IN THE SUPERIOR COURT OF PENNSYLVANIA

In re: D.R. and A.R.

Appeal of K.R.

Nos. 01542EDA99 and 01543EDA99

BRIEF FOR AMICI CURIAE JUVENILE LAW CENTER AND WOMEN'S LAW PROJECT IN SUPPORT OF APPELLANT

Appeal from the May 13, 1999 Order of the
Court of Common Pleas of Philadelphia County,
D.P. Nos. 2049-99-01 and 2050-99-01
J. No. 276625

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INTEREST OF AMICI CURIAE

The Juvenile Law Center ("JLC") and Women's Law Project ("WLP") submit this Brief as Amici Curiae on behalf of Appellant K.R. Amici contend that the lower court erred in adjudicating the children of K.R. dependent and removing them from her care under §§ 6301, 6302 and 6351 of the Juvenile Act. The evidence regarding K.R.'s parenting skills was uncontroverted: the children were well cared for and attended to by their mother. Despite these findings, the lower court adjudicated K.R.'s children dependent and immediately removed them from her care based on evidence that K.R. had used cocaine. Because Pennsylvania's Juvenile Act expressly requires that there be clear and convincing evidence that a child is without proper parental care or control before that child is adjudicated dependent under 42 Pa. Cons. Stat. Ann. § 6302, Amici submit that the lower court erred in finding K.R.'s children dependent on the basis of a per se rule -- that a parent's drug use, in and of itself, renders a child dependent. The trial court's holding directly conflicts with the language of the Juvenile Act which establishes that the mere fact of drug or alcohol use, without further evidence that the children's health, safety or welfare has been placed at risk as a consequence of that drug or alcohol use, cannot be the basis of a dependency adjudication.

In adjudicating K.R.'s children dependent, the lower court risks setting a dangerous precedent establishing a per se rule regarding drug use which could well result in the removal of a child from his or her mother's home even when that child is quite well-parented -- well-fed, well-clothed, and well-loved. Federal and state law establishes that preserving family unity remains the primary goal of our child welfare system. The

lower court's decision in this case completely disregarded the Juvenile Act's commitment to family preservation, and unnecessarily separated two children from the mother who loved and cared for them.

JLC is a private, non-profit public interest law firm that has represented children since 1975 in cases involving Pennsylvania's child welfare, juvenile justice, mental health and public health systems. JLC has worked to ensure, inter alia, that children's constitutional and statutory rights are rigorously enforced throughout these systems. JLC's publications are used by attorneys, judges, and child welfare professionals across the Commonwealth. They include A Guide to Judicial Decisions Affecting Dependent Children: A Pennsylvania Judicial Deskbook (Third Edition); Child Abuse and the Law (Fifth Edition), and the Children's Rights Chronicle (a bi-monthly newsletter). JLC has participated as Amicus Curiae in the Pennsylvania and United States Supreme Courts, as well as this Court.

WLP is a non-profit women's legal advocacy organization based in Philadelphia. Founded in 1974, the Law Project works to advance the legal and economic status of women and their families through litigation, public policy development, education, and one-on-one counseling. The Law Project has represented amici curiae in a number of recent cases involving the improper application of state criminal child abuse and drug delivery statutes to pregnant women and new mothers who have given birth while suffering from an addiction to drugs. Together with the Center for Reproductive Law & Policy, the Law Project also represented amici curiae in Elaine W. v. Joint Diseases North General Hospital, 613 N.E.2d 523 (N.Y. 1993), invalidating a New York hospital's

refusal to provide pregnant women with drug treatment. In addition, the Law Project has published a resource manual listing substance abuse treatment programs in Philadelphia that will admit pregnant women and parenting women with children.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in the Brief for Appellant.

SUMMARY OF ARGUMENT

The lower court erred in adjudicating appellant K.R.'s two children dependent under the Pennsylvania Juvenile Act and in removing them from their mother's care. Although the lower court purportedly adjudicated K.R.'s children dependent on the ground that they were without proper parental care or control, the evidence before the court did not meet the "clear and convincing" standard required by the Juvenile Act before a child may be adjudicated dependent. Indeed, the only professional testimony presented characterized the children as well-fed, well-clothed, and generally well cared for. In the absence of any evidence critical of K.R.'s parenting of her children, the decision below cannot stand.

Moreover, to the extent the lower court relied on evidence presented that K.R. had recently tested positive for drug use, this evidence alone, without more, cannot support the adjudication here. This Court has consistently held that the Juvenile Act precludes per se rules as a basis for a finding of dependency. Rather, this Court has insisted that such a sensitive and serious inquiry requires that the facts of each case be fully presented and explored to ensure that the strict evidentiary standard required by the Act is met. "Shortcuts" relying on anything other than probative and competent evidence

demonstrating the present inability of the parent to properly care for her children have been uniformly, and repeatedly, rejected.

Additionally, while this Court has occasionally relied on prognostic evidence to uphold a finding of dependency, it has never relaxed the evidentiary standards under the Act. The new amendment to the Act allowing the court to consider evidence of drug or alcohol abuse in cases of alleged dependency, where such use presents a risk of harm to the children, does not alter this threshold requirement of clear and convincing evidence.

Finally, there was no evidence presented to the court below that met the "clear necessity" standard for removing a child from his or her mother's care following an adjudication of dependency. There was absolutely no evidence presented below that suggested that the health, safety or welfare of K.R.'s children would be at risk if they remained in her home under the continuing supervision of the Philadelphia Department of Human Services ("DHS"). To the contrary, the record proves the success of DHS supervision in this case.

ARGUMENT

I. INTRODUCTION

Amici submit this brief in support of Appellant, K.R., whose children were wrongfully adjudicated dependent and removed from her home by the lower court. Although the lower court purportedly acted pursuant to the Juvenile Act, 42 Pa. Cons. Stat. Ann. §§ 6301 et seq., in fact, both the adjudication and removal of K.R.'s children were contrary to the express requirements of that Act and prior holdings of this Court.

As set forth in Appellant's Statement of the Case, the lower court adjudicated

Appellant K.R.'s children dependent following a hearing on May 13, 1999, and immediately removed them from her care. Ignoring uncontroverted testimony that the children were well-parented and relying instead on evidence that K.R. had used cocaine, the trial court found that K.R.'s children were dependent because they lacked proper parental care or control and that there was a "clear necessity" that the children be removed from their mother's care.

In adjudicating K.R. dependent based solely on evidence of her drug use, the trial court applied a recent amendment to § 6302 of the Juvenile Act, 42 Pa. Cons. Stat. Ann. §§ 6301 et seq., which defines a dependent child and which now provides, in pertinent part, as follows:

> A "Dependent Child" is without proper parental 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 . . . that places the health, safety or welfare of the child at risk, including evidence of the parent's . . . use of alcohol or a controlled substance that places the health, safety or welfare of the child at risk.

42 Pa. Cons. Stat. Ann. § 6302 (emphasis added).

This amendment to the "Definitions" section of the Juvenile Act was adopted by the General Assembly in the course of amending the Act to conform to the requirements of the federal Adoption and Safe Families Act of 1997 ("ASFA"). Public Law 105-89. ASFA required that, in order to continue to remain eligible for federal matching funds, states' child welfare programs must conform to certain new federal requirements. In amending the Juvenile Act to comply with ASFA, the Pennsylvania General Assembly also used the occasion to add the above highlighted language regarding alcohol or drug

use to the definitions of "dependent child" under the Act -- an amendment that was not required by ASFA.

This appeal thus raises the question of whether the added language regarding substance abuse alters in any way this Court's well-established framework for adjudicating allegations of dependency under the Act. As demonstrated below, Amici submit that it does not. The statutory language is clear: evidence of a parent's drug and alcohol use may be considered by the court in determining whether a child is dependent only to the extent that such drug or alcohol use places the health, safety or welfare of the child at risk. Thus, while evidence of a parent's drug or alcohol use is relevant in a dependency proceeding to the extent that the parent's substance abuse affects his or her ability to parent the child appropriately, the mere fact that a parent is using or has used drugs or alcohol is not dispositive in a dependency adjudication. The amended language does not establish a per se rule of dependency, but rather plainly requires that a parent's drug or alcohol use be considered relevant evidence in a dependency proceeding only if it "places the health, safety or welfare of the child at risk."[1] See also 42 Pa. Cons. Stat. Ann. § 6351(f.1) (providing that, in disposition or permanency hearings, evidence of the

[1] This construction of the new provisions is consistent with this Court's treatment of evidence of a parent's drug or alcohol use in similar prior cases. In Grimes v. Yack, 289 Pa. Super. 495, 433 A.2d 1363 (1981), for example, this Court, in recounting the history of a dependency case, revealed the following: "At the conclusion of the dependency hearing, we found it was necessary to get an evaluation regarding the natural father's use of alcohol. . . .The contents of the report must remain confidential, but we may disclose that there was no indication that the father's alcohol use presented a threat to the child's safety." Id. at 508, 433 A.2d at 1370 (emphasis added). Based in part on that evaluation, the lower court in the case had terminated the dependency adjudication and returned the child to her natural parents; this Court upheld that decision. Thus, this Court has previously recognized that drug and alcohol use is relevant only to the extent it "present[s] a threat to the child's safety."

use of alcohol or controlled substances be presented to the court when such use "places the health, safety or welfare of the child at risk").

Accordingly, the recent amendments to the definition of "dependency" in the Act did not alter the burden of proof requirements under the Act. An adjudication of dependency – on any ground – must be based on clear and convincing evidence. 42 Pa. Cons. Stat. Ann. § 6341(c); In Interest of Pernishek, 268 Pa. Super. 447, 408 A.2d 872 (1979). Furthermore, after a finding of dependency based on clear and convincing evidence, a child still may not be removed from his or her parents' home unless that separation is "clearly necessary." In Interest of Rhine, 310 Pa. Super. 275, 456 A.2d 608 (1983). As set forth below, the trial court in this case failed to comply with these well-established evidentiary standards.

II. THE LOWER COURT ERRED IN ADJUDICATING K.R.'S CHILDREN DEPENDENT BASED SOLELY ON ITS FINDING THAT K.R. HAS RECENTLY USED AN ILLEGAL DRUG.

A. The Uncontroverted Evidence Before the Trial Court Established That K.R.'s Children Were Well-Fed, Well-Clothed, and Well-Cared for by Their Mother.

It is well settled that a court may only adjudicate a child dependent if it concludes by clear and convincing evidence that proper parental care is not immediately available. In re Frank W.D., 315 Pa. Super. 510, 516, 462 A.2d 708, 711 (1983). Clear and convincing evidence is "testimony that is so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." In re Jackson, 267 Pa. Super. 428, 431, 406 A.2d 1116, 1118 (1978) (citing LaRocca Trust, 411 Pa. 633, 640, 192 A.2d 409, 413 (1963)).

The heavy burden of proof imposed on the state in seeking to have a child adjudicated dependent is in keeping with the primary purpose of the Juvenile Act, which is "[t]o preserve the unity of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this act." 42 Pa. Cons. Stat. Ann. § 6301(1). This Court has consistently recognized that the courts must maintain a balance between preserving and promoting family integrity, while also protecting the health and safety of innocent children. See, In the Interest of S.A.D., 382 Pa. Super. 166, 555 A.2d 123 (1989); In re S.M., 418 Pa. Super. 359, 614 A.2d 312 (1992). The requirement that proof of dependency be "clear and convincing" is an effort to maintain this balance: "For the courts to sanction a serious intrusion such as state interference with the parent-child relationship, a strict burden of proof must be sustained by those that would seek to take the child from its parents. That the evidence be 'clear and convincing' is mandated by statute." In the Interest of Black, 417 A.2d 1178, 1182 (1980).

According to this Court, "[w]hether a child is lacking proper parental care and control encompasses two discrete questions: (1) Is the child at this moment without proper parental care or control? and (2) If so, is such care and control immediately available?" In the Matter of C.R.S., 696 A.2d 840, 842 (1997) (citing In Re Jeffrey S., 427 Pa. Super. 79, 628 A.2d 439, 440 (1993)). This Court has defined "proper parental care" as "that care which (1) is geared to the particularized needs of the child and (2) at a minimum, is likely to prevent serious injury to the child." Id. at 845 (citing Interest of Justin S., 375 Pa. Super. 88, 543 A.2d 1192, 1200 (1988)). In focusing on whether a

child is receiving proper parental care and control, a court must evaluate "the behavior of the parent vis a vis the child . . . [and] the quality of care the child is receiving from the parent(s)." In re L.J., 456 Pa. Super. 685, 695, 691 A.2d 520, 525 (1997).

Viewed against this backdrop, it is clear that the lower court erred in adjudicating K.R.'s children dependent and removing them from her care. As the record reflects, there was no evidence presented to the trial court that K.R.'s children were anything but well-cared for, well-fed, and well-clothed by their mother. The uncontroverted evidence before the lower court was that K.R. had always taken good care of her children, insuring that they were well-fed, well-clothed, and well-loved. At the adjudicatory hearing, the petitioner, Philadelphia Department of Human Services ("DHS"), introduced no evidence that K.R. had ever abused or neglected her children in any way. To the contrary, the DHS social worker testified that every time she had observed K.R. and her children at their home, 'the children are always well fed and well cared for." (N.T. p. 25). In addition, the social worker testified that she had never "seen signs of neglect" in K.R.'s home, nor had she ever "seen signs of abuse" in K.R.'s home. (N.T. p. 25). The social worker also revealed that she had "seen the mother show signs of love with these children" and that "there are bonds in both direction, the children and the mother." (N.T. p. 27). Finally, the social worker admitted that K.R. appropriately supervised her children when they played, and that she had "normal contact" with her children. (N.T. p. 28). The record is otherwise barren of any competent evidence contradicting or even qualifying the social worker's

observations.[2] The social worker's testimony readily established that K.R. provided appropriate parental care and control for her children. The State thus failed to prove, by clear and convincing evidence, that K.R.'s care was not "geared to the particularized needs of her children" and that K.R.'s care was "not likely to prevent serious injury to her children." See C.R.S., 696 A.2d at 845.

Where there is no evidence that a parent has abused or neglected her child, nor deprived her child of proper care, this Court has repeatedly held that it is error to adjudicate that child dependent. See, S.A.D., 382 Pa. Super. 166, 555 A.2d 123; In the Interest of Hall, 703 A.2d 717 (Pa. Super. 1997). Similarly, this Court has reversed a dependency adjudication where the juvenile court failed to make a "comprehensive inquiry" as to "whether proper parental care was immediately available or what sort of care [the child] would receive in the future if returned to appellant." In re Swope, 391 Pa. Super. 484, 490, 571 A.2d 470, 473 (1990); see also In the Interest of H.B., 293 Pa. Super. 109, 115, 437 A.2d 1229, 1232-33 (1981) (Refusing to adjudicate a child dependent despite the fact that "the evidence . . . does strongly suggest that appellant had neglected her daughter's physical and emotional well-being to some extent," because "[t]he present record . . . does not clearly establish that proper parental care or control was not immediately available.").

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[2] It is unclear whether the trial court relied at all upon the confused and contradictory hearsay testimony regarding abandonment. To the extent that the court did consider this testimony, it plainly erred, as this testimony was inadmissible for the truth of the matter asserted and falls far short of the "clear and convincing" standard required by the Juvenile Act. See Br. Appellant at Part II (D)(2).

In H.B., this Court reversed a dependency adjudication because the state failed to present sufficient evidence of the mother's parenting abilities:

> There was precious little evidence directly addressing appellant's abilities and shortcomings as a parent. The record contains the subjective impressions of nurses who saw appellant with her daughter briefly during hospital visits, as well as those of the foster mother and the caseworker. Absent, however, is any professional evaluation of appellant's parenting abilities and the child's prospects with appellant.

Id. at 115, 437 A.2d at 1233. Here, the record is replete with testimony from professionals consistently affirming K.R.'s successful performance as a parent. Instead of relying on this evidence of her actual performance, however, the trial court speculated about the possible long-term effects that "constant" or "daily" use of cocaine "at high levels" could hypothetically have.[3] Despite the fact that the judge, himself, repeatedly recognized that expert testimony would be helpful in clarifying whether and to what extent K.R.'s drug use would affect her ability to parent her children, the court did not seek out the assistance of an expert. By failing to do so while acknowledging that expert testimony was needed, the court failed to follow this Court's recommended practice for a dependency hearing.[4] As this Court

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[3] The judge asked: "The effects of having high levels of cocaine in your system. I'm just wondering if it would be helpful to have an expert testify as to high levels of cocaine in your system. Is there a point where you can operate in a normal fashion, so to speak, or close to normal, and then after a while the constant subjecting your body to a daily . . . high cocaine usage is there a point where you just snap?" (N.T. pp. 30-31.) The judge also opined, "[M]aybe an expert could testify whether or not if you are using cocaine every day, you have high levels, what effect cumulatively this has on your body and your mind. And can you just keep doing forever without there being some type of bad effect on you?" (N.T. p. 30.) The record does not support the inference that K.R.'s drug use followed the pattern of use here presumed by the trial court. See Br. Appellant at Part II (D)(1).

[4] Among the questions such an expert could have addressed is whether a person can parent successfully while using cocaine. In fact, recent research indicates that many can. See discussion infra at 16-19.

has noted, "as a point of practice, we note that when the hearing judge believes the evidence offered at a dependency hearing to be incomplete, he not only may but should receive, and if necessary should seek out, evidence from objective, disinterested witnesses." In re Jackson, 267 Pa. Super. 428, 432, 406 A.2d 1116, 1118 (1979).

As in Swope and H.B, the lower court could not have found clear and convincing evidence of K.R.'s inability to provide proper parental care and control for her children. Thus, the lower court's dependency adjudication must be reversed.

B. The Lower Court Effectively Created a Per Se Rule of Dependency Based on a Finding of Drug Use Alone, Contrary to the Express Language of the Juvenile Act and This Court's Established Precedent.

The lower court's ruling that evidence of a parent's drug use alone, without more, supported an adjudication of dependency, establishes a per se rule that runs counter to both the express language of the Juvenile Act and this Court's established precedent. The sole fact that K.R. had recently tested positive for a controlled substance, in the absence of any expert or professional testimony reflecting negatively on K.R.'s parenting abilities, cannot constitute clear and convincing evidence that K.R.'s children were without proper parental care and control. See In re S.A.D.; In the Interest of T.M., 456 Pa. Super. 140, 689 A.2d 954 (1996).

In determining whether there is clear and convincing evidence that a child lacks proper parental care or control, this Court has consistently and repeatedly refused to apply any kind of per se rule. Instead, this Court has insisted that a dependency determination is a fact sensitive inquiry -- that the facts of each case must be fully presented and explored to

determine if there is clear and convincing evidence that a particular child is without proper parental care or control.

Thus, for example, in In the Interest of R.T., 405 Pa. Super. 156, 592 A.2d 55 (1991), this Court reversed an adjudication of dependency where the only evidence of "dependency" was the fact that the child was an abused child within the meaning of the Child Protective Services Law, 11 P.S. § 2201 et seq. (recodified at 23 Pa. Cons. Stat. §§ 6301 et seq.) This Court held that a finding of abuse is "not determinative in adjudicating a child dependent." Id. at 165, 592 A.2d at 59. Rather, the juvenile court "must make a further determination by clear and convincing evidence that the abused child is presently without proper care and control necessary for physical, mental, or emotional health or morals." Id.

Similar examples of this Court's refusal to sustain adjudications of dependency in the absence of probative and competent evidence critical of the parent's parenting abilities abound; shortcuts to avoid the rigorous evidentiary burden have been uniformly rejected. In Interest of R.T. this Court declared: "A child should not be found dependent simply because his siblings are." Id. at 168, 592 A.2d at 61. In In the Interest of Palmer, 404 Pa. Super. 314, 590 A.2d 798 (1991), this Court reversed an adjudication of dependency in which a one-year-old child was adjudged dependent after the suspicious death of his older half-sister. The infant's father was arrested for homicide in the death, and the infant was adjudicated dependent and transferred to the custody of his maternal grandmother before being returned conditionally to his mother. In reversing the adjudication of dependency, this Court noted that most of the evidence at trial concerned the death of the older girl: "There was no testimony concerning appellant's parenting ability," there was no evidence that the infant was

abused or neglected, and it was undisputed that the infant's mother could care for him. Id. at 319, 590 A.2d at 800.

In Interest of T.M., 456 Pa. Super. 140, 689 A.2d 954, this Court rejected another proposed "shortcut," refusing to adopt a prima facie test for dependency based on the parents' failure to comply with a court order. In T.M., the State had argued that the parent's failure to abide by all the requirements of a previous court order was prima facie clear and convincing evidence that the child lacked proper parental care and control under the Juvenile Act, justifying an adjudication of dependency. In rejecting the State's argument, this Court wrote:

> We will continue to require [the state] to show, by clear and convincing evidence that the child falls within the Act's definition of a dependent child. We adopt this position in recognition of the seriousness of the nature of these proceedings and the potential harm that could result from adjudicating the merits of a dependency petition without a proper evidentiary foundation.

Id. at 144, 689 A.2d at 956. Similar to the record here, the record in T.M. revealed that "there had never been any medical evidence of physical abuse on the child." Id. at 146, 689 A.2d at 957. Furthermore, a nurse who had visited the home of T.M. testified that the child was "always clean. She appeared to be well fed. She was always well attended to. Whenever we came in the baby was within sight. She always had a clean diaper." Id. at 147, 689 A.2d at 957. Based on the testimony that there was no evidence that the parent was abusive or neglectful toward the child, and that the child was well cared for and well attended to, this Court reversed the lower court's adjudication of dependency. See also Interest of Hall, 703 A.2d 717 (refusing to apply a per se rule of adjudication in a case where a child who was

herself a dependent child gave birth to a child while she was in foster care).

The above cases make clear that dependency adjudications under the Juvenile Act must meet the exacting evidentiary standards adopted by the General Assembly and consistently applied by this Court -- or fail. The record in the instant case comes no closer to meeting this evidentiary standard than the cases cited above. Indeed, the only competent evidence of K.R.s' parenting ability was unambiguously positive. As such, the lower court broke with established court precedent when it applied a per se rule to the dependency adjudication and held that K.R.'s children were dependent based solely on the evidence of her use of a controlled substance.

C. The Lower Court Erred in Adjudicating K.R.'s Children Dependent on the Theory That K.R.'s Drug Use Constituted an "Imminent Risk" ThatThreatened the Health, Safety and Welfare of the Children.

In adjudicating K.R.'s children dependent, the lower court suggested that it did so in part because it feared that the children were at risk of harm if they remained in their mother's care.[5] Though it is well established that the Juvenile Court need not wait until children are actually harmed before declaring them dependent and, if necessary, removing them from their parents' home, the facts of this case do not meet the established standards for adjudicating a child dependent based on prognostic evidence.

In In the Matter of DeSavage, 241 Pa. Super 174, 175, 360 A.2d 237, 238 (1976), this Court addressed the question of whether the Juvenile Act "permits the juvenile court to declare a newborn infant 'deprived' within the meaning of 11 P.S. § 50-102(4) (recodified

[5] The judge below stated: "[T]o just keep engaging in the use of cocaine in high levels, indicates to me, is reckless conduct, which is like a time bomb waiting to go off. And I'm not going to subject the children to that risk." (N.T. p. 42.)

as a dependent child, 42 Pa. Cons. Stat. § 6302), when the child has never been in the custody of its natural parents, and the parents have never voluntarily relinquished custody of their child or evidenced an intent to do so?"

Significantly, while holding that a dependency adjudication could be premised on prognostic evidence provided that it meets the "clear and convincing" standard, this Court reversed the adjudication in DeSavage because it found that the lower court had wrongly applied a "best interest" standard in adjudicating the child dependent. Reviewing the record, this Court found the evidence otherwise insufficient to prove that the child was without proper parental care simply because his parents were young and immature, and that there was no imminent risk that the child would be abused or neglected if returned to his parents' care:

> Even without the responsibilities of raising a child, [the parents] would face certain difficulties simply because they are immature and unsophisticated. To be sure, it is conceivable that their other burdens may result in some deficiencies of care. It is, at this point, however, conjectural to state that the possibility of such neglect is so great as to render the child presently deprived.

Id. at 188, 360 A.2d at 243.

DeSavage established that the imminent risk of neglect or abuse to a child must be significant before the courts will sustain a dependency adjudication based on prognostic evidence. Accord In the Interest of Black, 273 Pa. Super. 536, 417 A.2d 1178 (1980) (affirming dependency adjudication on prognostic evidence, finding that suspicious deaths of two siblings was sufficiently clear and convincing). In Black, the evidence established that the parent's other two children had both died at very young ages as the result of their parents' improper care. In addition, there was evidence presented to the trial court which

revealed that the parents' current living conditions were grossly inadequate for a child. This Court upheld the dependency adjudication on the grounds that "these parents have not been able to maintain a 'minimum standard of care' in the past, and there has not been any evidence to show that their performance would improve in the future." Id. at 547, 417 A.2d at 1184.

Where there is no evidence of any such imminent risk, however, and where, in fact, the evidence establishes that a child is being well-cared for, this Court has refused to adjudicate that child dependent. For example, in Interest of T.M., this Court rejected the state's argument that a child was in imminent risk of serious harm based on evidence that the child's mother was seen "shaking and distracted," that she requested help from the agency because "she was afraid that if she picked up the crying infant she would drop her," and that on one occasion, the mother had inadvertently hit her child on the cheek. 456 Pa. Super. at 145-46, 689 A.2d at 956. This Court refused to find that the child was dependent based on alleged "imminent risk" because the evidence established that the child had never been physically abused or neglected by her parents. Id. at 147, 689 A.2d at 957.

Though the lower court here speculated that the children could be at risk of serious physical injury in the future as a result of K.R.'s continued drug use, the evidence presented to the court below does not meet the standard set forth in Black and DeSavage. In fact, the testimony given by the social worker established that K.R.'s home was clean and appropriate for her children, and that the children are well-parented. This testimony is consistent with the findings of a significant body of medical, sociological and psychological research revealing that many substance-abusing women can and do maintain adequate parenting skills.

This research, while not conclusive, seriously undermines the findings of earlier studies that often relied on stereotypes and inadequate research methods as the basis for declaring drug-using mothers to be inherently unfit parents.[6]

Numerous studies have found no difference in childrearing practices between addicted and non-addicted mothers, and no correlation between drug use and parent-child interaction. See Susan C. Boyd, Mothers and Illicit Drugs: Transcending the Myths 14-16 (1999) (citing Sowder and Burt's 1980 study and Leeders's 1992 study, and listing at least twelve studies demonstrating that women who use illicit drugs can be adequate parents) (hereinafter "Boyd"). Avril Taylor spent fifteen months studying a group of over fifty female heroin users. She concluded that "[o]ne of the strongest images of female drug users is that they are, by definition, unfit mothers. Again, the evidence from the present study shows this to be inaccurate. Most of the mothers in this study looked after and cared for their children perfectly adequately." Avril Taylor, Women Drug Users: An Ethnography of a Female Injecting Community 151 (1993).

Taylor's findings are supported by a study conducted a year later involving 68 mothers using cocaine. M. Kearney et al., Mothering on Crack Cocaine: A Grounded

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[6] Although there are a number of earlier studies concluding that drug use is per se evidence of inadequate parenting, more recent studies have revealed the shortcomings of the earlier research. In general, this earlier research has been "biased by an overrepresentation of families suffering from social and economic deprivation and of minority groups. Other flaws in the research include lack of empirical data, and failure to define abuse, alcoholism and drug use." Susan C. Boyd, Mothers and Illicit Drugs: Transcending the Myths 14 (1999). Boyd notes that some researchers' studies of the effects of cocaine on parenting were conducted not with women but with laboratory rats, and points out that "animals isolated in clinical settings differ from those that are socially housed. Research on animals given specific drugs in a clinical setting may not be applicable to humans in their natural environment." Id. at 10-11.

Theory Analysis, 38 Social Science and Medicine 351, 355 (1994). Kearney observed that all the subjects used what she labeled "defensive compensation" to protect their children from the negative effects of their drug use. These mothers were very concerned with giving their children a better, healthier life and thus were constantly careful not to use drugs around their children; to separate household money from drug money and make sure the children's needs were met first; to isolate themselves from friends or family who encouraged their drug use; and, when necessary, to place their children with other caretakers.

An earlier study compared the mothering attitudes and experiences of 170 women in treatment for heroin addiction with those of 175 non-addicted women. This interview-based study also revealed "little difference between addicted mothers and their non-addicted counterparts" in their perceptions of mothering. See M. Colten, Attitudes, Experience and Self-Perceptions of Heroin Addicted Mothers, 38 J. Soc. Issues 77. Colten specifically looked at how the mothers spent time with their children, how they viewed their children's behavior and how they disciplined their children. Notably, she discovered that "[w]hile 74% of non-addicted mothers report spanking or whipping as a form of punishment, only 48.6% of addicted mothers say they use that technique." Id. at 84.

Taylor, Kearney, and Colton all found that a large percentage of drug-using mothers are adequate parents who actively strive to protect their children from any negative effects of their drug use. This more complete understanding of drug-using mothers is found over and over in other studies. See M. Jackson & G. Berry, Mothering and Drug Dependency: The Attributes of Full-time Versus Part-time Responsibility for Child Care, International J. Addictions, 29(12), 1519-1535 (1994) (concluding that drug

using mothers actually perform better when they have full-time responsibility for their children and that increased contact enhances good maternal behavior) (hereinafter "Jackson"); N. Lief, The Drug User As a Parent, International J. Addictions, 20(1), 63, 76 (1985) (finding that addicted mothers who are given specific instruction in baby care often do as well, and sometimes better, than non-addicted mothers); V. Bernstein et al., A Longitudinal Study of Offspring Born to Methadone-Maintained Women, American J. Drug & Alcohol Abuse, 10(2), 161-93 (1984) (finding drug use alone is not the critical factor related to poor mother-child communications, but is one of several other risk factors unrelated to drug use); Enrique M. Ostrea, Jr., The Care of the Drug Dependent Pregnant Woman and Her Infant, 74-75 (1978) (study indicating that the growth and psychomotor developments of infants were not significantly different between children cared for by drug using mothers, those cared for exclusively by relatives and those in foster homes). In light of this research, the presumption that all mothers who use controlled substances are unable to parent their children is unfounded.

The "imminent risk" cases previously decided by this Court establish that there must be real and direct evidence which establishes that a child is at risk of serious injury or neglect before the court can adjudicate that child dependent based on prognostic evidence. As there was no such evidence in this case, the lower court erred in adjudicating K.R.'s children dependent on the grounds that they were in imminent risk of serious harm.

III. THE LOWER COURT ERRED IN FINDING "CLEAR NECESSITY" THAT THE CHILDREN BE REMOVED FROM THEIR MOTHER'S HOME.

After a finding of dependency, the trial court must enter an order of disposition under

Section 6351 of the Juvenile Act. Even a child adjudicated dependent may not be removed from the parental home unless such separation is clearly necessary, and unless alternative services that would enable the child to remain at home are not feasible. Interest of Rhine, 310 Pa. Super. 275, 456 A.2d 608. "The law is clear that a child should be removed from their parent's custody and placed in the custody of a state agency only upon a showing that removal is clearly necessary for the child's well-being. In addition, this court has held that clear necessity for removal is not shown until the hearing court determines that alternative services that would enable the child to remain with her family are unfeasible." Interest of H.B., 293 Pa. Super. at 116, 437 A.2d at 1233.

This Court has explained that such strict criteria are needed prior to removing a dependent child from his or her home: "[A] decision to remove a child from his or her parents' custody must be reconciled with the 'paramount purpose' of preserving family unity." In re S.M., 418 Pa. Super. 359, 365, 614 A.2d 312, 315 (1992). Thus, the clear necessity standard sets a "heavy burden" on the state before "removing children from their natural parents." In the Interest of Feidler, 573 A.2d 587, 591 (1990). As this Court has recognized:

> The family is an institution which preceded governments. Its sanctity was universally recognized before judges or statutes or constitutions or welfare organizations were known to man. The right of a child to a mother and a mother to a child are rights created by natural law. They are rights attributable to the nature of mankind rather than enactments of law. It is a serious matter for the long arm of the state to reach into a home and snatch a child from its mother. It is a power which a government dedicated to freedom for the individual should exercise with extreme care, and only where the evidence clearly establishes its necessity.

In the Interest of A.E., 722 A.2d 213, 216 (Pa. Super. 1998) (citing In Re Rinker, 180 Pa. Super. 143, 117 A.2d 780, 783 (1955)).

If a parent cannot meet the basic needs of her child, even with the help of state-sponsored services, this Court has found that removal of the dependent child from the home is "clearly necessary." For example, in In re Miller, this Court upheld the dependency adjudication and the lower court's decision to remove the children from the home where the parents failed to provide their infant daughter basic care, and where "[t]he parents' demonstrated lack of parenting skills, including prolonged inability to properly feed and safely supervise the child, has made it essential that custody of [the child] remain in CYS." 380 Pa. Super. 423, 429-30, 552 A.2d 261, 264 (1988); see also In re S.M., 418 Pa. Super 359, 614 A.2d 312 (upholding child's removal from home because "parents were incapable of providing him with proper parental guidance, support, and discipline.").

This Court has also upheld placement of a child outside the home when parents were unable to meet the special physical, social or emotional needs of their child. In Interest of Pernishek, 268 Pa. Super. 447, 408 A.2d 872, the trial court placed a child who was diagnosed as a psychosocial dwarf, where the evidence at trial established that the growth deficiency was an adverse reaction to the home environment. There was no evidence presented at trial which established that the parents, by themselves, or with medical and psychiatric intervention, could care for the child in their home in such a way that catch-up-growth would be likely.

Similarly, where the evidence has shown that a dependent child was at risk of physical or sexual abuse if he remained in his parent's home, this Court has upheld the

child's removal as "clearly necessary." In In re A.M. and P.M. Minors, 365 Pa. Super. 516, 527, 530 A.2d 430, 436 (1987), this Court upheld the removal of dependent children from their parents where there was substantiated sexual abuse and there was a risk that the children would be subject to further abuse by the parents if they remained in the home. This Court emphasized the Juvenile Act's primary goal of preserving the family whenever possible, but noted that in this case it was impossible to supervise or rehabilitate the parents because of their constant moves to different jurisdictions and their continued abuse of the children.

The threshold requirements established by this Court for a finding of "clear necessity" before removing a dependent child from his or her parent's care have not been met in this case. There was absolutely no evidence presented below that suggested that the health, safety or welfare of K.R.'s children would be at risk if they remained in her home with the continuing supervision of the Department of Human Services. In fact, the record reflects exactly the opposite. All the evidence presented below establishes the success of DHS's supervision in the home. It is uncontested that K.R. and her children were doing well with the ongoing help of workers from Services to Children in their Own Homes (SCOH). Unlike the child described in Pernishek, there was no evidence presented here suggesting that K.R.'s children had special needs that K.R. could not meet, nor was there evidence that she was not meeting their basic needs. Instead, the testimony below revealed that K.R.'s children were healthy and normal and were thriving in their home environment. Nor was this a situation like that described in A.M. and P.M. where K.R.'s children needed to be removed from her care because they were in danger of being abused.

Removing children from their parents' care unnecessarily can inflict grave harm on

them. The problems afflicting foster care systems have been extensively documented over the past three decades. See, e.g., Bonita Evans, Youth in Foster Care: The Shortcomings of Child Protection Services (1997); Scott J. Preston, note, "Can You Hear Me?" 29 Creighton L. Rev. 1653 (1996); Michael Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stanford L. Rev. 985 (1975) (hereinafter "Wald"). Wald's survey of the effects of foster care concludes that "[r]emoving a child from his family may cause serious psychological damage—damage more serious than the harm intervention is supposed to prevent." See Wald at 994. Furthermore, "the mere act of placement and the uncertain position of a child in foster care creates psychological difficulties, even for children who are not required to move to different foster homes." Id. at 995. Based on his own study and the research of others, Jackson warns that "the increasing placement of drug-exposed children in foster care is coupled with poor growth outcomes in the physical, mental and emotional development of these children." Jackson, at 1521. Thus, Jackson concluded that, when possible, keeping the family intact should be a primary goal. Id. at 1521, 1532. Such a goal is in harmony both with the purposes of the child welfare system and the findings that some drug-using mothers, especially with appropriate assistance, can provide safe and nurturing homes for their children.

Because there was no evidence presented to the court below which suggested that K.R.'s children needed to be removed from their mother's care in order to protect their health and well-being, the lower court erred in finding that such a removal was "clearly necessary."

CONCLUSION

WHEREFORE, for the foregoing reasons, Amici pray that this Court reverse the dependency adjudication of K.R.'s children and the decision to remove them from her care under 42 Pa. Cons. Stat. §§ 6301, 6302 and 6351.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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