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CRIMES AND OFFENSES Crimes Against the Person: Revise the Definition of Feticide; Prohibit the Voluntary Manslaughter of an Unborn Child; Prohibit Assaults and Batteries of Unborn Children Under Certain Circumstances; Provide for Punishment for Persons Convicted of Such Offenses; Amend Title 40 of the Official Code of Georgia Annotated, Relating to Serious Traffic Offenses, So As to Remove the Requirement That an Unborn Child Be Quick in the Definition of Feticide by Vehicle; Amend Title 52 of the Official Code of Georgia Annotated, Relating to General Provisions Concerning Registration, Operation

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CRIMES AND OFFENSES

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CODE SECTION: O.C.G.A. §§ 16-5-20 (amended), -28 (new), -29 (new), -80 (amended), 40-6-393.1 (amended), 52-7-12.3 (amended).

BILL NUMBER: SB 77

ACT NUMBER: 654

GEORGIA LAWS: 2006 Ga. Laws 643

SUMMARY: The Act makes it a misdemeanor of a high and aggravated nature to commit an assault against a pregnant female. The Act provides a definition for the phrase 'unborn child': A member of the species homo sapiens at any stage of development who is carried in the womb. Using this definition, the Act makes it an offense of assault to attempt to injure an unborn child that is subsequently born alive. Using the new definition of an unborn child, the Act makes it an offense of battery to intentionally inflict physical harm against an unborn child that is

subsequently born alive. Assault is a misdemeanor of a high and aggravated nature, and battery is a misdemeanor. Additionally, the new definition of unborn child amends the offense of feticide by removing the requirement that the fetus be 'quick.' Thus, feticide now covers the willful killing of all unborn children, regardless of their stage of development in the womb. Additionally, the Act provides for felony feticide in the event a fetus is killed during the commission of a felony. Finally, the new definition is used to create the felony offense of manslaughter of an unborn child, punishable by imprisonment of one to twenty years.

EFFECTIVE DATE: April 28, 2006¹

History

In 2004, a jury in a high-profile case found Scott Peterson guilty in the killing of his wife and unborn child.² Months before Scott Peterson's conviction, the U.S. Senate passed legislation making it a separate offense to harm a fetus, at any stage of development, in a federal crime committed against a pregnant mother.³ Senators used the high-profile murder of Laci Peterson and her unborn child to generate support for passage of the legislation.⁴

1. See 2006 Ga. Laws 643 §§ 3,4, at 649. The Act became effective upon approval by the Governor.

2. See Carolyn Marshall, *Jury Finds Scott Peterson Guilty of Wife's Murder*, N.Y. TIMES, Nov. 13, 2004, at A10 ("Some television stations had offered to send notice of the verdict by instant message to mobile phones.").

3. See Carl Hulse, *Senate Outlaws Injury to Fetus During a Crime*, N.Y. TIMES, Mar. 26, 2004, at A1.

4. See *id.* The legislation is also known as "Laci and Conner's Law." See 18 U.S.C. § 1841 (2006).

With the law “entangled in the politics of abortion,” both sides of the abortion debate were involved with the legislation and accompanying rhetoric.⁵ U.S. Senator Dianne Feinstein said, “This will be the first strike against all abortion in the United States of America.”⁶ U.S. Senator Mike DeWine, chief author of the measure, disagreed, maintaining the legislation is not about abortion, but rather recognizing that “when someone attacks and harms a mother and her unborn child, that attack does, in fact, result in two separate victims.”⁷

President Bush, echoing the remarks of Senator DeWine, signed the bill into law on April 1, 2004, noting, “[C]rimes of violence against a pregnant woman often have two victims.”⁸ By December of 2004, approximately 30 states had similar feticide laws, many of them inspired by the murder of Laci Peterson and her unborn son, Conner.⁹

Prior to 2006, Georgia law limited feticide to the killing of an unborn child “so far developed as to be ordinarily called ‘quick,’” or “capable of movement within the mother’s womb.”¹⁰ Thus, with a number of states having altered their feticide laws, the stage was set for Georgia to follow suit in 2006.¹¹

In the 2005 Georgia General Assembly, prior to the 2006 feticide debate, Senators Renee Unterman, Ralph Hudgens, Nancy Schaefer, Greg Goggans and David Shafer of the 45th, 47th, 50th, 7th, and 48th districts, respectively, initially sponsored SB 77 as legislation requiring parental notification and changing other topics related to abortion.¹² On January 28, 2005, the Senate first read SB 77 and

5. Amy Goldstein, *Bush Signs Unborn Victims Act*, WASH. POST, Apr. 2, 2004, at A4.

6. See Hulse, *supra* note 3.

7. See Hulse, *supra* note 3.

8. See Goldstein, *supra* note 5. Laci Peterson’s mother and stepfather were present for the signing. *Id.*

9. Donna St. George, *States Add Penalties for Death of Unborn*, WASH. POST, Dec. 20, 2004, at A06. Of the more than 30 states with such laws, 18 criminalized actions against unborn children at any stage of development. Shannon M. McQueeney, Note, *Recognizing Unborn Victims over Heightening Punishment for Crimes Against Pregnant Women*, 31 N.E. J. ON CRIM. & CIV. CONFINEMENT 461, 463 (2005). The high-profile Peterson case was only one of 1,367 maternal homicides in the years from 1990 to 2005, and thus it may not have been the inspiration for all such laws. See Mathew T. Mangino, *When a Murder Victim Is Pregnant*, 28 PENN. LAW WEEKLY 8 (2005).

10. O.C.G.A. 16-5-80 (2005); *Smith v. Newsome*, 815 F.2d 1386, 1387 (11th Cir. 1987).

11. See generally, Mangino, *supra* note 9.

12. See SB 77, as introduced, 2005 Ga. Gen. Assem.

Lieutenant Governor Mark Taylor, President of the Senate, assigned the bill to the Senate Committee on Health and Human Services.¹³ The Senate never passed the bill in its 2005 form.¹⁴

Bill tracking of SB 77

Recommitment, Consideration and Passage by the Senate

Lieutenant Governor Taylor recommitted SB 77 to the Committee on Health and Human Services on January 9, 2006.¹⁵ The Senate Health and Human Services Committee favorably reported the bill, by substitute, on February 23, 2006.¹⁶

The substituted version of SB 77 was drastically different, removing most limitations on abortion and replacing those limitations with additions to Georgia's criminal code concerning feticide and associated criminal acts involving fetuses.¹⁷

Senate Floor Amendments

The Senate read the bill for the third time on March 2, 2006.¹⁸ Senators proposed five floor amendments during the ensuing floor debate.¹⁹ Senator Steve Henson of the 41st district introduced the only floor amendment the Senate would adopt, albeit in an amended form.²⁰

Senator Henson's amendment attempted to prevent the Health and Human Services Committee substitute from creating a new code

13. See State of Georgia Final Composite Status Sheet, SB 77, Jan. 9 2006 (Mar. 30, 2006).

14. Ga. Gen. Assem., SB 77 Bill Tracking, http://www.legis.state.ga.us/legis/2005_06/sum/sb77.htm (last visited Mar. 17, 2006).

15. See State of Georgia Final Composite Status Sheet, SB 77, Jan. 9 2006 (Mar. 30, 2006).

16. See State of Georgia Final Composite Status Sheet, SB 77, Feb. 23, 2006 (Mar. 30, 2006).

17. Compare SB 77, as introduced, 2005 Ga. Gen. Assem., with SB 77 (SCS), 2006 Ga. Gen. Assem.

18. State of Georgia Final Composite Status Sheet, SB 77, Mar. 2, 2006 (Mar. 30, 2006).

19. See SB 77 (SCSFA), 2006 Ga. Gen. Assem.; Withdrawn Senate Floor Amendment to SB 77, introduced by Sen. Gloria Butler, Mar. 2, 2006; Withdrawn Senate Floor Amendment to SB 77, introduced by Sen. Horacena Tate, Mar. 2, 2006; Withdrawn Senate Floor Amendment to SB 77, introduced by Sen. Valencia Seay, Mar. 2, 2006; Withdrawn Senate Floor Amendment to SB 77, introduced by Sen. Preston Smith, Mar. 2, 2006; see also State of Georgia Final Composite Status Sheet, SB 77, Mar. 2, 2006 (Mar. 30, 2006).

20. SB 77 (SCSFA), 2006 Ga. Gen. Assem.

section for assault of an unborn child, and instead sought to add to the already existing Code section 16-5-20.²¹ Specifically, Senator Henson designed the amendment to remove language concerning assault on an unborn child and replace it with language making it a misdemeanor of a high and aggravated nature to commit assault on a pregnant woman, an increase in degree of the then-existing crime.²² Senator Henson's amendment left alone other provisions dealing with manslaughter and battery of an unborn child.²³ Senator Unterman, however, strongly opposed the amendment, stating that it "change[d] the intent" and went so far as to "almost question[] its germaneness."²⁴

Senator Preston Smith of the 52nd district brokered a compromise by offering an amendment to Senator Henson's floor amendment.²⁵ Senator Smith's amendment kept the language of Senator Henson's amendment, which provided stiffer penalties for assault against a pregnant woman.²⁶ Additionally, Senator Smith's amendment eliminated the striking language of the first floor amendment, which would have eliminated the assault provision of the committee substitute.²⁷

The Senate adopted the Committee substitute, as amended by Senators Henson's and Smith's amendments, and then passed SB 77 by a vote of 37 to 15.²⁸

Consideration and Passage by the House

The House first read SB 77 on March 6, 2006.²⁹ The Speaker assigned the bill to the House Committee on Judiciary, Non-Civil.³⁰

21. See Audio Recording of Senate Proceedings, Mar. 2, 2006 [hereinafter Senate Audio] (remarks by Sen. Steve Henson), available at http://www.georgia.gov/00/article/0,2086,4802_6107103_47120055,00.html.

22. See *id.* Compare SB 77 (SCS), 2006 Ga. Gen. Assem., with SB 77 (SCSFA), 2006 Ga. Gen. Assem.

23. Compare SB 77 (SCS), 2006 Ga. Gen. Assem., with SB 77 (SCSFA), 2006 Ga. Gen. Assem.

24. See Senate Audio, *supra* note 21 (remarks by Sen. Renee Unterman).

25. SB 77 (SCSFA 1b), 2006 Ga. Gen. Assem.

26. *Id.*

27. SB 77 (SCSFA1b); SB 77 (SCSFA1); see Senate Audio, *supra* note 21 (remarks by Sen. Smith).

28. Georgia Senate Voting Record, SB 77 (Mar. 2, 2006).

29. State of Georgia Final Composite Status Sheet, Mar. 6, 2006 (Mar. 30, 2006).

30. *Id.*

The House second reading of SB 77 occurred on March 8, 2006.³¹ The House Committee on Judiciary favorably reported the bill by substitute on March 22, 2006.³²

Although the House Committee substitute made several changes, the substitute left the scope and purpose of the bill largely unchanged.³³ The House Committee substitute streamlined the section concerning simple assault against a pregnant woman by removing the definition of an unborn child.³⁴ Additionally, the House Committee substitute added further-reaching exemption provisions.³⁵ Specifically, the House Committee substitute enlarged the exemption provisions in two areas: (1) the substitute specifically excluded from prosecution a person involved in a legal abortion consented to by the mother or “for which such consent is implied by law” and; (2) the substitute excluded from prosecution a “woman with respect to [harm to] her unborn child.”³⁶ Representative Tom Bordeaux of the 162nd district was instrumental in adding the additional exceptions.³⁷ The House Committee substitute was the result of many lawyers being on the House Committee who were better able to make changes clarifying provisions of the bill.³⁸

On March 27, 2006, the House passed SB 77, as substituted, by a vote of 155 to 0.³⁹

Senate Agrees to the House Substitute

On March 30, 2006 the Senate agreed to the House Committee substitute by a vote of 41 to 6.⁴⁰

31. State of Georgia Final Composite Status Sheet, Mar. 8, 2006 (Mar. 30, 2006).

32. State of Georgia Final Composite Status Sheet, Mar. 22, 2006 (Mar. 30, 2006).

33. Compare SB 77 (HCS), 2006 Ga. Gen. Assem., with SB 77 (SCSFA), 2006 Ga. Gen. Assem.

34. Compare SB 77 (HCS), 2006 Ga. Gen. Assem., with SB 77 (SCSFA), 2006 Ga. Gen. Assem. It is unclear why the Senate left the definition of an unborn child in the section concerning assault on a pregnant woman. Interview with Sen. Ralph Hudgens, Senate Dist. 47, in Atlanta, Ga. (Mar. 28, 2006) [hereinafter Hudgens Interview].

35. See SB 77 (HCS), 2006 Ga. Gen. Assem.

36. *Id.*

37. Telephone Interview with Julie Edelson, Policy Director, Planned Parenthood of Georgia (Apr. 19, 2006) [hereinafter Edelson Interview].

38. Hudgens Interview, *supra* note 34.

39. Georgia House of Representatives Voting Record, SB 77 (Mar. 27, 2006).

40. Georgia Senate Voting Record, SB 77 (Mar. 30, 2006).

The Act

The Act amends or adds several code sections to titles 16, 40, and 52. The Act defines an unborn child as a “member of the species homo sapiens at any stage of development who is carried in the womb” and uses this definition for all new or amended sections except for the portion amending simple assault against a pregnant female.⁴¹

Title 16

The Act amends Code section 16-5-20 to provide for the offense of simple assault against a pregnant female and makes that offense punishable as a misdemeanor of a high and aggravated nature.⁴²

The Act adds a new Code section that provides for the offense of assault against an unborn child and makes such an offense punishable as a misdemeanor.⁴³ The Act also creates a new Code section that makes battery against an unborn child a misdemeanor.⁴⁴

The Act amends Code section 16-5-80 by changing the existing crime of feticide so as not to require that the fetus be quick or capable of movement within the mother’s womb; feticide can occur with respect to a fetus at any stage of development in the mother’s womb.⁴⁵ Additionally, the Act amends the *mens rea* and *actus reus* requirements of Code section 16-5-80: (1) the *mens rea* is changed from “willfully kills an unborn child” to “willfully and without legal justification causes the death of an unborn child”; (2) the *actus reus* is changed from requiring an act “which would be murder if it resulted in the death of such mother” to an act “which would be murder if it resulted in the death of such mother” or an act occurring “in the commission of a felony, [which] causes the death of an unborn child.”⁴⁶ The amended *actus reus*, which allows for felony feticide, is

41. See, e.g., O.C.G.A. § 16-5-28 (Supp. 2006).

42. O.C.G.A. § 16-5-20 (Supp. 2006).

43. O.C.G.A. § 16-5-28 (Supp. 2006).

44. O.C.G.A. § 16-5-29 (Supp. 2006).

45. O.C.G.A. § 16-5-80 (Supp. 2006).

46. *Id.*

nearly identical to Georgia's felony murder statute.⁴⁷ The Act amends the Code section to include a new offense for voluntary manslaughter of an unborn child.⁴⁸ The punishment for voluntary manslaughter of an unborn child is not less than one and no more than twenty years.⁴⁹

The new assault, battery, feticide, and voluntary manslaughter sections provide exemptions from prosecution for the following:

- (1) Any person for conduct relating to an abortion for which the consent of the pregnant woman, or person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;
- (2) Any person for any medical treatment of the pregnant woman or her unborn child; or
- (3) Any woman with respect to her unborn child.⁵⁰

Title 40

The Act amends Code section 40-6-393.1 by changing the existing charge of feticide by vehicle to include a new definition of an unborn child.⁵¹ The former definition required the unborn child to be "quick" before the feticide by vehicle statute applied.⁵² The new definition is "a member of the species homo sapiens at any stage of development who is carried in the womb."⁵³ The Act uses this changed definition throughout.⁵⁴

Title 52

The Act amends Code section 52-7-12.3 by changing the existing charge of feticide by vessel to include the new definition of an unborn child found throughout the Act.⁵⁵

47. Compare O.C.G.A. § 16-5-80 (Supp. 2006), with O.C.G.A. § 16-5-1 (2006).

48. O.C.G.A. § 16-5-80 (Supp. 2006).

49. *Id.*

50. O.C.G.A. §§ 16-5-28, -29, -80 (Supp. 2006).

51. O.C.G.A. § 40-6-393.1 (Supp. 2006).

52. 1991 Ga. Laws 1109, § 1, 1109-10 (formerly found at O.C.G.A. § 16-5-80 (2005)).

53. O.C.G.A. § 40.6.393.1 (Supp. 2006).

54. See *supra* note 41 and accompanying text.

55. O.C.G.A. § 52-7-12.3 (Supp. 2006); see *supra* note 41 and accompanying text.

*Analysis**The Act and Similar Federal Law*

The Act is parallel to and was modeled after the Federal “Unborn Victims of Violence Act.”⁵⁶ Thus, Georgia law is now harmonious with federal law and the law in more than 30 states that have fetal homicide laws protecting a fetus regardless of its stage of development.⁵⁷

While harmonious with federal law, Georgia law does not cover as broad a scope of conduct.⁵⁸ The Act fails to make conduct that is not done willfully a crime.⁵⁹ Further, it does not prohibit conduct that is not a felony but nonetheless causes the death of a fetus.⁶⁰ Federal law also prohibits conduct that is a felony and results in the death of a fetus.⁶¹ Furthermore, federal law specifically removes any requirement that the person engaging in the conduct harming the fetus had done so intentionally or with the knowledge that the mother was pregnant.⁶² Georgia’s new felony feticide provision, which is almost identical to its felony murder statute, is the only provision that reaches the scope of federal law, as Georgia’s new statute does not require a defendant to possess an intent to kill, transferred or otherwise.⁶³

56. See Senate Audio, *supra* note 21. Compare O.C.G.A. § 16-5-80 (Supp. 2006), with 18 U.S.C. § 1841 (2006).

57. See Senate Audio, *supra* note 21; see also St. George, *supra* note 9. Compare O.C.G.A. § 16-5-80 (Supp. 2006), with 18 U.S.C. § 1841 (2006).

58. Compare O.C.G.A. § 16-5-80 (Supp. 2006) with 18 U.S.C. § 1841 (2006).

59. O.C.G.A. § 16-5-80 (Supp. 2006).

60. O.C.G.A. § 16-5-80 (Supp. 2006).

61. See 18 U.S.C. § 1841(a)(2)(B) (2006).

62. See *id.*

63. See *e.g.*, Holliman v. State, 356 S.E.2d 886 (Ga. 1987); O.C.G.A. 16-5-1(c). The felony feticide provision, by definition, does not include feticide where the underlying offense is a misdemeanor. O.C.G.A. § 16-5-80 (Supp. 2006).

Possible Legal Challenges to the Act

Feticide laws protecting fetuses from conception to birth, such as Georgia's new Act, are ripe for due process challenges on the grounds that they are overly broad or vague.⁶⁴

In *Commonwealth v. Bullock*, the criminal defendant put a post-conception feticide statute to the test in a Pennsylvania criminal appeal.⁶⁵ Bullock challenged the constitutionality of Pennsylvania's feticide law after his conviction for manslaughter of his girlfriend's unborn child.⁶⁶ Specifically, Bullock challenged as overly vague the statute's definition of an unborn child as "an individual of the species homo sapiens from fertilization until live birth."⁶⁷

The court in *Bullock* rejected the vagueness challenge, stating it was "clear that the legislature intended to protect unborn children from the moment of fertilization," making unambiguous the *corpus delicti* of the crime.⁶⁸ Similarly, the Minnesota Supreme Court, in its decision to uphold a conviction for second degree murder of a 28-day old embryo, explained the issues:

The state must prove only that the implanted embryo or the fetus in the mother's womb was living, that it had life, and that it has life no longer. . . . It is not necessary to prove, nor does the statute require, that the living organism in the womb in its embryonic or fetal state be considered a person or a human being. People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo is a human being, or on whether or at what stage the embryo or fetus is ensouled or acquires "personhood." These questions are entirely irrelevant to criminal liability under the statute. Criminal liability here requires only that the genetically human embryo be a living organism that is growing into a human being. Death

64. See *infra*, notes 65-69 and accompanying text.

65. *Commonwealth v. Bullock*, 868 A.2d 516 (Pa. Super. Ct. 2005), *appeal granted*, 885 A.2d 40 (Pa. 2005).

66. See *id.* at 521 (noting defendant also challenged other aspects of his conviction).

67. *Id.* at 522 (citing 18 PA. CONS. STAT. § 3203 (2005)).

68. *Bullock*, 868 A.2d at 522.

occurs when the embryo is no longer living, when it ceases to have the properties of life.⁶⁹

Both *Bullock* and *Merrill* focused on the respective laws' broad scope of protection of unborn children from conception to birth, and the Act does just that.⁷⁰ While the decisions of other states' courts do not bind Georgia courts, the other courts based their decisions on longstanding constitutional principles that Georgia courts are likely to apply if similar issues are raised in Georgia.⁷¹

Pro-Abortion Activists' Concerns

With the definition of the beginning of life at issue, both sides of the abortion debate entered into the discussion.⁷² Becky Rafter, executive director of NARAL Pro-Choice Georgia asked, "If an embryo has legal rights, what's going to happen next?"⁷³ Legislators' attempts to alter Georgia's feticide law received strong support from Georgia Right to Life, an anti-abortion group.⁷⁴ Kevin Harris, a lobbyist for Georgia Right to Life, acknowledged the bill fits within Right to Life's agenda because it focuses on the definition of when life begins.⁷⁵ Nonetheless, Mr. Harris maintained the legislation has "nothing to do with the issue of abortion."⁷⁶ Ms. Rafter and Mr. Harris's rhetoric highlight the significance both sides of the abortion debate attached to the feticide bill.⁷⁷

The new definition of an unborn child relates most closely to the abortion debate.⁷⁸ Code sections 16-12-140 and -141 dictate when an abortion is legal and when it is criminal.⁷⁹ Specifically, first and

69. *State v. Merrill*, 450 N.W.2d 318, 324 (Minn. 1990).

70. *See supra*, *The Act* and accompanying text.

71. *See, e.g., Merrill*, 450 N.W.2d at 324, *cert. denied*, 496 U.S. 931 (1990).

72. *See, e.g., Carlos Campos, Legislature 2006: Bill Makes Killing a Pregnant Woman at Any Stage a Double Slaying*, ATLANTA J.-CONST., Feb. 14, 2006, at 1B.

73. *Id.*

74. Sonji Jacobs, *Senate Approves 3 Bills Backed by Right to Life*, ATLANTA J.-CONST., Mar. 3, 2006, at A1.

75. Campos, *supra* note 72.

76. *Id.*

77. *See Campos, supra* note 72; *Jacobs, supra* note 74.

78. O.C.G.A. § 16-5-80 (Supp. 2006).

79. *See* O.C.G.A. §§ 16-12-140, -141 (2005).

second trimester abortions are legal.⁸⁰ Third trimester abortions are illegal unless the life or the health of the mother is at risk.⁸¹

Opponents of Georgia's new feticide bill worry that assigning rights to a fetus regardless of the stage of development will threaten a woman's right to abortion in Georgia.⁸² One can draw the Pandora's Box analogy: Once legislators define and protect an unborn child at any stage of development from criminal aggression, the door is open to protecting an unborn child at any stage of development from non-criminal harm, *i.e.*, abortion. This slippery slope argument is the crux of abortion rights advocates' opposition to the Act.⁸³

Conclusion

Georgia law explicitly defines when abortion becomes illegal—after the second trimester.⁸⁴ Thus, although the new definition of an unborn child is broader than past definitions, Georgia's current statutory provisions covering abortion provide a safe-harbor for those wishing to have an abortion, and the new definition does not threaten those provisions.⁸⁵ Absent legislators' amending Code section 16-12-141, abortion rights advocates' fears are premature. The Act, however, may still be subject to due process claims. Since courts in other jurisdictions have upheld similar laws, Georgia's law is likely to be found constitutional.⁸⁶

Adam S. Levin

80. O.C.G.A. § 16-12-141 (2005).

81. O.C.G.A. § 16-12-141 (2005).

82. See Edelson Interview, *supra* note 37.

83. See Michael Holzapfel, Comment, *The Right to Live, the Right to Choose, and the Unborn Victims of Violence Act*, 18 J. CONTEMP. HEALTH L. & POL'Y 431, 439 (2002).

84. See O.C.G.A. § 16-12-141(c).

85. See *id.*

86. See, *e.g.*, *State v. Merrill*, 450 N.W.2d 318, 324 (Minn. 1990); *Commonwealth v. Bullock*, 868 A.2d 516 (Pa. Super. Ct. 2005), *appeal granted*, 885 A.2d 40 (Pa. 2005).