother somehow failed to protect N.B.-A. However, there is no evidence that Mother knew or had any reason to anticipate that N.B.-A.'s adult stepbrother, or any other person, posed any risk to N.B.-A.'s safety. N.B.-A. did not disclose the abuse to Mother; Mother never witnessed any acts of abuse; and when Mother was not personally caring for N.B.-A., she left N.B.-A. safely in the care of her grandmother or great aunt. Regardless of how Mother's affect was perceived in the aftermath, no evidence was presented that Mother could have done anything more than she did to protect her child.

The Superior Court also incorrectly invoked 23 Pa.C.S. § 6381(d) to conclude that DHS established a *prima facie* case that Mother was a perpetrator of child abuse. As a matter of law, Section 6381(d) should not apply to presume that a parent or caregiver is responsible for abuse known to have been perpetrated by another individual in the absence of evidence that the parent knew or should have known of the danger into which the child was placed, and failed to act. The Superior Court's application of Section 6381(d) in this case is an unprecedented expansion that is outside the scope of the legislature's intent, and does not serve the purpose articulated by this Court – to assign blame among responsible parties

where abuse is evident, but a “conspiracy of silence” prevents the county agency from definitively identifying the perpetrator.

Additionally, the Superior Court incorrectly usurped the fact-finding function of the trial court to affirm the finding of child abuse under the guise of the “right for any reason” doctrine. Section 6381(d) was not raised, litigated, or relied upon in the trial court to support a finding of child abuse against Mother. Thus, DHS waived it as a basis to support the finding of child abuse on appeal.

Additionally, the Superior Court cannot *sua sponte* rely on Section 6381(d) as a basis to affirm the finding of child abuse because it requires a finding of fact that sufficient evidence was presented to trigger Section 6381(d), and a finding of fact that Mother failed to rebut the *prima facie* presumption that she is a perpetrator of abuse. These factual findings are outside the scope of the Superior Court’s authority. Thus, the Superior Court was not entitled to invoke the “right for any reason” doctrine to affirm on this basis.

Further, the Superior Court’s reading of Section 6381(d) in this case suggests that categorically, all parents whose child is sexually abused by another identified person are presumptively responsible for that abuse, unless and until the parent can rebut the presumption. This reading is inconsistent with the legislature’s clear intent to limit the circumstances in which Section 6381(d) applies. Also, this Court has previously considered and rejected the idea that Section 6381(d) could

be invoked under such circumstances. In Pennsylvania, the press surrounding the Sandusky scandal and the recent grand jury report revealing widespread child sex abuse across several decades within the Catholic Church have made visible the number of children who are abused by trusted adults other than their parents or caregivers. The Superior Court's reading of Section 6381(d) in this case thus has far-reaching and dangerous implications that were not anticipated nor intended by the legislature or this Court.

Finally, even if this Court holds that Section 6381(d) is applicable in this case, and has not been waived, the Superior Court abused its discretion by finding that Mother failed to rebut the *prima facie* presumption of responsibility. Although the trial court found Mother not to be a credible witness, the testimony and evidence presented by DHS failed to contradict any of Mother's testimony or present a countervailing narrative requiring the trial court to resolve any conflict of evidence.

For the foregoing reasons, the trial court's finding of child abuse against Mother was contrary to law, and the Superior Court erred as a matter of law and abused its discretion by affirming this finding.

VII. Argument for Appellant

A. The Superior Court abused its discretion by affirming the trial court's finding that Mother is a perpetrator of child abuse by omission in the absence of clear and convincing evidence that she intentionally, knowingly, or recklessly caused or created a likelihood of sexual abuse through a recent act or failure to act.

To support a finding that a parent or caregiver is a perpetrator of child abuse pursuant to 23 Pa.C.S. § 6303(b.1), clear and convincing evidence must be presented that the parent or caregiver's recent acts, or failure to act, caused or created a reasonable likelihood that abuse would occur. In re L.V., 127 A.3d 831, 837 (Pa. Super. 2015). In a dependency proceeding, the party that is requesting a finding of child abuse bears the burden of proof. In the Interest of J.M., 166 A.3d 408, 422 (Pa. Super. 2017).

Clear and convincing evidence must first be presented that the harm the child suffered falls within the definition of "child abuse" as set forth in the Child Protective Services Law (CPSL). 23 Pa.C.S. § 6303(b.1); In re L.V., 127 A.3d at 837. Clear and convincing evidence requires "testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitation of the truth of the precise facts in issue." Adoption of Atencio, 650 A.2d 1064, 1066 (Pa. 1994). This standard is "the highest level of proof required in any civil proceeding." Interest of B.L.L., 787 A.2d 1007, 1014 (Pa. Super. 2001).

To support a finding of child abuse, the moving party must additionally present clear and convincing evidence of the requisite intent. “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....” 23 Pa.C.S. § 6303(c).

A person acts “intentionally” when it is his “conscious object to engage in conduct of that nature or to cause such a result.” 23 Pa.C.S. § 6303(b.1); 18 Pa.C.S. § 302(b)(1). The finder of fact can conclude the actor intends the “natural and probable consequences of his actions” to result therefrom. Com. v. Bradley, 69 A.3d 253, 257 (Pa. Super. 2013).

A person acts “knowingly” if he is “aware that his conduct is of that nature...” or if he is “aware that it is practically certain that his conduct will cause such a result.” 23 Pa.C.S. § 6303(b.1); 18 Pa.C.S. § 302(b)(2). The actor need not have actual knowledge that a particular event or injury will likely occur as a result of his conduct. The finder of fact may infer that the actor had knowledge of all that can fairly be considered “common sense.” Com. v. Smith, 956 A.2d 1029, 1037 (Pa. Super. 2008).

In Com. v. Smith, Father was convicted of endangering the welfare of a child after his son sustained injuries consistent with shaken baby syndrome. 956 A.2d at 1031. Father appealed his conviction, arguing that the Commonwealth did

not prove that he possessed the requisite mental state (“knowingly”). Id. at 1032. In support of his position, Father argued that his doctor never instructed him about the dangers of shaking a baby. Id. at 1037.

The court held that the Commonwealth need not prove that Father was aware of the particular medical condition and its causes in order to demonstrate that he acted “knowingly,” because “it takes nothing more than common sense for an adult to know that violently shaking an infant child...could threaten the child's physical and/or psychological welfare.” Id. at 1038.

“Recklessness” requires that a person “consciously disregard a substantial and unjustifiable risk” that abuse will result from her conduct. 23 Pa.C.S. § 6303(b.1); 18 Pa.C.S. § 302(b)(3). The risk must be of such a nature and degree that her conduct “involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation.” 18 Pa.C.S. § 302(b)(3). Further, “recklessness” requires conscious action or inaction which creates a substantial risk of harm to others. Com. v. Vogel song, 90 A.3d 717, 719 (Pa. Super. 2014). See, e.g., In the Interest of T.G., No. 1195 EDA 2018, 2019 WL 1760114, at *7 (Pa. Super. Apr. 22, 2019) (holding that Mother's failure to maintain her medically complex child's calendar of critical appointments with various specialists over a period of five years and failure to follow the prescribed feeding regimen to combat T.G.’s chronic malnutrition demonstrated a conscious

disregard of the substantial and unjustifiable risk of further impairing T.G.'s already fragile health).

Here, Mother does not contest the finding that N.B.-A. was the victim of “sexual abuse or exploitation” as defined in the CPSL,⁵ and thus, that N.B.-A. was the victim of “child abuse.” 23 Pa.C.S. § 6303(b.1). However, no evidence was presented to support a finding that Mother “recklessly” caused or created a likelihood of sexual abuse through any act or failure to act – much less “knowingly” or “intentionally.” Accordingly, the Superior Court abused its discretion by affirming the trial court’s finding that Mother is a perpetrator of child abuse.

The trial court made a finding that Mother is responsible for the abuse perpetrated against N.B.-A. by her adult stepbrother, concluding that Mother

⁵ “Sexual abuse or exploitation” is defined, in relevant part, as 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:

.....

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

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

.....

- (iv) Sexual assault as defined in 18 Pa.C.S. § 3124.1.

23 Pa.C.S. § 6303.

“lacked the protective capacities to be responsible for N.B.-A.” T.C.O., pg. 5. The Superior Court concluded on review of the record that Mother “chose to ignore the obvious indicia of abuse” and that her “inattentiveness to her daughter around the adult stepbrother knowingly or recklessly created a likelihood of sexual abuse...”

In re N.B.-A., slip op. at 13.

To be held responsible as a perpetrator of child abuse “by omission,” clear and convincing evidence must be presented that the parent or caregiver knew or should have known of the danger to which the child was exposed, and that failing to act to protect the child under the circumstances was at least “reckless.”

The Superior Court’s opinion in this case departs from established precedent where the court properly found that a parent or caregiver’s intentional, knowing, or reckless omissions caused or created a likelihood of child abuse. In C.B., the trial court made a finding of child abuse against both Mother and Father resulting from the sexual abuse Father perpetrated against ten year-old C.B. 861 A.2d 287, 290 (Pa. Super. 2004). Testimony was presented that C.B. disclosed to her therapist that Mother was aware of the abuse. Id. at 293. Rather than taking any action to prevent further abuse, Mother told C.B. that she should not engage in sexual activity with Father, and blamed C.B. for the abuse. Id. at 298. Mother also wrote a letter to the county agency accusing C.B. of lying about the abuse. Id. The finding of abuse against Mother was affirmed on appeal; the reviewing court did “not

hesitate to conclude that Mother knew what was happening to her daughter,” and failed to act. Id.

In R.P., the trial court found that Mother was a perpetrator of abuse by omission after her 18 month-old child was brought into the hospital in critical condition due to injuries inflicted by Father. 957 A.2d 1205, 1208 (Pa. Super. 2008). R.P. had approximately 100 bruises on his body that were in various stages of healing, a Battle’s sign behind his right ear, which is indicative of skull fracture, as well as a possible hip fracture and healing wrist fracture. Id. Mother reported that she had not observed any bruises while bathing the child that morning. Id. at 1209. The reviewing court affirmed the finding of abuse on appeal, citing Mother’s “knowledge of the abuse and failure to protect her child.” Id. at 1212. “Mother continued to observe bruises on R.P.’s body, especially after being in Father’s care, yet she did nothing to protect the child.” Id. at 1218.

In L.V., the trial court made a finding that Mother was a perpetrator of abuse after L.V. presented at the hospital with numerous injuries, some life-threatening, inflicted by Father. 127 A.3d 831, 833 (Pa. Super. 2015). L.V. had sustained at least 23 rib fractures, which were in various stages of healing, as well as other fractures, internal organ damage, and an acute subdural hemorrhage. Id. at 835. Mother reported that she had left the child in Father’s care when she left for work that morning. Id. at 833. Father initially claimed that the child had sustained the

injuries when she rolled off of a bed while Father was in the shower, but later admitted that he hit the child. Id. The treating doctor testified that some of the rib fractures showed signs of healing, indicating that they would have happened approximately ten to fourteen days prior to the hospitalization. Id. at 835. The Superior Court affirmed the finding of abuse against Mother on appeal, stating that “at the very least, Mother should have known that the Child was being abused, as... the Child’s rib fractures would have caused her to be in noticeable pain, even with normal handling.” Id. at 837. The court concluded that Mother “failed to stop Father’s abuse of the Child...” Id. at 838.

In R.W. v. Dept. of Human Services, Mother was named as a perpetrator of abuse by omission after her 26 month-old child drowned in the bathtub while in Father’s care. 128 A.3d 839, 840 (Pa. Cmwlth. 2015). Mother was aware that Father had a history of mental health issues, including paranoid schizophrenia and psychosis, and was not taking his prescribed medications at the time of the child’s death. Id. at 841. Mother also witnessed Father’s increasingly paranoid behavior and delusions. Id. The maternal grandfather, a retired psychiatrist, had expressed concerns to Mother about Father’s ability to care for the child. Id. However, the Commonwealth Court reversed the finding of abuse by omission, stating that Mother’s knowledge of Father’s mental illness was not sufficient to prove that Mother was, or should have been, aware that Father posed a significant risk to the

child's safety.⁶ Id. at 846.

Here, DHS presented no evidence that Mother was aware of any risk posed to N.B.-A.'s safety by her adult stepbrother's presence in the home, or that Mother consciously and unjustifiably disregarded this risk at her daughter's expense. In contrast to C.B., where testimony from the child's therapist established that the child had disclosed the abuse to Mother and that Mother failed to act to prevent further abuse, here there is no evidence that the child told anyone of the abuse either before or during the investigation. See, C.B., 861 A.2d at 293, 298. No testimony was presented that the child disclosed to Mother, the hospital, DHS, nor a forensic interviewer employed by the Philadelphia Children's Alliance. N.T., 3/16/18 at 62, 64, 67.

The only "obvious indicia of abuse" that exist in this record is N.B.-A.'s diagnosis of chlamydia, which does not support a conclusion that Mother knew, or should have known, of the danger posed to N.B.-A. before the fact. Unlike in R.P. and L.V., here there was no pattern of recurring visible injuries or symptoms that Mother should have noticed that would have raised a substantial concern for N.B.-

⁶ In an administrative appeal of an "indicated" report of child abuse, the county agency bears the burden of establishing, by substantial evidence, that the identified person perpetrated child abuse as defined in the CPSL. See, Bucks County Children and Youth Social Services Agency v. Dept. of Public Welfare, 616 A.2d 170, 174 (Pa. Cmwlth. 1992). "Substantial evidence" is defined in the CPSL as "[e]vidence which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion." 23 Pa.C.S. § 6303(a).

A.'s safety to any reasonable person. See, R.P., 957 A.2d at 1218; L.V., 127 A.3d at 837.

Further, there is no evidence to suggest that Mother should have anticipated any need to be “attentive” to her daughter around any of her household members, and failed to do so. Thus, it was not “reckless” for Mother to continue to reside with N.B.-A. and her other household members. Compare, R.W. v. Dept. of Human Services, 128 A.3d 839 (Pa. Cmwlth. 2015) (holding that Mother’s awareness of Father’s deteriorating and untreated mental health, including clear episodes of psychosis and paranoia, was not sufficient to support a conclusion that Mother knew or should have known that Father posed a threat to the child’s safety, and thus it was not “reckless” for Mother to leave the child alone in Father’s care), with C.K. v. Dept. of Public Welfare, 869 A.2d 48 (Pa. Cmwlth. 2015) (affirming a finding of child abuse by omission against Mother who had exposed her young children to “imminent risk of abuse” by continuing to reside in a home with two indicated perpetrators of sexual abuse, despite the agency’s repeated warnings to her not to do so), and In re B.B., 62 A.2d 979 (Pa. Super. 1993) (upholding a finding of child abuse by omission against Mother whose paramour caused significant bruising on B.B.’s buttock area, citing Mother’s awareness of previous instances of physical punishment using a wooden ruler and paint stirrer while B.B. was in her paramour’s care).

Here, there was no evidence that Mother consciously disregarded any warning signs that N.B.-A. was at risk of harm, or that Mother should have anticipated that N.B.-A.'s adult stepbrother posed a danger to her. Rather, Mother did everything any responsible parent would do to ensure N.B.-A.'s safety and wellbeing. When Mother herself was not caring for the child, she left N.B.-A. in the care of her grandmother or great aunt. N.T., 3/16/18 at 63-64. In fact, although DHS alleges that Mother is a perpetrator of child abuse due to her failure to protect N.B.-A. from harm, DHS could not identify any apparent omission that resulted in N.B.-A.'s victimization or a likelihood of victimization. Nor was any evidence presented that Mother had any ability to prevent the abuse from occurring, and failed to do so.

Instead, DHS relies on a series of thin innuendos to imply that Mother should be held responsible. DHS pointed to Mother's "very relaxed and not very concerned" affect and her initial resistance to believing that her child had been sexually abused as evidence supporting her alleged culpability. N.T., 3/16/18 at 15-16, 22-24, 38-39. Additionally, DHS elicited testimony that Mother initially reported being comfortable speaking with the DHS investigator in English, but later requested the assistance of a Spanish interpreter to suggest that Mother is

somehow not trustworthy. N.T., 3/16/18 at 26-28.⁷ Regardless of how Mother's affect was perceived, "[i]nnuendo and suspicion alone are not enough to compel a finding of child abuse." In Interest of J.M., 166 A.3d 408, 424 (Pa. Super. 2017) (internal citation omitted).

The evidence presented was not sufficient to establish that Mother consciously failed to take action in the face of a known threat to N.B.-A.'s safety, or that Mother's conduct was a "gross deviation" from what any reasonable person would have done under these circumstances. Mother had no reason to believe that any of her household members would harm N.B.-A. — thus, it was not "reckless" for Mother to remain in the home with N.B.-A. and her other family members. The trial court's finding of child abuse was an abuse of discretion and contrary to law, and the Superior Court's conclusion that Mother knowingly or recklessly created a likelihood of sexual abuse was in error.

⁷ The DHS investigator testified that she did use a Spanish interpreter when interviewing N.B.-A., "only because she wasn't as fluent in English." N.T., 3/16/18 at 29. She went on to testify that although N.B.-A. was observed speaking English and appeared to be proficient, DHS used a Spanish interpreter because N.B.-A. felt more comfortable with Spanish. N.T., 3/16/18 at 29-30. In contrast, Mother's request for an interpreter during subsequent interviews with the police and DHS was unjustly presented as a mark against Mother's credibility rather than a reasonable request and entitlement for a person whose native language is not English.

B. The Superior Court committed an error of law by invoking 23 Pa.C.S. § 6381(d) to find that DHS established a *prima facie* presumption that Mother was responsible for the abuse perpetrated against N.B.-A. by her adult stepbrother.

Although the trial court did not rely upon 23 Pa.C.S. § 6381(d) to find that Mother is a perpetrator of child abuse, the Superior Court concluded upon review of the record that N.B.-A. “suffered child abuse of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of Mother,” triggering a *prima facie* presumption of Mother’s responsibility for the abuse. In re N.B.-A., slip op. at 13.⁸

First, as a matter of law, invoking Section 6381(d) to presumptively hold parents or caregivers accountable for abuse known to have been perpetrated by another individual is an unprecedented expansion of Section 6381(d) that is outside the scope of the legislature’s intent and does not serve the purpose behind the presumption as articulated by this Court in In re L.Z. 111 A.3d 1164, 1183-84 (Pa. 2015).

In the alternative, should this Court hold that as a matter of law Section 6381(d) can be applied to presume a parent or caregiver responsible for abuse perpetrated by another known individual, it cannot serve as a basis for affirming

⁸ The Superior Court commented in a footnote that “[w]hile the Juvenile Court did not specifically invoke § 6381(d), this Court can affirm the trial court on any basis supported by the certified record. See, In re Adoption of Z.S.H.G., 34 A.3d 1283, 1288 (Pa. Super. 2011).” In re N.B.-A., 893 EDA 2018, slip op. at n. 8 (Super. Ct. 2019).

the trial court's finding of child abuse against Mother in this case because it has been waived. Additionally, insufficient evidence was presented to establish that the abuse N.B.-A. suffered was of a nature where ordinarily it would not exist absent an act or omission of a parent or caregiver. Thus, the Superior Court's application of Section 6381(d) was in error.

1. Invoking Section 6381(d) to establish a *prima facie* presumption that parents and/or caregivers are responsible for abuse known to have been perpetrated by an identified third party is outside the scope of the legislature's intent and does not serve the purpose articulated by this Court.

“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly...” 1 Pa.C.S. § 1921(a). The stated purposes of the Child Protective Services Law (CPSL) as expressed by the legislature include to “encourage more complete reporting of suspected child abuse; ... provid[e] protection for children from further abuse...” and “preserve, stabilize and protect the integrity of family life wherever appropriate...” 23 Pa.C.S. § 6302(b). To that end, the legislature established the evidentiary presumption of 23 Pa.C.S. § 6381(d), which provides that:

(d) Evidence that a child has suffered child abuse of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the welfare of the child shall be *prima facie* evidence of child abuse by the parent or other person responsible for the welfare of the child.

The appellate courts have further explained that the purpose of the presumption set forth in 23 Pa.C.S. § 6381(d) is to prevent multiple caregivers from “circling the wagons,” or alternatively, pointing the finger at each other in an attempt to conceal the identity of the abuser. In re L.Z., 111 A.3d 1164, 1181 (Pa. 2015) (quoting J.W. v. Dept. of Public Welfare, 9 A.3d 270, 273 (Pa. Cmwlth. 2010)). It is designed to address the “conspiracy of silence” that exists in cases where abuse is evident, but the perpetrator is unknown, and no adult responsible for the child’s wellbeing provides sufficient information about the circumstances surrounding the injuries. In re L.Z., 111 A.3d at 1183.

As this Court commented in L.Z.,

“[C]hild abuse cases often involve a child presenting to a hospital with significant injuries that are entirely consistent with common types of child abuse and entirely inconsistent with the implausible explanations concocted by the parents and responsible persons to avoid allegations of child abuse.... Thus, while [CYS] can prove the existence of abuse rather easily, they have no ability to assign responsibility for the heinous act among the responsible adults.”

111 A.3d at 1185.

Section 6381(d) was enacted to provide county agencies with a mechanism to assign responsibility for acts of abuse among responsible parties in the absence of definitive evidence of the true perpetrator. The appellate courts have applied Section 6381(d) in a manner consistent with this purpose. See, e.g., Interest of

L.V., No. 1390 EDA 2018, 2019 WL 1967820 (Pa. Super. May 3, 2019) (affirming finding of child abuse against both Mother and Father where two-month-old child presented in the hospital with 26 unexplained fractures in various stages of healing that were “highly indicative of child abuse,” and where Mother and Father were the sole caretakers of the child); Interest of S.L., 202 A.3d 723, 728 (Pa. Super. 2019) (stating “[i]n situations where a perpetrator of abuse is unknown, a parent’s culpability may be established by *prima facie* evidence pursuant to [section] 6381(d)...”) (emphasis added); E.M. v. Dept. of Human Services, 191 A.3d 44 (Pa. Cmwlth. 2018) (applying Section 6381(d) to establish a *prima facie* presumption that both Mother and her paramour were responsible for unexplained injuries consistent with inflicted trauma that occurred in their joint custody); T.H. v. Dept. of Human Services, 145 A.3d 1191, 1200 (Pa. Cmwlth. 2016) (invoking Section 6381(d) to establish a *prima facie* presumption that Mother and Father were both responsible for the child’s injuries where county agency could not definitively prove which parent had inflicted the abuse; and commenting that because “parents are always responsible for their children...establishing their lack of physical presence at the time of the abuse could be a way of rebutting the presumption...[but it] is not determinative of whether the presumption is triggered in the first instance.”); In re L.Z., 111 A.3d at 1185 (construing Section 6381(d) to trigger *prima facie* presumption that both Mother and Aunt, the child’s sole

caregivers during the time period in which the injuries were estimated to have occurred, were responsible for the child's injuries which testimony established could not have been self-inflicted and were not consistent with accidental trauma explanations provided).

However, in circumstances where a perpetrator other than the parent or caregiver is identified, triggering a *prima facie* presumption that the child's parent or caregiver is also responsible for the abuse does not serve the purposes of the CPSL as articulated by the legislature and by this Court. Presuming that a parent or caregiver is a perpetrator of child abuse under these circumstances would neither encourage more complete reporting of suspected child abuse, nor protect children from further abuse. Also, invoking the Section 6381(d) presumption under these circumstances undermines the legislative intent to preserve the unity of the family where appropriate.

In cases where a perpetrator has been identified, no "conspiracy of silence" or "circling of the wagons" prevents the county agency from being able to appropriately assign responsibility for the abuse. Additionally, if the county agency believes that a parent or caregiver's actions or inactions rise to level of intentionally, knowingly, or recklessly causing or creating a reasonable likelihood that abuse would result, the county agency could pursue a finding of child abuse by act or omission against the parent or caregiver pursuant to 23 Pa.C.S. § 6303(b.1).

Section 6381(d) is premised on the idea that “the likelihood clearly established abuse has occurred, other than at the hands of the custodian, is so small that *prima facie* evidence the custodian has caused the injury, either by acts or omissions, is all that is required.” In Interest of J.R.W., 631 A.2d 1019, 1024 (Pa. Super. 1993). However, this is a flawed premise in contemporary times, as evidenced by the increased visibility surrounding the startling number of children who are abused by trusted adults other than their parents or caregivers — such as teachers, coaches, and clergy.

As a matter of law, Section 6381(d) should not be applied to hold a parent or caregiver presumptively responsible for abuse known to have been perpetrated upon a child by another identified person in the absence of clear and convincing evidence that the parent or caregiver’s actions or inactions caused or created a likelihood of abuse, and without requiring the county agency to present clear and convincing evidence of the requisite intent under 23 Pa.C.S. § 6303(c).

2. Section 6381(d) cannot serve as a basis upon which to affirm the trial court’s finding that Mother is a perpetrator of child abuse because it has been waived due to DHS’s failure to raise Section 6381(d) as an issue in the trial court, depriving Mother of a meaningful opportunity to rebut the presumption.

Section 6381(d) was not raised, litigated, or relied upon in the trial court as a basis for finding that Mother is a perpetrator of child abuse. Rather, DHS requested that the trial court “find that there was sexual abuse or exploitation of the child for

--- through a failure to act. Mother's state of mind --- she intentionally and knowingly put her child in danger by not taking her out of that house." N.T., 3/16/18 at 73-74.

The trial court, when concluding that Mother is a perpetrator of child abuse, stated the following:

"I believe that the Department has made their case with clear and convincing evidence... I'm going to [make a finding of child abuse], pursuant to CPSL 23 --- I think it's subsection 6303."

N.T., 3/16/18 at 84-85.

The trial court opinion similarly does not invoke or discuss Section 6381(d) as a basis supporting the court's decision, instead citing that "Mother lacked the protective capacities to be responsible for N.B.-A," and concluding that "clear and convincing evidence [existed] for a finding of child abuse against Mother." T.C.O., pg. 5. The trial court did not make any findings of fact related to whether sufficient evidence was presented to trigger the application of Section 6381(d), nor whether Mother presented evidence sufficient to rebut the *prima facie* presumption.

In this case, the Superior Court commented in a footnote that "[w]hile the Juvenile Court did not specifically invoke § 6381(d), this Court can affirm the trial court on any basis supported by the certified record. See, In re Adoption of Z.S.H.G., 34 A.3d 1283, 1288 (Pa. Super. 2011)." In re N.B.-A., slip op. at n. 8. However, the Superior Court is not entitled to usurp the fact-finding function of the

trial court based on a cold reading of the record. The “right for any reason” doctrine “may not be used to affirm a decision when the appellate court must weigh evidence and engage in fact finding or make credibility determinations to reach a legal conclusion.” In re A.J.R.-H., 188 A.3d 1157, 1176 (Pa. 2018). Rather, as this Court has articulated, once rebuttal evidence is presented, “[t]he evaluation of the validity of the presumption... rest[s] with the trial court evaluating the credibility of the *prima facie* evidence presented by the CYS agency and the rebuttal of the parent or responsible person.” In re L.Z., 111 A.3d at 1185. It is solely within the province of the trial court to “weigh the evidence and render a credibility determination, as would be done in any other situation involving a conflict of evidence.” T.H. v. Dept. of Human Services, 145 A.3d at 1204-05.

Here, the Superior Court exceeded the bounds of its authority by engaging in fact finding to support a legal conclusion that the trial court itself did not consider. The Superior Court, based on its review of the record, made a finding of fact that N.B.-A. “suffered child abuse of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of Mother,” sufficient to trigger a *prima facie* presumption that Mother was a perpetrator of child abuse pursuant to Section 6381(d). In re N.B.-A., slip op., at 13. The Superior Court then weighed the evidence and made a finding that Mother failed to rebut that presumption. Id. at 13-14. These findings were solely within the province of the trial court to make.

Further, appellate courts have held that where the agency fails to raise Section 6381(d) as a basis to support a finding of child abuse in the trial court, it cannot be invoked as a basis to affirm on appeal. In J.W. v. Dept. of Public Welfare, the county CYS agency filed indicated reports of child abuse against father, father's paramour, and maternal grandmother due to unexplained injuries that were estimated to have occurred during a time period in which all three people were caring for the child. 9 A.3d 270 (Pa. Cmwlth. 2010) (overruled on other grounds by In re L.Z., 111 A.3d 1164 (Pa. 2015)). Father testified on his own behalf at the administrative hearing, but his paramour and maternal grandmother did not testify. Id. at 272. Petitioners' appeals to expunge the indicated report were denied, based on the ALJ's conclusion that Section 6381(d) applied to presume each caregiver responsible, and no caregiver presented credible evidence to rebut the presumption. Id. The Commonwealth Court reversed, finding that the Section 6381(d) presumption was waived because "it was not raised as an issue at the hearing, thereby depriving Petitioners of a meaningful opportunity to rebut the presumption at the hearing." Id.⁹ See also, C.E. v. Dept. of Public Welfare, 917

⁹ The Commonwealth Court went on to explain that even if the presumption had not been waived, the court would reverse based on its reading of Section 6381(d), concluding that in multiple caregiver situations the presumption could not be applied to all caregivers without evidence that each caregiver was responsible for the welfare of the child at the time of injury. J.W. v. Dept. of Public Welfare, 9 A.3d 270 at 272-73. This reading of section 6381(d) was rejected by this Court in L.Z. as being too restrictive. This Court in L.Z. did not, however, disagree with the Commonwealth Court's finding of waiver.

A.2d 348, 356-57 (Pa. Cmwlth. 2007) (finding waiver of Section 6381(d) as a basis to affirm indicated report of child abuse because it was not raised in the hearing before the ALJ) (overruled on other grounds by In re L.Z., 111 A.3d 1164 (Pa. 2015)).

In this case, as in J.W. and C.E., Section 6381(d) was not raised in the trial court. Although Mother testified on her own behalf, as Father did in J.W., Mother did so without knowing that her testimony would be later required to rebut a *prima facie* presumption of responsibility for the abuse perpetrated against N.B.-A. Thus, because Section 6381(d) was not raised in the trial court, the Superior Court erred when it affirmed the trial court's finding of child abuse against Mother on this basis.

3. The Superior Court inappropriately applied Section 6381(d) to establish a *prima facie* presumption that Mother is responsible for the abuse perpetrated by N.B.-A.'s adult stepbrother in the absence of evidence that N.B.-A. suffered abuse of such a nature that "would not ordinarily be sustained... except by reason of the acts or omissions of the parent..."

Although the Section 6381(d) presumption was not raised, litigated, or relied upon as a basis for the finding of abuse against Mother in the trial court, the Superior Court made a finding based on review of the certified record that N.B.-A. "suffered abuse of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of Mother." In re N.B.-A., slip op. at 13.

The Superior Court thus concluded that Section 6381(d) could be applied to establish a *prima facie* presumption that Mother was responsible for the sexual abuse perpetrated upon N.B.-A. by her adult stepbrother. *Id.* at 13-14. However, insufficient evidence was presented to support the conclusion that N.B.-A. suffered abuse “of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of [Mother]. . . .” 23 Pa.C.S. § 6381(d).

When considering questions of statutory construction, it can be presumed “that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.” 1 Pa.C.S. § 1922(1). The Superior Court’s reasoning in this case suggests that categorically, sexual abuse “would ordinarily not . . . exist . . . except by reason of the acts or omissions of the parent . . .” 23 Pa.C.S. § 6381(d). This reading of Section 6381(d) leads to an absurd and unreasonable result – that all parents whose child is sexually abused, even if the abuse is known to have been perpetrated by an identified individual other than the parent or caregiver, are presumptively responsible for that abuse unless and until the parent can rebut the presumption. This reading cannot be the result intended by the legislature.

When ascertaining legislative intent, “[e]very statute shall be construed, if possible, to give effect to all its provisions.” 1 Pa.C.S. § 1921(a). It can also be presumed “that the General Assembly intends the entire statute to be effective and

certain.” 1 Pa.C.S. § 1922(2). The legislature clearly intended to limit the scope of Section 6381(d) by adding a triggering provision within the text of the statute – the evidentiary presumption does not apply unless the abuse is “of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the welfare of the child...” 23 Pa.C.S. § 6381(d).

This Court has already contemplated and affirmed that there are limitations to when Section 6381(d) can be applied, and has suggested in dicta that the facts of this case should not trigger the Section 6381(d) presumption. When *Amici* writing in support of the Mother in L.Z. raised concern that Section 6381(d) could be used to hold parents presumptively responsible for any abuse perpetrated by other adults, such as teachers, coaches, or clergy, this Court responded that because the presumption is triggered only in circumstances where it is “unlikely that the child could have suffered the injuries but for the acts or omissions of a parent or caregiver,” this would only be true if the parent or caregiver “should have known of the danger into which they placed the child.” In re L.Z., 111 A.3d 1164, n. 24 (Pa. 2015).

In this case, for the reasons previously articulated in section VII-A, there is no evidence to support a conclusion that Mother knew or should have known of the danger into which N.B.-A. was placed by living at home with her family members,

including her adult stepbrother. Thus, the Superior Court erred in finding that Section 6381(d) applied to presume Mother was responsible for the abuse perpetrated against N.B.-A. by her adult stepbrother, unjustly shifting the burden onto Mother to rebut her presumed responsibility.

C. The Superior Court abused its discretion by finding that Mother failed to rebut the Section 6381(d) *prima facie* presumption that she is responsible for the abuse perpetrated against N.B.-A. by her adult stepbrother.

The trial court did not invoke Section 6381(d) as the basis for finding that Mother was a perpetrator of child abuse, and thus did not consider or make any findings regarding whether the Section 6381(d) presumption applied or whether Mother had successfully rebutted, or failed to rebut, the presumption of responsibility. However, the Superior Court, based on its review of the record, made a finding that Mother failed to rebut the *prima facie* presumption of responsibility. In re N.B.-A., slip op. at 13-14. Even if this Court finds that, as a matter of law, the Section 6381(d) presumption is applicable in this case, and that it was not waived, the Superior Court's finding that Mother failed to rebut the *prima facie* presumption of responsibility was an abuse of discretion.

Prima facie evidence is “[s]uch evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain

sufficient.” Black's Law Dictionary 825 (6th ed. abridged 1991). In L.Z., this Court contemplated that a parent or caregiver could rebut the *prima facie* presumption of responsibility for abuse perpetrated upon a child by presenting evidence that they did not inflict the abuse, “potentially by testifying that they gave responsibility for the child to another person about whom they had no reason to fear or perhaps that the injuries were accidental rather than abusive.” 111 A.3d at 1185. Once rebuttal evidence is presented, “[t]he evaluation of the validity of the presumption... rest[s] with the trial court evaluating the credibility of the *prima facie* evidence presented by the CYS agency and the rebuttal of the parent or responsible person.” Id.

In L.Z., this Court found that Mother failed to rebut the *prima facie* presumption that she was responsible for the child’s injuries because Mother did not present any evidence or testimony from any witness for the court to consider as rebuttal evidence. 111 A.3d at 1186. See, T.H. v. Dept. of Human Services, 145 A.3d 1191, 1203 (Pa. Cmwlth. 2016) (“We observe that one of the main reasons the Supreme Court held in L.Z. that the mother did not rebut the presumption was because *she did not testify.*”) (emphasis in original).

Prior cases have determined that rebuttal testimony that attempts to establish a cause of injury that conflicts with the medical opinion about the likely mechanism of injury, and is rejected by the trial court as not credible for this reason, is not sufficient to rebut the presumption of responsibility. In E.M. v. Dept.

of Human Services, Section 6381(d) was applied to presume that both Mother and her paramour were perpetrators of child abuse. 191 A.3d 44 (Pa. Cmwlth. 2018). In an attempt to rebut the presumption, Mother testified that the child's femur fracture could have resulted from the child being pushed off of the couch by an older sibling, the bruises could be the result of a genetic clotting disorder, and that the child's lacerated liver could have occurred when the child fell off an ATV while riding with his father. *Id.*, at 65-66. These explanations were rejected by the ALJ as implausible, in light of the medical testimony that the injuries were "unquestionably" the result of child abuse. *Id.* at 67. Thus, the ALJ's finding that Mother failed to rebut the presumption of responsibility was affirmed.

In contrast, here the DHS investigator testified that Mother consistently stated throughout the investigation that she did not know how N.B.-A. had contracted chlamydia. N.T., 3/16/18 at 18-19. During the initial investigation, when pressed for an explanation, Mother speculated that perhaps N.B.-A. had contracted the infection from Mother during childbirth because someone that Mother knew had a child who contracted an infection in this manner. N.T., 3/16/18 at 18-19. While transmission from mother to child during birth is possible, it was ruled out in this case because N.B.-A.'s symptoms did not manifest until well after birth. N.T., 3/16/18 at 47-48.

At trial, Mother testified that she did not know how N.B.-A. contracted

chlamydia before taking her daughter to the hospital. N.T., 3/16/18 at 62. Mother testified that N.B.-A. never disclosed the abuse while living at home. N.T., 3/16/18 at 62. The DHS investigator testified that N.B.-A. was interviewed by hospital staff and DHS, and also completed a forensic interview with the Philadelphia Children's Alliance; in all three interviews, N.B.-A. denied abuse or inappropriate contact with any adult. N.T., 3/16/18 at 25-26, 30, 68-69.

However, in contrast to the parent in E.M., here Mother did not attempt to assert at trial that N.B.-A.'s infection was the result of childbirth or some mechanism other than sexual abuse. Rather, Mother testified that she was aware that N.B.-A. had disclosed the abuse months after being removed from home, and that Mother believed that N.B.-A.'s disclosure was truthful. N.T., 3/16/18 at 64.

Mother also explained her initial resistance to believing that her daughter had been the victim of sexual abuse. When Mother was not personally available to care for N.B.-A. due to work or other obligations, she made appropriate caregiving arrangements for N.B.-A. to be with her grandmother or great aunt. N.T., 3/16/18 at 63-64. Because Mother always made sure that N.B.-A. was in the care of someone she trusted, it was very difficult to accept that N.B.-A. was abused because "it was just hard...to believe that something could have happened to her because my mom was always with her and I was always with her." N.T., 3/16/18 at 65.

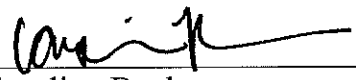
In this case, there was no factual conflict between Mother's testimony and that of the DHS investigator and Dr. McColgan. Although the trial court found Mother not to be a credible witness, the testimony presented by DHS fails to present any countervailing narrative. It was thus an abuse of discretion for the Superior Court to find that Mother failed to rebut the *prima facie* presumption that she was a perpetrator of child abuse.

VIII. Conclusion

WHEREFORE, for the reasons stated above, Petitioner-Mother respectfully requests that the trial court's finding that Mother is perpetrator of child abuse be VACATED.

Respectfully submitted,

Date: 6/6/19


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CHILDREN'S FAST TRACK APPEAL

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IN THE SUPREME COURT OF PENNSYLVANIA

In re: N.B.-A.

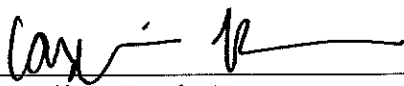
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No. 11 EAP 2019

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the foregoing brief contains 9,939 words, as calculated by Microsoft Word 2010 processing system. This word count does not include Supplementary matter. This Certificate demonstrates compliance with Rule 2135 of the Pennsylvania Rules of Appellate Procedure.

Date: 6/6/19


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CHILDREN'S FAST TRACK APPEAL

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IN THE SUPREME COURT OF PENNSYLVANIA

In the Interest of:	:	
	:	No. 11 EAP 2019
N.B.-A.	:	
_____	:	


CERTIFICATION OF SERVICE

Caroline Buck, Esq., counsel for Petitioner-E.A. in the above matter, hereby certifies that she served the foregoing Brief of Appellant, on this date, by first class mail and electronic service to the following persons:

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CHILDREN'S FAST TRACK APPEAL

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IN THE SUPREME COURT OF PENNSYLVANIA

In re: N.B.-A.

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:
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No. 11 EAP 2019

Addendum Table of Contents

- A. Order Granting Allocatur
- B. Superior Court Memorandum
- C. Trial Court Opinion

APPENDIX “A”

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

IN THE INTEREST OF: N.B.-A., A	:	No. 120 EAL 2019
MINOR	:	
	:	
	:	
PETITION OF: E.A., MOTHER	:	Petition for Allowance of Appeal from
	:	the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 6th day of May, 2019, the Petition for Allowance of Appeal is
GRANTED. The issues, as stated by petitioner, are:

- (1) Did the Superior Court err by affirming the trial court's finding that Mother was a perpetrator of child abuse in the absence of clear and convincing evidence that she intentionally, knowingly, or recklessly caused or created a likelihood of sexual abuse through a recent act or failure to act?
- (2) Did the Superior Court commit an error of law by applying 23 Pa.C.S. § 6381(d) to find that DHS established a prima facie case that Mother was responsible for the abuse perpetrated against N.B.-A. where another individual had been identified as the direct perpetrator?
- (3) Did the Superior Court commit an abuse of discretion by finding that Mother failed to rebut the prima facie presumption that she was a perpetrator of child abuse pursuant to 23 Pa.C.S. § 6381(d)?

APPENDIX “B”

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
FAMILY COURT DIVISION

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IN RE: N.B.A. : CP-51-DP-0002607-2016
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APPEAL OF: E.A, Mother : Superior Court
No. 893 EDA 2018

OPINION

Younge, J.

This Appeal arises from this Court's Order on March 16, 2018, Aggravated Circumstances and Child Abuse Hearing of N.B.A., and pursuant to the petition filed on behalf of the Department of Human Services ("DHS") by the City of Philadelphia Solicitor's Office. Caroline Buck, Esquire, filed a timely Appeal from the March 16, 2018 Order finding Aggravated Circumstances against Mother with no efforts are to be made to preserve the family and reunify N.B.A. with Mother. Caroline Buck, Esquire, on behalf of Evelin Abreu, Mother filed a Notice of Appeal and Statement of Matters Complained.

Factual and Procedural Background:

A summary of the relevant procedural history is set forth as follows:

On November 18, 2016, Department of Human Services received a Child Protective Service (CPS) report alleging that six-year-old N.B.A. was taken to the emergency room at the Children's Hospital of Philadelphia (CHOP) on November 17, 2016 by her Mother. Mother disclosed that N.B.A. had a vaginal discharge. Testing and the test results revealed that N.B.A. was suffering from Chlamydia. The report further alleged that unidentified individuals visit the family's home frequently and provide Mother with money for unknown reasons. The report alleged N.B.A. visits family members outside of the home for after-school care. The report alleged that three adult family members allegedly live in the home and Mother denied any males lived in the home. The report also alleged that Mr. Rondon-Munoz, an adult male household member, tested positive for Chlamydia and informed a physician that he was tested at DHS request. Mr. Munoz returned to the hospital for treatment. Mr. Munoz quickly left the hospital when he was told that he tested positive for Chlamydia. The report further alleged that Mother appeared completely unconcerned that N.B.A. was suffering from Chlamydia and asked where she could order a pizza. Mother had no explanation how N.B.A. contracted Chlamydia and denied that anyone had access to her. The report alleged Mother lied several times during interview at CHOP. DHS learned N.B.A.'s three adult uncles, resided with the family. N.B.A. was admitted to CHOP. This report is currently pending determination.

Furthermore, DHS learned that Mother's paramour and his two adult sons live in the home with the family, and that several other males may also live in the home.

On November 21, 2016, DHS visited the family. Mother, Maternal Aunt-in-law, N.B.A.'s Maternal Grandmother were present in the home. DHS explained the allegations of the child abuse report to Mother, who did not appear to be concerned, and who denied that anyone in the home had sexually abused N.B.A. When DHS asked why she reported conflicting information regarding who lived in the home, Mother stated that she was embarrassed and did not want anyone to know about the allegations. Mother denied that unknown men frequent the family's home and provide Mother money for unknown reasons. As a safety measure, DHS requested that all family members in direct contact with N.B.A. receive sexually transmitted infection (STI) test.

On November 22, 2016, DHS obtained an OPC for N.B.A. and placed her in an Asociacion de Puertorriquenos en Marcha (APM) foster home, where she currently remains.

On November 23, 2016, Mother learned the results of her STD test to DHS. Mother reported that she was diagnosed with Chlamydia. DHS is currently waiting for official copies of Mother's test results, along with test results for the other household members.

At the Shelter Care Hearing for N.B.A. was held on November 25, 2016, Juvenile Master Theodore Vigilante lifted the OPC, ordered that the temporary commitment to DHS stand, and issued a Stay-Away order against Mother as to N.B.A.'s school, Lewis Elkin Elementary School. Master Vigilante ordered that Mother's visits with N.B.A. be supervised line-of-sight, line-of-hearing visits at the agency.

On November 26, 2016, DHS received a supplement to the November 18, 2016 CPS report alleging that the Philadelphia Police Department Special Victims Unit (SVU) had not received a report about the possible sexual abuse of N.B.A. and that N.B.A. had been removed from the family's home and was placed in foster care.

N.B.A.'s father is believed to reside in the country of the Dominican Republic. Father's level of involvement in N.B.A.'s care is unknown to DHS.

The Appeal of Mother follows:

Issues:

1. Whether the Trial Court erred as a matter of law and abused its discretion when it made a finding of child abuse against Mother based on the evidence introduced to demonstrate that Mother recklessly, knowingly, or intelligently caused or failed to prevent the abuse perpetrated against N.B.A?
2. Whether Trial Court abused its discretion when it found Mother not to be a credible witness without placing any basis for this finding on the record?.
3. Whether Trial court erred as a matter of law and abused its discretion when it made a finding of Aggravated Circumstances on the basis of an indicated child protective services report, in

the absence of clear and convincing evidence that the child was a victim of "physical abuse as required under 42 Pa. C.S. § 6302.

4. Whether the Trial Court erred as a matter of law and abused its discretion when it allowed the DHS investigator to testify as to the hearsay statements of the medical staff at the Children's Hospital of Philadelphia over Mother's objection?
5. Whether the Trial Court erred as a matter of law and abused its discretion when it admitted into evidence the written summary of the child's forensic interview, for which no foundation had been laid, denying Mother her constitutional right to cross-examine any witnesses against her?
6. Whether Trial Court erred as matter of law and abused its discretion when it relieved the child welfare agency of its obligation to provide reasonable efforts towards reunification without conducting a searching inquiry as to Mother's progress towards reunification or the effect on the child of terminating reunification efforts?

Discussion:

Section 6301(b) of the Juvenile Act provides that the Act shall be interpreted and construed to effectuate the following purposes: "(1) To preserve the unity of the family whenever possible or to provide another alternative permanent family when the unity of the family cannot be maintained. (1.1) To provide for the care, protection, safety and wholesome mental and physical development of children coming within the provisions of this chapter."

To effectuate this purpose the Juvenile Act adopts the "permanency," reasonable efforts and aggravated circumstances mandates of federal law.

By law, children and youth agencies must provide a service if it is logically included in "reasonable efforts," a term that is not defined in either federal or state legislation. The phrase has been interpreted by the courts in Pennsylvania to require that county agencies provide or ensure the provision of services, which will preserve family unity whenever possible. See, e.g., *In the Interest of S.A.D.*, 555 A.2d 123 (Pa. Super. Ct. 1989) (Single mother voluntarily placed child in care of agency; court found that getting mother "hooked up" with community services, providing a bus pass and a motel room through the Salvation Army, not sufficient to comply with reasonable efforts requirements.); *In the Interest of James Fedler*, 573 A.2d 587 (Pa. Super. Ct. 1990) (Agency must not only provide preventative and reunification services, but can be required to provide services that are the province of other agencies). If the court finds that the agency provided appropriate services and the parent failed to take advantage of the services, the court will find that the agency met its duty to extend reasonable efforts to preserve the family. *In re Diaz*, 669 A.2d 372 (Pa. Super. Ct. 1995).

The Juvenile Act provides that, generally, courts must conduct permanency review hearings every six months after a child has been removed from the care of his or her parent, guardian or custodian 42 Pa.C.S.A. § 6351 (e)(3)(i)(A).

Section 6302 of the Juvenile Act provides § the legislative definition of "Aggravated Circumstances" as any of the following circumstances where:

(1) The child is in the custody of a county agency and either:

(i) The identity or whereabouts of the parents is unknown and cannot be ascertained and the parent does not claim the child within three months of the date the child was taken into custody; or

(ii) The identity or whereabouts of the parents is known and the parents have failed to maintain substantial and continuing contact with the child for a period of six months.

(2) The child or another child of the parent has been the victim of physical abuse resulting in serious bodily injury, sexual violence or aggravated physical neglect by the parent. 42 Pa.C.S.A. § 6302

The reasonable efforts language of the Adoption Assistance and Child Welfare Act of 1980 has been interpreted to require children and youth agencies to offer a full range of services to prevent children from being removed from their homes and placed into foster or other substitute care, or to enable the reunification of families after the children's removal. 42 U.S.C. § 671(a) (15).

Here, in the instant matter, the social worker testified N.B.A. was admitted to Children Hospital of Pennsylvania (CHOP) due to vaginal discharge. (N.T. 3/16/18, pg. 13) Sexual Transmitted Disease testing was performed on N.B.A. and the test revealed N.B.A. was positive for Chlamydia. (N.T. 3/16/18, pg. 13). Furthermore, the social worker testified Mother denied N.B.A. was exposed to anyone. (N.T. 3/16/18, pg. 16) Mother reported she knew Chlamydia was a disease transmitted through contact. (N.T. 3/16/18, pg.15) The social worker testified during the investigation Mother continued to report she was unaware of how N.B.A. contracted Chlamydia and was not concerned about the sexually transmitted disease the result of testing. (N.T. 3/16/18, pg. 18) Furthermore, social worker testified members of the household where N.B.A. resided were tested for Chlamydia. (N.T. 3/16/18, pgs. 19-20) N.B.A.'s mother and step-brother were positive for Chlamydia. (N.T. 3/16/18, pgs. 20-21) The social worker testified there were alarming concerns about Mother's abnormal behavior and lack of concern about the outcome of N.B.S.'s visit to CHOP. (N.T. 3/16/18, pg. 22)

Testimony of Dr. McColgan stated Chlamydia was transmitted from sexually from infected fluids to another person and could be contacted by sexual contact or the birth process. (N.T. 3/16/18, pg. 46) Dr. McColgan testified a child of N.B.A.'s age of six years and ten months would confirm the disease was not from the birth process. (N.T. 3/16/18, pg. 48) N.B.A. contracted Chlamydia by some sexual act or contact. (N.T. 3/16/18, pg. 48)

Dr. McColgan testified N.B.A. did not have any physical signs of injury on her examination, which is consistent with her diagnosis of Chlamydia and likely sexual abuse. (N.T. 3/16/18, pg. 50) Furthermore, Dr. McColgan the majority of children who have been victims of sexual abuse have normal exams for a variety of reasons. (N.T. 3/16/18, pg. 50) Dr. McColgan testified N.B.A. did have redness in her genital areas and any injury that may have been there when the most recent incident of abuse occurred could have healed in the time in between the last incident

and examination. (N.T. 3/16/18, pg. 51) Furthermore, Dr. McColgan testified a person could transmit an infection via fluids or contact without causing physical injuries such as tears or bleeding. (N.T. 3/16/18, pg. 51)

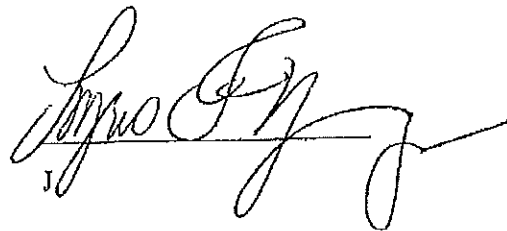
The Court found the testimony of the social worker credible. (N.T. 3/16/18, pg. 85) The Court found the testimony of Dr. McColgan to be credible. (N.T. 3/16/18, pg. 85) The Court found the medical testimony of Dr. Mc Colgan lead to the basis of the finding of Aggravated Circumstances and child abuse against Mother. (N.T. 3/16/18, pgs. 81, 85) The Court reasoned Mother lacked the protective capacities to be responsible for N.B.A. (N.T. 3/16/18, pg. 84) The Court reflected on Mother's discrepancies about household members at the hospital when N.B.A. was diagnosed and placing their interest over the well-being of N.B.A. (N.T. 3/16/18, pg. 83) The Court questioned Mother's credibility due to Mother's testimony and denial of the medial diagnosis which indicated N.B.A. had been subjected to a sexually transmitted disease. (N.T. 3/16/ 18, pg. 83) Mother testified she did not witness her step son sexually abuse N.B.A. (N.T. 3/16/18, pg. 67) Mother testified she would believe N.B.A. if she reported to Mother she was sexually abused. (N.T. 3/16/18, pg. 67).

Conclusion:

For the foregoing reasons, the Court found that the Department of Human Services sufficiently presented substantial, sufficient, credible, clear and convincing evidence for a finding of child abuse against Mother. The Court also found due to the allegations of child abuse of N.B.A. by Mother, Department of Human Services did not have to make reasonable efforts to reunify N.B.A. with Mother was not in the best interest of the child, based on the testimony regarding the child's safety, protection, mental, physical and moral welfare.

Accordingly, the Trial Court's Orders entered on March 16, 2018 in finding of child abuse against Mother and ordering that no reasonable efforts are to be made to preserve the family and reunify N.B.A. with her Mother should be properly affirmed.

By the Court:

A handwritten signature in black ink, appearing to be "L. J. [unclear]", written over a horizontal line.

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
FAMILY COURT DIVISION

IN RE: N.B.A.	:	CP-51-DP-0002607-2016
	:	
	:	
	:	
APPEAL OF: E.V., Mother	:	Superior Court No. 893 EDA 2018

PROOF OF SERVICE

I hereby certify that this court is serving, today, May 21, 2018, the foregoing Opinion, by regular mail, upon the following person(s):

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BY THE COURT

A handwritten signature in cursive script, likely belonging to a judge, written over a horizontal line.

APPENDIX “C”

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: N.B.-A, A	:	IN THE SUPERIOR COURT OF
MINOR	:	PENNSYLVANIA
	:	
	:	
APPEAL OF: E.A., MOTHER	:	
	:	
	:	
	:	
	:	No. 893 EDA 2018

Appeal from the Order entered on March 16, 2018
In the Court of Common Pleas of Philadelphia County Family Court at
No(s): CP-51-DP-0002607-2016,
FID: 51-FN-002489-2016

BEFORE: BOWES, J., STABILE, J., and McLAUGHLIN, J.

MEMORANDUM BY BOWES, J.:

FILED FEBRUARY 19, 2019

E.A. ("Mother") appeals from the juvenile court's order entered on March 16, 2018, that (1) deemed Mother a perpetrator of child abuse against her daughter, N.B.-A.; (2) determined that aggravated circumstances existed as to Mother; and (3) relieved Philadelphia Department of Human Services ("DHS") from employing reasonable efforts toward reunification.¹ We affirm in part and reverse in part.

¹ When the juvenile court entered the aggravated circumstances order that is the genesis of this appeal, it also entered a permanency review order that reiterated the court's finding that Mother perpetrated child abuse. Mother attached both orders to her notice of appeal and she conflates the two orders in the argument section of her brief. We address the merits of the aggravated circumstances order, which presented the three juvenile court rulings that Mother challenges on appeal. To the extent that we would also confront the merits of the permanency review order's superfluous finding that Mother committed child abuse, we would affirm it for reasons identical to those that we explain herein.

The record reveals the following pertinent facts and procedural history. N.B.-A. was born during February 2010. The child came to the attention of the Philadelphia Department of Human Services ("DHS") in November of 2016. At that time, N.B.-A. resided with Mother, Mother's husband ("Stepfather"), the husband's two adult sons, and the maternal grandmother. On November 17, 2016, Mother took N.B.-A. to Children's Hospital of Philadelphia ("CHOP") because N.B.-A. was experiencing vaginal discharge. CHOP treated and released N.B.-A. Further testing revealed that N.B.-A., then six-years-old, tested positive for chlamydia. During the ensuing investigation, Mother and one of the adult stepbrothers tested positive for the disease. Upon receiving the test results, the stepbrother immediately "ran out of the hospital" and fled to the Dominican Republic. N.T., 3/16/18, at 34. Stepfather's test was negative. However, prior to the evidentiary hearing, he followed his son to the Dominican Republic.

On November 18, 2016, DHS received a Child Protective Services report alleging that N.B.-A. was a victim of sexual abuse. Following DHS's investigation, the report was indicated as to both Mother and the stepbrother who tested positive for chlamydia, with Mother identified as a perpetrator by omission.² On November 22, 2016, DHS obtained an order of protective

² The Child Protective Services Law defines an indicated report, in pertinent part, as:

custody and N.B.-A. was placed in foster care. The juvenile court adjudicated N.B.-A. dependent on December 5, 2016.

The court conducted permanency review hearings in June 2017, September 2017, and December 2017. Subsequently, N.B.-A.'s guardian *ad litem* filed a motion for a finding of aggravated circumstances. On March 16, 2018, the court conducted a child abuse and aggravated circumstances hearing. At the hearing, DHS presented the testimony of Sharina Johnson, a DHS investigator, and Maria McColgan, M.D., who treated N.B.-A. and is board-certified in child abuse pediatrics. Mother testified on her own behalf. N.B.-A.'s guardian *ad litem* appeared on N.B.-A.'s behalf, although N.B.-A. was not present at the hearing. As it relates to the issues on appeal, during the hearing, DHS and N.B.-A.'s guardian *ad litem* requested findings of child abuse and aggravated circumstances as to Mother.

On March 16, 2018, the juvenile court entered an aggravated circumstances order that found that Mother committed child abuse, determined that aggravated circumstances existed against Mother, and

[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 services investigation.
- (iii) An admission of the acts of abuse by the perpetrator.

23 Pa.C.S. § 6303(a).

concluded that DHS no longer needed to make reasonable efforts to reunify N.B.-A. with Mother.

Mother timely filed a notice of appeal and a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b). The juvenile court filed its Rule 1925(a) opinion on May 21, 2018.

On appeal, Mother presents the following issues for our review:

1. Did the trial court abuse its discretion when it made a finding of child abuse against Mother when insufficient evidence was introduced to demonstrate that Mother intentionally, knowingly, or recklessly caused or created a likelihood of sexual abuse?
2. Did the trial court err as a matter of law and abuse its discretion when it made a finding of aggravated circumstances on the basis of an indicated child protective services report, in the absence of clear and convincing evidence that the child was a victim of "physical abuse resulting in serious bodily injury, sexual violence or aggravated physical neglect by the parent" as required under 42 Pa.C.S. § 6302?
3. Did the trial court err as a matter of law and abuse its discretion when it allowed the DHS investigator to testify to the hearsay statements of the medical staff at the Children's Hospital of Philadelphia over Mother's objection?
4. Did the trial court err as a matter of law and abuse its discretion when it admitted into evidence the written summary of the child's forensic interview, for which no foundation had been laid and which contained prejudicial hearsay statements, denying Mother her constitutional right to cross-examine any witnesses or evidence against her?
5. Did the trial court err as a matter of law and abuse its discretion when it relieved DHS of its obligation to provide reasonable efforts towards reunification without conducting a

searching inquiry as to Mother's progress towards reunification or the effect on the child of terminating reunification efforts?

Mother's brief at 3-4.³

Our standard of review for dependency cases is as follows:

[T]he standard of review in dependency cases requires an appellate court to accept the findings of fact and credibility determinations of the trial court if they are supported by the record, but does not require the appellate court to accept the lower court's inferences or conclusions of law. Accordingly, we review for an abuse of discretion.

In re R.J.T., 9 A.3d 1179, 1190 (Pa. 2010) (citations omitted); ***see also In the Interest of L.Z.***, 111 A.3d 1164, 1174 (Pa. 2015). "The trial court is free to believe all, part, or none of the evidence presented and is likewise free to make all credibility determinations and resolve conflicts in the evidence." ***In re M.G.***, 855 A.2d 68, 73-74 (Pa.Super. 2004) (citation omitted).

The Child Protective Services Law ("CPSL") defines child abuse, in pertinent part, as follows:

(b.1) Child abuse.--The term "child abuse" shall mean intentionally, knowingly or recklessly doing any of the following:

. . . .

(4) Causing sexual abuse or exploitation of a child through any act or failure to act.

³ The argument section of Mother's brief combines issues one, three, and four into her first argument. Further, DHS has filed a brief arguing in support of affirmance with respect to the juvenile court's finding that Mother committed child abuse, but DHS asserts that the juvenile court erred in concluding aggravated circumstances existed and that DHS need not make further efforts to reunify N.B.-A. with Mother. DHS's brief at 17-31. N.B.-A.'s guardian *ad litem* filed a letter joining the brief filed by DHS.

. . . .

(6) Creating a likelihood of sexual abuse or exploitation of a child through any recent act or failure to act.

23 Pa.C.S. § 6303(b.1) (4) and (6).

In defining intentionally, knowingly, and recklessly, the CPSL refers to the Crimes Code definitions, in relevant part:

(b) Kinds of culpability defined.--

(1) A person acts intentionally with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(2) A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(3) 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.

18 Pa.C.S. § 302.

In ***In the Interest of J.R.W.***, 631 A.2d 1019, 1024 (Pa.Super. 1993), we explained that, pursuant to the doctrine of incorporation, the Juvenile Act's definition of dependent child subsumed the definition of child abuse outlined in the CPSL.⁴ Thus, we stated the two laws "must be applied together in the resolution of child abuse complaints." ***Id.*** at 1023. We reasoned,

The Legislature intended a detailed and specific definition of abuse to leave no doubt as to the capacity of the trial court, which in this case can only be the Juvenile Court, to make a finding and determination that a child has been abused. In its capacity as a trial judge, the Juvenile Court judge will look and must look to the above definition of child abuse in a case referred by the child protective service agency to the Court under petition for review of dependency when child abuse has been alleged.

Id.

⁴ In this context, a dependent child is defined as one who:

is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals. A determination that there is a lack of proper parental care or control may be based upon evidence of conduct by the parent, guardian or other custodian that places the health, safety or welfare of the child at risk.

42 Pa.C.S. § 6302(1).

In addition to establishing the pertinent definition of child abuse, the court in ***In the Interest of J.R.W.*** also stressed that the juvenile court's determination of whether child abuse occurred must be supported by clear and convincing evidence. ***Id.***

[T]he clear and convincing evidence necessary to find dependency, has been imposed by the Legislature as the standard which the Juvenile Court must apply in deciding abuse cases. . . . There is no conflict, constitutional or otherwise, with the clear and convincing evidence standard imposed by the Act to establish child abuse.

Id.; ***see also In re L.Z.***, 111 A.3d 1164, 1174 (Pa. 2015).

Moreover, 23 Pa.C.S. § 6381 provides, in part:

(d) Prima facie evidence of abuse.--Evidence that a child has suffered child abuse of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the welfare of the child shall be prima facie evidence of child abuse by the parent or other person responsible for the welfare of the child.

Mother asserts the juvenile court erred in concluding that she committed child abuse as defined in the CPSL. Mother claims that DHS failed to present evidence that she intentionally, knowingly, or recklessly caused or created a likelihood of sexual abuse or exploitation. Mother's brief at 12. Mother also faults the juvenile court for admitting and relying on hearsay statements about her reaction to the abuse. ***Id.*** at 16. While Mother acknowledges that N.B.-A. was sexually abused,⁵ she contends that DHS failed to present evidence

⁵ "Here, Mother does not contest the trial court's finding that N.B.[-]A. was the victim of child abuse as defined pursuant to the CPSL." Mother's brief at 13.

that Mother was aware of any such risk, claiming “Mother had no reason to believe that any of her household members would harm N.B.-A.” **Id.** at 15-16. Further, Mother argues that § 6381 does not apply, because there is an identified perpetrator. These contentions are unpersuasive.

The evidence of record supports the juvenile court’s finding that Mother is a perpetrator of child abuse. At the hearing, DHS presented the testimony of Dr. Maria McColgan, a board certified doctor in child abuse pediatrics. N.T., 3/16/18, at 43-44. After CHOP discharged N.B.-A., Dr. McColgan treated N.B.-A. at St. Christopher’s Hospital. **Id.** at 55-56. Dr. McColgan testified that chlamydia is transmitted either by sexual contact or at birth. **Id.** at 46. When it is transmitted at birth, the infection resolves by the time the child is two or three at the latest. **Id.** at 48. Since N.B.-A. was nearly seven at the time of her diagnosis, Dr. McColgan was adamant that her infection did not arise from her birth. **Id.** Dr. McColgan concluded N.B.-A. was the victim of sexual abuse. **Id.** at 50, 55. Further, Dr. McColgan testified that the symptoms of chlamydia can include genital discharge, irritation, and pain. **Id.** at 47. Dr. McColgan also identified a risk of pelvic inflammatory disease, although she testified that pelvic inflammatory disease does not typically occur in younger children. **Id.** at 57.

DHS also presented the testimony of Sharina Johnson, an investigator in the DHS sex abuse department. **Id.** at 12. Ms. Johnson testified that she first spoke with Mother the day after N.B.-A. was removed from her home.

Id. at 13-14. Mother initially reported to Ms. Johnson that she spoke English and Ms. Johnson observed Mother speaking English fluently. **Id.** at 27. Accordingly, when Ms. Johnson asked Mother whether she needed an interpreter, Mother declined. **Id.** at 27-28.⁶

During the ensuing discussion, Mother appeared relaxed and indifferent to the results of the chlamydia testing. **Id.** at 15. Indeed, Ms. Johnson conducted the investigative interview while Mother was having her hair styled. **Id.** at 22. In this vein, Ms. Johnson recalled that Mother did not believe that N.B.-A.'s positive chlamydia test was a serious matter, and was not visibly upset by the diagnosis. **Id.** Over Mother's objection, Ms. Johnson testified that, as part of her investigation, she interviewed the medical providers at the emergency room, who similarly observed that Mother was relaxed during their conversations, seemingly more concerned about a good place from which to order pizza than her daughter's wellbeing.⁷ **Id.** at 23-24. Mother denied any

⁶ Mother requested an interpreter when interviewed by the police. N.T., 3/16/18, at 27.

⁷ Mother asserts that the juvenile court erred in admitting Ms. Johnson's testimony as well as information from a forensic interview. She contends that this evidence constitutes hearsay and lacked authentication. DHS responds that the testimony was unnecessary for DHS to meet its burden of proof and argues that its admission did not prejudice Mother. DHS brief at 25. While Mother objected to Ms. Johnson's testimony as hearsay, she did not object to DHS admitting a concomitant report that included the observation, "[M]other's affect was completely unconcerned, and she was wondering where she could order pizza." DHS Exhibit 1, at 7. Accordingly, the testimony that Mother challenges is cumulative of information admitted without objection in DHS

knowledge of how N.B.-A. contracted chlamydia, and believed that she might have contracted it at birth. *Id.* at 18-19.

Mother also informed Ms. Johnson that she had researched chlamydia and understood that it was transmitted through sexual contact. *Id.* at 16. Nonetheless, she protested that it was impossible for N.B.-A. to have been sexually abused in the household, and that it was simply a "big misunderstanding." *Id.* at 38-39. Mother explained that she and N.B.-A. slept in the same bed and that the maternal grandmother would either sleep in the same bed or on the couch. *Id.* at 33. When asked whether N.B.-A. were exposed to any other people in the home, she replied no. *Id.* at 16. However, Mother testified paradoxically that she and N.B.-A. resided with Mother's husband and two stepsons. *Id.* Mother indicated that both stepsons shared a bedroom in the home and that her husband slept in a shed behind the kitchen. *Id.* at 17-18. In addition to those potential contacts, Ms. Johnson subsequently received information that N.B.-A. might have been exposed to various people who visited the home to give Mother money for unexplained reasons. *Id.* at 30.

Mother testified that either she, N.B.-A.'s grandmother, or her great-aunt always cared for N.B.-A. *Id.* at 63-64. She denied that N.B.-A. disclosed

Exhibit 1. Therefore, any error in the admission of hearsay statements is harmless. *Schuenemann v. Dreemz, LLC*, 34 A.3d 94, 99 (Pa.Super. 2011) ("[Evidentiary] rulings must be shown to have been not only erroneous but also harmful to the complaining part[y].").

any abuse to her. **Id.** at 64. However, her testimony suggests that, at a subsequent point in the investigation, N.B.-A. leveled allegations of abuse against both Stepfather and the stepbrother who fled the country. **Id.** at 66-67. When questioned as to whether she believed her daughter's later allegations, Mother asserted, if "she says that that's what happened, that's what happened." **Id.** at 64. Nevertheless, despite these supportive sentiments, Mother failed to act on her daughter's allegations or attempted to protect her from abuse. She acknowledged that she did not tell the medical providers that Stepfather or his sons lived in the home. Her rationale for failing to immediately disclose this vital information was "[b]ecause, honestly, I didn't know what was going on and I didn't want to involve . . . anybody, like dad or [N.B.-A.'s] brother in something involved with the -- the child." **Id.** at 62. Even at this juncture, she persists that her failure to disclose the presence of Stepfather and his sons in the home was not an effort to protect them. **Id.** Mother testified that she is no longer married to Stepfather and that she has no relationship with either him or his sons. **Id.** at 62-63. She further denied that Stepfather ever provided care for N.B.-A. **Id.** at 64. As it relates to the peculiar visitors that would frequent the home, Mother explained that people came to her house to pay her money for lottery tickets that her uncle sold. **Id.** at 65.

Based on the foregoing testimony adduced at the hearing, we conclude that the juvenile court did not abuse its discretion in concluding that Mother

was a perpetrator of child abuse regardless of the fact that her stepson had been identified as the actual perpetrator of the sexual abuse. It is undisputed that N.B.-A. was assaulted sexually. Mother acknowledged that she was N.B.-A.'s primary caregiver, and denied that either Stepfather or his sons cared for N.B.-A. While Mother disclaimed any knowledge that N.B.-A. suffered sexual abuse, the juvenile court determined that she lacked credibility. Juvenile Court Opinion, 5/21/18, at 5. Indeed, Mother's own testimony establishes that when she first learned that six-year-old N.B.-A. contracted chlamydia, she passed it off as a birth-related malady and was untruthful about whether any males lived in her house. In sum, Mother was indifferent to the fact that her daughter contracted a sexually transmitted disease, and she chose to disregard the obvious indicia of abuse.

The totality of this evidence adduced by DHS supports the juvenile court's conclusion that Mother was a perpetrator of child abuse. In addition to the evidence that established that Mother's inattentiveness to her daughter around the adult stepbrother knowingly or recklessly created a likelihood of sexual abuse, the certified record demonstrates that N.B.-A. suffered child abuse of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of Mother. Hence, through the foregoing evidence of record, DHS established a *prima facie* case pursuant to 23 Pa.C.S. § 6381, that Mother was a perpetrator of child abuse, and Mother failed to

rebut that presumption of abuse. Accordingly, we do not disturb the juvenile court's finding of child abuse as perpetrated by Mother.⁸

Mother's second and third issues, which we consider together, present a challenge to the juvenile court's finding of aggravated circumstances, as well as the court's conclusion that DHS did not need to make further efforts to reunify N.B.-A. with Mother. The framework for the court's analysis is well settled. If the juvenile court determines that a child is dependent and aggravated circumstances have been alleged by either the county agency or by the child's attorney, the court must also determine whether, by clear and convincing evidence, aggravated circumstances exist. 42 Pa.C.S. § 6341(c.1).⁹

⁸ While the Juvenile Court did not specifically invoke § 6381(d), this Court can affirm the trial court on any basis supported by the certified record. ***See In re Adoption of Z.S.H.G.***, 34 A.3d 1283, 1288 (Pa.Super. 2011) ("we may affirm the orphans' court on any basis supported by the certified record").

⁹ Specifically, § 6341(c.1) provides:

Aggravated circumstances.--If the county agency or the child's attorney alleges the existence of aggravated circumstances and the court determines that the child is dependent, the court shall also determine if aggravated circumstances exist. If the court finds from clear and convincing evidence that aggravated circumstances exist, the court shall determine whether or not reasonable efforts to prevent or eliminate the need for removing the child from the home or to preserve and reunify the family shall be made or continue to be made and schedule a hearing as required in section 6351(e)(3) (relating to disposition of dependent child).

The Juvenile Act defines "aggravated circumstances," in relevant part, as follows.

"Aggravated circumstances." Any of the following circumstances:

. . . .

(2) The child or another child of the parent has been the victim of physical abuse resulting in serious bodily injury, sexual violence or aggravated physical neglect by the parent.

. . . .

42 Pa.C.S. § 6302. Serious bodily injury is "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ."

Id. Sexual violence is "[r]ape, indecent contact as defined in 18 Pa.C.S. § 3101 (relating to definitions), incest or using, causing, permitting, persuading or coercing the child to engage in a prohibited sexual act as defined in 18 Pa.C.S. § 6312(a)^[10] (relating to sexual abuse of children) or a simulation of a prohibited sexual act for the purpose of photographing, videotaping, depicting on computer or filming involving the child." **Id.** Aggravated physical neglect is "[a]ny omission in the care of a child which results in a life-threatening condition or seriously impairs the child's functioning." **Id.**

¹⁰ Effective September 14, 2009, the General Assembly deleted subparagraph (a) from the statute and transferred the definition of prohibited sexual act to 18 Pa.C.S. § 6312(g).

If the juvenile court determines that aggravated circumstances exist, it “shall determine whether or not reasonable efforts . . . to preserve and reunify the family shall be made or continue to be made[.]” 42 Pa.C.S. § 6341(c.1). A court may end reasonable efforts at its discretion. **See *In re L.V.***, 127 A.3d 831, 839 (Pa.Super. 2015) (citing ***In re A.H.***, 763 A.2d 873, 878 (Pa.Super. 2000)).

Our review of the certified record confirms that the juvenile court erred in concluding that DHS established aggravated circumstances as to Mother by clear and convincing evidence. In fact, DHS admits that it presented no evidence that Mother was an actual perpetrator of physical abuse or sexual violence, a view that the guardian *ad litem* endorses. Moreover, we observe that the juvenile court’s finding of Mother’s accountability for purposes of the CPSL is not tantamount to clear and convincing evidence that she actually committed sexual violence, which the Juvenile Act defines as tantamount to a criminal act, *i.e.*, “[r]ape, indecent contact . . ., incest or using, causing, permitting, persuading or coercing the child to engage in a prohibited sexual act[.]” 42 Pa.C.S. § 6302. The CPSL is preventative rather than criminal. **See *Interest of L.J.B.***, 2018 WL 6816576, *1, (OAJC) (stating non-criminal, protective purposes of CPSL, including statewide database identifying perpetrators of abuse).

Furthermore, although the sexual abuse that N.B.-A. endured was unquestionably traumatic, the evidence does not reveal that it caused serious

bodily injury. Indeed, neither Dr. McColgan, nor any other witness, testified that N.B.-A.'s functioning was seriously impaired. Likewise, while Dr. McColgan testified that N.B.-A. contracted chlamydia as a result of the sexual abuse, her testimony was insufficient to establish that the child suffered from a life-threatening physical condition as contemplated by the definition of "aggravated physical neglect." **See** 42 Pa.C.S. § 6302. As noted, the parties that originally petitioned for a finding of aggravated circumstances now concede that the certified record does not sustain the juvenile court's determination. Accordingly, for all of the foregoing reasons, we reverse the portion of the March 16, 2018 order finding that aggravated circumstances existed pursuant to § 6303.

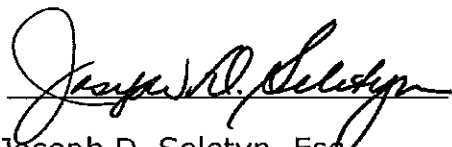
Finally, since the juvenile court grounded its concomitant determination under § 6341(c.1), that DHS should discontinue reasonable efforts toward reunifying N.B.-A. with Mother, on the unsound finding the aggravated circumstances existed, we also reverse that determination.

In sum, we sustain the juvenile court's findings of child abuse perpetrated by Mother, but we reverse the juvenile court's finding of aggravated circumstances and its attendant determination that no reasonable efforts should be extended by DHS in reunifying N.B.-A. with Mother.

Order affirmed in part and reversed in part. Jurisdiction relinquished.

J-A27008-18

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: 2/19/19