



Case Law Review

Key Legal Issues in Civil Child Protection Cases Involving Prenatal Substance Exposure

November 2020

Executive Summary

Over the last two decades, the nation has experienced a four-fold increase in opioid use disorders among pregnant women and three-fold increase in rates of neonatal abstinence syndrome among infants.¹ The increase is forcing medical, social service and court systems to address the issue to ensure the needs of vulnerable children, women and families are met. The court system, in particular, is faced with balancing the need to protect the health and safety of children with protecting and strengthening families.

This body of case law represents a robust discussion of legal issues surrounding prenatal substance exposure in civil child protection cases across the country. The variation in analysis from different jurisdictions shows this area of child protection law presents many challenges and lacks consistent decision making across courts. The goal of this case law summary is to help the field understand how different courts have approached these legal issues to establish greater uniformity when addressing prenatal substance use cases in the future.

Several legal themes have emerged in these cases:

Determining how “child” is defined by the state’s civil child protection statute.

States largely limit civil child protection statutes to cases involving children from birth to age 18. Courts generally do not permit state child protection authorities to intervene in a family when a child is in utero. At least one state supreme court declined to find prenatal substance exposure was abuse under the state’s civil child protection statute because there was no “child” at the time of the alleged harm in utero.

Determining what evidence is needed to support state intervention after a child is born prenatally exposed to substances.

In states that permit state intervention when a child is born after being prenatally exposed to substances, the evidence needed to support intervention varies. Some states have found evidence of prenatal substance use alone, such as a mother’s positive drug screen, a mother’s admitted substance use, or a baby’s positive drug screen, is enough to establish abuse and neglect under the state’s civil child protection statute to support state intervention. Other states require a showing of actual harm or an imminent risk of harm to support a finding of abuse and neglect. At least one state includes prenatal substance use in its statutory definition of “severe abuse,” a ground to terminate parental rights.

Evaluating the long-term consequence of listing in the state’s central registry.

Listing in the state’s central child abuse and neglect registry—a sanction many mother’s face when their prenatal substance use is deemed abuse or neglect—is increasingly recognized by courts as contrary to the child welfare system’s goal of supporting parents and promoting family stability. Courts have shown a willingness to consider registry listing as a factor when evaluating abuse and neglect claims in cases involving prenatal substance exposure.

While these legal issues are distinct they are also interrelated. As courts interpret whether and how civil child protection statutes apply in cases involving prenatal substance use, defining “child” is often the first step followed by evaluating if the parent’s actions meet statutory definitions of abuse and neglect to support intervention.

Evaluating special issues when determining if state intervention is warranted.

A few scenarios create unique issues for courts when determining if prenatal substance exposure is abuse or neglect warranting state intervention. In determining the parent’s culpability in each of these scenarios, courts generally focus on the nature of harm to the child and the circumstances surrounding the parent’s actions. For example:

- ❑ *Mothers who seek substance abuse treatment during their pregnancies that results in prenatal substance exposure*—Courts have recognized that mothers struggling with substance use disorders during pregnancy should not be penalized for securing medically recommended treatment to address their addiction and promote healthy outcomes for their children.² However, courts distinguish between mothers whose actions harm a child while making a good faith attempt to seek treatment to protect their child and mothers whose participation in treatment does not change the mother’s substance use disorder but rather continues a pattern of substance use that harms a child.
- ❑ *Mothers who are unaware they are pregnant when using substances during pregnancy*—One court that considered this issue held the mother should not be penalized for exposing her child to substance during her pregnancy when she did not know she was pregnant. The court refused to impute knowledge of pregnancy based on the fact the mother had been pregnant previously or based on her knowledge of the risk of becoming pregnant by engaging in sexual activities.
- ❑ *Fathers who know a mother is using substances during pregnancy.* Courts have interpreted civil child abuse and neglect statutes to apply to fathers who are aware of a mother’s prenatal substance use yet fail to intervene. Conversely, a father’s supportive efforts to help the mother enroll in substance abuse treatment and stop her prenatal substance use has been considered in finding the father’s actions did not support an abuse or neglect finding.

Case Law Review

State supreme and appellate courts presiding over civil child protection cases often decide legal issues relating to a mother’s prenatal use of substances. While the substances driving child welfare system involvement have changed over the years—crack cocaine, heroin, methamphetamine, opioids—the issues remain the same as courts balance the need to protect the health and safety of the child with protecting and strengthening families. Courts must often decide whether exposing a baby to substances during pregnancy constitutes abuse or neglect under a state’s civil child protection statute to warrant state intervention.³

Legal Questions

In reaching an answer, courts have considered several legal questions:

1. Do state civil child protection statutes apply to an unborn “child” to permit state intervention before birth?
2. Do state civil child protection statutes’ definition of “child” support a finding of child abuse at birth based on prenatal conduct?
3. What evidence is required to establish abuse and neglect at birth based on prenatal substance exposure? Is prenatal substance use enough or must there be a showing of harm or a risk of harm?
4. Can prenatal substance exposure resulting from a pregnant mother’s participation in medically approved substance treatment support an abuse and neglect finding?
5. Can a finding of abuse or neglect based on prenatal substance use be made when a mother lacks knowledge of her pregnancy when using illegal substances?
6. Can a finding of abuse or neglect be made against a respondent father who knows of the mother’s prenatal substance use but fails to intervene?
7. Can a parent’s name be included in a state child abuse registry based on prenatal substance use?
8. Is prenatal substance use a basis to terminate parental rights at birth?

These questions call on courts to interpret state statutes and analyze court precedent, sometimes resulting in conflicting case outcomes on similar issues and fact patterns.

About this Review

This case law review highlights select state supreme and appellate court decisions that are shaping the legal response to prenatal substance use throughout the country. Cases were reviewed to identify the key issues courts have considered in the last 10-15 years. Priority was given to state supreme court cases when selecting cases to include followed by appellate level cases. For issues with many cases on point, precedent-setting cases offering contrasting viewpoints were selected to show variations across courts’ handling. For issues with limited cases on point, all cases were included as long as the issues were addressed with enough depth to be helpful to readers.

This review offers insights for legal practitioners who represent clients in civil child protection cases about:

- ☐ trends in these cases,
- ☐ key legal issues and arguments that have been raised, and
- ☐ practice implications.

Case summaries in this review differ in length based on the depth of analysis of the highlighted legal issue. Many cases raised several issues that were outside the legal issue focused on in this narrative.

Question 1

Do state civil child protection statutes apply to an unborn “child” to permit state intervention before birth?

When a mother’s substance use during pregnancy is the focus of child abuse and neglect allegations, some courts have focused on how a state’s child protection statute defines “child” and whether that definition includes a fetus. Courts have considered this definition when deciding if state intervention is warranted when a child is in utero.

CASE SUMMARY ►

In re Unborn Child of Starks, 18 P.3d 342 (Okla. 2001).

Holding

The Oklahoma Supreme Court considered as an issue of first impression whether a fetus is a “child” under Oklahoma’s Children’s Code, concluding the legislature clearly limited the Children’s Code’s application to human beings who have been born and are under age 18. Since the child was still a fetus at the time of the mother’s alleged abuse, Oklahoma’s Children’s Code’s protections did not apply.

Background

A mother was arrested and incarcerated for manufacture and possession of methamphetamine when she was seven months pregnant. An emergency juvenile custody proceeding was held at which the trial court adjudicated the mother’s fetus deprived based on the acts on the date of the mother’s arrest. The trial court then took temporary emergency custody of the mother’s viable fetus based on its belief that the fetus would potentially be harmed if the mother was released from jail because she might engage in methamphetamine-related activities again.

Trial Court Ruling

When the mother’s baby was born, the juvenile court entered an order placing emergency custody with the Department of Human Services. Ten days later, the district attorney filed a deprivation petition under Oklahoma’s Children’s Code. A jury found the child deprived based on the mother’s conduct on the day she was arrested while she was carrying the child. No evidence was presented to show the mother caused the child to be deprived after birth or after the day she was arrested. The trial court adjudicated the child deprived and found efforts to prevent the child’s removal from the home were not made because the removal was an emergency and necessary for the child’s safety and to protect the public. At the dispositional hearing, the trial court continued the child’s custody with the department with the mother as caretaker.

State Supreme Court Ruling

On appeal, the mother claimed the trial court lacked subject matter jurisdiction to take custody of her fetus under Oklahoma’s Children’s Code. The supreme court focused on whether the term “child” in Oklahoma’s Children’s Code includes a fetus. The state argued that because the mother’s fetus arguably was viable it had a duty under Oklahoma’s Children’s Code to protect it from harm. However, the state cited no statutory or case law authority to support this position, or evidence of legislative intent to interpret the Children’s Code this way.

Application of criminal protections for unborn children. The state further argued that since a fetus can be the subject of a homicide and its biological parents can recover damages for its wrongful death a fetus should receive the same protection as a child under the Children’s Code. The supreme court disagreed. The court cited the Oklahoma Court of Criminal Appeals’ holding in *Hughes v. State*, 868 P.2d 730 (1994) that a fetus may be a “human being” against whom a homicide may be committed under the criminal code. It explained

...the legislature clearly limited the Children’s Code’s application to human beings who have been born and are under age 18. Since the child was still a fetus at the time of the mother’s alleged abuse, Oklahoma’s Children’s Code’s protections did not apply.

that while medical science can offer proof about a fetus's viability during the defendant's act of carrying out a homicide and whether the act was the cause of death, medical science cannot prove whether a fetus might be emotionally, mentally, physically, or intellectually deprived within the definitions of the Children's Code. In limiting the Children's Code's protections to children, the court stated, "The set of 'human beings' contains at least three subsets, to-wit: adults, fetuses and children, only the latter of which is protected by the Children's Code."

The court also distinguished its decisions in *Evans v. Olson*, 550 P.2d 924 (Okla. 1976) addressing recovery for wrongful death of a fetus, and *Nealis v. Baird*, 996 P.2d 438 (Okla. 1999) extending the protection recognized in *Evans* to a nonviable fetus born alive. It explained that in a wrongful death action for a nonviable fetus born alive, the recovery is based on its holding that the word "one" as used by the legislature in the wrongful death statute means "person." Once a child is born, there is no debate whether the fetus is a "person" since the live child becomes "one." Oklahoma's wrongful death statute does not prohibit its application to a viable or nonviable fetus. In contrast, the supreme court found nothing in the language or intent of Oklahoma's Children's Code to support its application to a fetus.

Legislative intent. The Children's Code defines "child" as "any person under eighteen (18) years of age." It also includes definitions for "child in need of mental health treatment," "child with a disability," and "child-placing agency." The supreme court emphasized that including these definitions within the Children's Code clarified the legislature's intent to limit its application to human beings who have been born and are under age 18. The court also reasoned that applying definitions of "deprived child" under the Children's Code to a fetus would be nonsensical as the definitions include, for example, a child who is destitute, homeless, or abandoned; who lacks proper parental care or guardianship; whose home is unfit due to neglect, abuse, cruelty, or depravity; and so forth.

The supreme court emphasized that if the legislature had intended to apply the Children's Code to a fetus or a pregnant woman it would have done so explicitly. It therefore vacated the trial court's orders and remanded with instructions to dismiss.

CASE SUMMARY ►

***Arkansas Dep't of Human Servs. v. Collier*, 95 S.W.3d 772 (Ark. 2003).**

Holding

The Supreme Court of Arkansas held the trial court exceeded its authority and abused its discretion by declaring an unborn fetus dependent neglected, placing the custody of the fetus with the Department of Human Services (DHS), and assessing costs of prenatal care to DHS. The court determined a juvenile is statutorily defined as an individual from "birth to age 18" and nothing in the Juvenile Code suggested the term "juvenile" applies to an unborn fetus.

Trial Court Ruling

Following the termination of a mother's parental rights to her 13-month-old son, a trial court issued a pickup order for the mother citing probable cause that she was placing her unborn child at serious risk of physical harm or death. The order was based on testimony indicating the mother was pregnant, had not received prenatal care, was abusing illegal substances, and had illegal substances in the home. The mother had also tested positive for methamphetamine in recent drug tests. The court ordered law enforcement to locate and detain the mother at the local detention center. It further ordered that drug tests be performed with results provided to the court, and that prenatal care be provided.

Emergency Custody Order

At an emergency and contempt hearing, the mother admitted she was pregnant. DHS confirmed she had tested positive for methamphetamine when she was taken into custody. The court held the mother in contempt and ordered her to remain at the local detention center until she went into labor. The court ordered that after the baby's delivery, the mother could

be discharged from the hospital, but her baby would remain in state custody. It found the mother's unborn child was at risk of severe maltreatment and was dependent neglected under the Arkansas Juvenile Code. It ordered the child's placement with DHS and required DHS to ensure she received prenatal care and a medical exam.

Department's Appeal

DHS moved to set aside the trial court's order, arguing that because the fetus had not yet been born it was not a "juvenile" as defined by the Juvenile Code and the court lacked jurisdiction to order a fetus into its custody as a dependent-neglected child. DHS also challenged the trial court's authority to order it to pay for prenatal care, arguing the Juvenile Code only allows DHS to pay for services for a family to reunite the family or prevent removal from the home. Since there was no juvenile as defined by the Juvenile Code, DHS argued the court lacked jurisdiction to order it to provide services in this case. It also stated the legislature had clearly defined "juvenile" in statute and the trial court could not change the meaning without violating separation of powers.

Supreme Court's Ruling

The Supreme Court of Arkansas granted DHS's petition for a writ of *certiorari*. The court considered whether the trial court judge exceeded her authority and committed "a plain, manifest, clear, and gross abuse of her discretion" when she declared the mother's unborn fetus dependent-neglected, placed custody of the fetus with DHS, and required DHS to pay for the mother's prenatal care.

The court noted the Arkansas Juvenile Code clearly defines "juvenile" as an individual "from birth to the age of 18" and found a fetus does not fall within this definition because there has been no birth. The court further cited the purpose of the Juvenile Code relating to protection and custody of juveniles: "to protect and strengthen familial ties, to protect a juvenile's health and safety when determining whether to remove the juvenile from the custody of his parents or custodian, and to secure worthwhile care upon removal from custody." It concluded that nothing in this provision suggested or implied that it applied to an unborn fetus.

The court cited a similar Wisconsin Supreme Court case, *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d (Wis. 1997), in which a mother and her unborn child were taken into protective custody based on the mother's alleged substance use while pregnant. In that case the supreme court, using statutory interpretation to determine the scope of Wisconsin's Children's Code and its application to an unborn child, held the Wisconsin legislature did not intend to include a fetus in the definition of a "child."

The court declined to read Arkansas case law recognizing a viable fetus as a "person" within Arkansas's wrongful death statute, or inclusion of the death of a fetus within the definition of victims of homicide in its Criminal Code, as reason to change the definition of "juvenile" in the Juvenile Code to include an unborn fetus. It concluded that if the legislature had intended to include an unborn child in its definition of "juvenile" in the Juvenile Code it would have done so like it did in the Criminal Code.

The court also disagreed with the state's assertion that an amendment to the Arkansas Constitution establishing a public policy protecting the life of every unborn child required amending the Juvenile Code's definition of "juvenile" and gave state agencies authority to take custody of fetus.

Based on these findings, the supreme court granted the writ of *certiorari*, concluding the trial court exceeded its authority and its order placing the fetus in DHS custody was an abuse of discretion.

A juvenile is statutorily defined as an individual from "birth to age 18" and nothing in the Juvenile Code suggested the term "juvenile" applies to an unborn fetus.

Key Takeaways

- ✓ Understanding how a state's civil child protection statute defines "child" is critical when evaluating abuse and neglect allegations based on prenatal substance use.
- ✓ These cases represent states' clear choice to provide protections for children from birth to age 18 in their civil child protection statutes, which do not authorize state intervention while the child is in utero. They recognize that a mother cannot be penalized for using illegal substances during pregnancy when the alleged harm occurred before the "child" existed.
- ✓ Legal arguments that analogize criminal statutes or case law that establish broader definitions of "child" to include unborn children or permit recovery for criminal acts involving an unborn child are generally not successful in child protection cases.

Question 2

Do civil child protection statutes' definition of "child" support a finding of child abuse at birth based on prenatal conduct?

One state supreme court focused on the state's statutory definition of child to determine if prenatal substance abuse supports a finding of abuse and neglect to support state intervention once the child is born.

CASE SUMMARY ►

In re L.J.B., 199 A.3d 868 (Pa. 2018).

Holding

The Pennsylvania Supreme Court held a mother's use of opioids while pregnant was not civil child abuse under Pennsylvania's Child Protective Services Law (CPSL). Using statutory interpretation, the supreme court reasoned the definition of "child," under the CPSL does not include a fetus or unborn child, and the mother could not be a perpetrator of child abuse unless there was a "child" at the time of the alleged abusive act.

Background

A mother used opioids while pregnant, resulting in her newborn suffering neonatal abstinence syndrome (NAS). The child welfare agency was granted emergency protective custody of the child based on the child's NAS symptoms and evidence that the mother left her at the hospital without checking on her consistently. The agency filed a dependency petition alleging the child lacked proper parental care and was a victim of child abuse, and the mother was a "perpetrator" of child abuse under Pennsylvania's child protection statute. Pennsylvania's CPSL defines child abuse as "intentionally, knowingly, or recklessly... (1) [c]ausing bodily injury to a child through any recent act or failure to act." The agency argued the child's hospitalization for 19 days and his NAS symptoms due to the mother's illegal substance use during pregnancy supported an abuse and neglect finding.

Trial Court Ruling

The mother conceded dependency based on her failure to provide proper care of the child but challenged the allegations of child abuse. The trial court adjudicated the child dependent based on a finding that the child lacked proper parental care or control. In determining if the mother's substance use during pregnancy was child abuse, the trial court concluded the CPSL did not provide for a finding of child abuse for actions by an individual on a fetus. The appellate court reversed; while it agreed the CPSL does not include a fetus or unborn child in the definition of a "child," it found the mother's substance use amounted to a 'recent act or failure to act' that caused or was reasonably likely to cause injury to a child who, *now born*, constituted a "child" under the statute.

Supreme Court Ruling

In reversing the appellate court's decision, the Supreme Court of Pennsylvania considered whether the mother was a "perpetrator" of child abuse at the time of the abusive act. Under the CPSL, a "perpetrator" is "a person who has committed child abuse" as defined by the act. Determining who qualifies as a perpetrator depends on the individual's relationship to the child, in this case a parent. Reading the CPSL's definitions of "child" and "perpetrator" together, the supreme court concluded "a person cannot have committed child abuse unless he or she was a perpetrator, and a person cannot be a perpetrator unless there is a 'child' at the time of the act." Since the mother's alleged abuse—ingesting opioids—occurred when she was pregnant, and the statutory definition of "child" does not include a fetus or unborn child, she could not be found to have committed child abuse against the child based on prenatal substance use because she was not a "perpetrator" at the time of the act.

The supreme court emphasized the CPSL "requires the existence of a child at the time of the allegedly abusive act in order for the actor to be a 'perpetrator' and for the act to constitute 'child abuse.'" The fact that the mother later met one of the statutory definitions of a perpetrator did not bring her earlier actions within the CPSL.

Since the mother's alleged abuse—ingesting opioids—occurred when she was pregnant, and the statutory definition of "child" does not include a fetus or unborn child, she could not be found to have committed child abuse against the child based on prenatal substance use because she was not a "perpetrator" at the time of the act.

The supreme court also found no legal basis for a claim that finding the mother committed child abuse under the circumstances in this case would protect future children from abuse. It explained that while CPSL's purpose is to protect the abused child and other children from harm at the hands of the perpetrator, labeling a mother a perpetrator of child abuse would not prevent her from becoming pregnant again or protect a later conceived child while in utero. It also would not prevent the mother from using illegal substances during a later pregnancy. Further, labeling a mother as an abuse perpetrator would make it hard for her to join the workforce and her child's activities, interfering with the goal of preserving family unity and supporting the child.

Key Takeaways

- ✓ This case represents a state's clear choice to limit application of its child protection statute to children from birth to age 18, and to exclude children who are in utero.
- ✓ By holding that drug exposure in utero is not child abuse and emphasizing the importance of supporting families in seeking help for substance use, the court has reaffirmed an important message about the goals of child welfare. A contrary finding in this case could result in penalizing women for seeking prenatal care, medical services, or addiction treatment while pregnant.
- ✓ A mother's status as a perpetrator of child abuse is also a key consideration when evaluating an abuse and neglect claim based on prenatal substance use. The Pennsylvania Supreme Court found the mother could not be a "perpetrator" of child abuse because the child did not exist at the time of the act.
- ✓ Legal arguments that finding a mother committed child abuse based on prenatal substance use will protect future children from abuse overlook the harmful effects of labeling the mother a child abuser on her ability to seek employment, join her child's activities, and work towards the goal of family unity.
- ✓ This case addresses a key issue of child abuse registries, explored in more detail below. In short, it stands for the principle that a parent cannot be included in a registry as a child abuser based on drug exposure that occurs before the child has been born.

Question 3

What evidence is required to establish abuse and neglect at birth based on prenatal substance exposure?

a. Prenatal substance exposure alone establishes abuse and neglect

When a child is born with known prenatal substance exposure or positive drug toxicology, courts have considered what evidence is needed to establish a finding of abuse or neglect. Some courts have concluded the presence of illegal substances at birth alone establishes abuse or neglect under the state's abuse and neglect statute.

CASE SUMMARY ►

***In re A.L.C.M.*, 801 S.E.2d 260 (W. Va. 2017).**

The West Virginia Supreme Court determined the presence of illegal substances in a child's system at birth, which was based on the mother's admitted use of substances during pregnancy, was sufficient evidence of abuse or neglect within the meaning of West Virginia's civil child abuse and neglect statute. Under the statute, "abuse" includes conduct that harms or threatens a child's welfare through physical, mental, or emotional injury. The court emphasized that the harm to the child need not be consummated, but rather can be attempted, to constitute abuse. Similarly, "neglect" includes conduct that harms or threatens a child's welfare based on refusal, failure, or inability to meet the child's needs. The court found the mother's use of substances during pregnancy met both definitions to support the filing of an abuse and neglect petition when the child was born.

CASE SUMMARY ►

***In re M.M.*, 133 A.3d 379 (Vt. 2015).**

The Vermont Supreme Court upheld a trial court's determination that a newborn was in need of protection at birth based solely on prenatal substance exposure. In Vermont, a child is a 'child in need of services' (CHINS) if he or she is without proper parental care or subsistence, education, medical, or other care necessary for his or her well-being." 33 V.S.A. §5102(3)(B). The focus of a CHINS proceeding is the welfare of the child and the court must determine if a child lacks proper parental care necessary for his or her well-being. Further, a child need not suffer 'actual harm' to be adjudicated CHINS. The evidence showed the child was born addicted to opioids at birth and had to be weaned from the substances over two months. Although the mother had enrolled in a medically monitored treatment program late in her pregnancy, she failed to comply and was terminated from the program. She returned to using unprescribed opioids on the street, did not return to a medically monitored treatment regimen, and lost the opportunity to obtain treatment through approved sources before her child's birth. The child's dependence on opioids at birth, therefore, was not the result of the mother participating in a bona fide treatment program. The supreme court found the trial court properly found the child was CHINS based on this evidence.

CASE SUMMARY ►

***In re Baby Blackshear*, 736 N.E.2d 462 (Ohio 2000).**

The Ohio Supreme Court held a newborn child who had a positive toxicology screen at birth due to his mother's prenatal substance use was *per se* an "abused child" as defined by the state's civil child abuse statute. Under the statute, "abused child" includes "any child who, '[because of the acts of his parents, *** suffers physical or mental injury that harms or threatens to harm the child's health or welfare.'" The court concluded the mother's actions of taking substances injured the child before and after birth, as evidenced by the newborn's positive toxicology screen and "jittery" symptoms. A dissenting opinion criticized the court's opinion for equating a positive drug screen with "injury or harm that threatens to harm" a newborn and cautioned against its *per se* rule that *in utero* substance exposure always harms or threatens to harm a child's health or welfare.

The Colorado Court of Appeals held a newborn was properly taken into state custody at birth and adjudicated abused or neglected based on a positive drug screen showing highly elevated levels of amphetamines, methamphetamine, and alcohol. The state's child protection statute defines a dependent or neglected child as "one who has been subjected to mistreatment or abuse by a parent, one who lacks proper parental care through the actions or omissions of the parent, or one whose environment is injurious to his or her welfare." The court determined the mother's prenatal substance use established that there would be mistreatment or abuse if the child was placed with her after birth. The court also held a child need not be placed with a parent to determine if the parent can provide proper care if the placement could harm the child. In this case, the mother denied she had a substance abuse problem, refused to undergo drug tests, and denied any impact of her prenatal substance use on the child, creating a concern about her ability to properly provide parental care.

Key Takeaways

- ✓ These decisions find evidence of prenatal substance exposure alone—such as a mother's positive drug screen, a mother's admitted substance use, or a baby's positive drug screen—is enough to support state intervention at the time of birth based on a finding of civil child abuse or neglect.

(Note: In the absence of universal screening, selection bias results in disproportionate screening and testing of patients of color, resulting in legal consequences and disparate involvement in the child welfare system. In a 2007 study on the effect of race on provider decisions to test for illicit drug use, "Black women and their newborns were 1.5 times more likely to be tested for illicit drugs as nonblack women... We found equivalent positivity rates among tested black and nonblack women."⁶)

- ✓ While the state child protection statutes applied in these cases typically include language related to harm or injury, or threat of harm or injury, based on the parent's conduct, the courts in these cases interpret a pregnant mother's substance use alone as constituting harm or risk of harm to the child. The West Virginia Supreme Court explicitly stated that the harm need not be consummated, just attempted, to constitute abuse. Similarly, the Vermont Supreme Court noted that a child need not suffer actual harm to be found a child in need of services.

However, this line of thinking is not without critics as the dissenting opinion in the Ohio Supreme Court case draws attention to the risk of equating prenatal substance exposure with abuse and neglect, noting that such exposure doesn't always harm a child's health or welfare.

Question 3

What evidence is required to establish abuse and neglect at birth based on prenatal substance exposure?

b. Evidence of actual harm or imminent risk of harm is required to establish abuse or neglect

Some state courts have determined that evidence of *actual harm* or an *imminent* or *substantial risk of harm* to the child based on the mother's prenatal substance use must be shown to establish abuse or neglect under the state's child abuse and neglect statute.

CASE SUMMARY ►

***New Jersey Dep't of Children & Families v. A.L.*, 59 A.3d 576 (N.J. 2013).**

The New Jersey Supreme Court concluded a finding of abuse or neglect cannot be based on a mother's prenatal use of substances during pregnancy when there is no evidence of actual harm or an imminent or substantial risk of harm to the newborn. New Jersey's civil child abuse and neglect statute requires showing that a child's physical, mental, or emotional condition has been impaired by a mother's substance use. Absent evidence of actual harm, the statute requires a showing of an imminent or substantial risk of harm to the child. In this case, records presented at trial showed the mother tested positive for cocaine when she was admitted to the hospital and cocaine metabolites were present in the baby's first stool, yet the baby's health was otherwise normal, and he was discharged from the hospital after two days. Absent evidence of actual harm or an imminent or substantial risk of harm, the court held the department failed to meet its burden to establish abuse or neglect under the statute.

CASE SUMMARY ►

***N.J. Div. of Child Protection & Permanency v. Z.S.*, 2017 WL 5248414 (N.J. Super. Ct. App. Div. 2017) (unpublished opinion).**

The New Jersey Court of Appeals affirmed a finding of abuse or neglect based on evidence of prenatal substance use that caused actual harm to a newborn. In this case, a mother tested positive for opiates and other substances that resulted in her newborn being born with neonatal abstinence syndrome. The baby experienced severe withdrawal symptoms at birth—including tremors, respiratory distress, and problems eating—that required intensive hospital care and treatment with morphine for a month. Unlike the baby in *New Jersey Dep't of Children & Families v. A.L.*, who tested positive for cocaine at birth but was otherwise healthy and discharged from the hospital after two days, the baby in this case suffered actual harm as a result of the mother's prenatal substance use. The court therefore found she fell within the child protection statute's definition of abused or neglected child – "...a child whose physical, mental, or emotional condition has been impaired..."

CASE SUMMARY ►

***In re V.R.*, 2008 WL 834368 (Ohio Ct. App.).**

The Ohio Court of Appeals determined a newborn could not be adjudicated dependent based on evidence of the mother's prenatal substance use absent clear and convincing evidence that the mother's actions harmed the child's condition, or the intended living situation would adversely affect the child's development. Ohio's child protection statute defines a dependent child as one "[w]ho lacks adequate parental care by reason of the mental or physical condition of [her] parents..." and provides that a child may be adjudicated dependent if her "condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship." The court stressed that while smoking marijuana, especially while pregnant, is not a good parenting decision, the state may not assume guardianship without clear and convincing evidence of an actual adverse effect on the child. The case differs from *In re Baby Blackshear*, in which the Ohio Supreme Court held a child with a positive toxicology screen at birth due to his mother's prenatal substance use was per se an "abused child" as defined by the state's civil child abuse statute.

CASE SUMMARY ➤

In re J.A., 260 Cal. Rptr. 3d 915 (2020).

The California Court of Appeals reversed a juvenile court ruling that a mother's use of medical marijuana while pregnant to treat her pregnancy symptoms was "substance abuse" that gave the juvenile court jurisdiction to bring a dependency action against the mother. The evidence showed the mother stopped using marijuana when asked and the claim that the mother's marijuana use harmed her child was speculative. The appellate court found the mother's prenatal marijuana use did not result in "injury, injuries, or detrimental condition" to her baby to trigger a statutory presumption of dependency.

Key Takeaways

- ✓ These decisions recognize that evidence of substance exposure or a positive drug test, without demonstrating a clear impact or risk of impact on the child, is not enough to support an abuse or neglect finding based on prenatal substance use. Mere speculation regarding harm to a child is not enough.
- ✓ The decisions offer guidance on the kinds of evidence that have been used to show actual harm (e.g., severe withdrawal symptoms, the need for intensive medical treatment, and lengthy hospital stays). These decisions also provide other examples where the information does not support an abuse or neglect finding based on prenatal substance use (e.g., a child's good health despite substance exposure, child's timely discharge from hospital, speculation about harm to child, mothers' compliance with request to stop using substances).

Question 4

Can prenatal substance exposure resulting from a pregnant mother's participation in medically approved substance treatment support an abuse and neglect finding at birth?

Treatment for mothers using substances during pregnancy has become more prevalent to promote healthy birth outcomes. Courts in New Jersey and California have considered if prenatal substance exposure resulting from a mother's use of medically approved drugs to minimize harmful effects to the newborn can support an abuse and neglect allegation at the time of the child's birth.

CASE SUMMARY ►

New Jersey Division of Child Protection & Permanency v. Y.N., **104 A.3d 244 (N.J. 2014).**

The Supreme Court of New Jersey considered a case involving a mother whose child suffered neonatal abstinence syndrome as a result of the mother's participation in a medically prescribed treatment program to address her substance use disorder during pregnancy. The mother, who was dependent on Percocet upon learning she was four months pregnant, followed recommendations from medical staff not to stop taking Percocet abruptly because it could endanger her pregnancy and entered a methadone maintenance treatment program. At birth, her baby suffered methadone withdrawal symptoms and remained hospitalized for seven weeks. The Division of Youth and Family Services filed an abuse and neglect complaint based on the mother's substance use before and during her pregnancy and the harm caused to her baby from methadone withdrawal.

The family court held a hearing and entered a finding of abuse and neglect. The appellate court affirmed, basing its decision on the ground that the mother caused her child to suffer withdrawal symptoms from methadone she took during a medically prescribed treatment program.

The Supreme Court of New Jersey reversed, holding that "absent exceptional circumstances, a finding of abuse or neglect cannot be sustained based solely on a newborn's enduring methadone withdrawal following a mother's timely participation in a bona fide treatment program prescribed by a licensed healthcare professional to whom she has made full disclosure." The court stressed that an abuse or neglect finding under New Jersey statute "required proof that [the mother] unreasonably inflicted harm on her newborn and did so, at least, by acting with gross negligence or recklessness." The supreme court concluded that by limiting its examination to the child's withdrawal symptoms at birth and not considering whether the mother took reasonable steps to minimize harm to her child by seeking treatment for her substance use disorder, the appellate court failed to consider all of the required statutory elements in its analysis.

The supreme court emphasized the high stakes a parent faces when an abuse and neglect finding is made and the importance of adhering to the statutory requirements. For example, in addition to the child's removal from parental care, in New Jersey an abuse and neglect finding results in the parent's name and information being listed in the state's Central Registry, disclosure of Central Registry information to future employers, potential transfer of a child's custody to a relative or other person, and potential termination of the parent's rights.

"...absent exceptional circumstances, a finding of abuse or neglect cannot be sustained based solely on a newborn's enduring methadone withdrawal following a mother's timely participation in a bona fide treatment program prescribed by a licensed healthcare professional to whom she has made full disclosure."

CASE SUMMARY ►

New Jersey Div. of Child Protection and Permanency v. J.G., **2015 WL 3538907 (N.J. Super. Ct. App. Div.).**

The New Jersey Superior Court Appellate Division, relying on *New Jersey Division of Child Protection & Permanency v. Y.N.*, reversed a family court order concluding a mother abused and neglected her newborn son based on prenatal substance use. The family court had based its abuse and neglect finding on the mother's admitted heroin use before the

child's birth, the child's positive test for opiate exposure at birth, and the child's diagnosis of narcotic withdrawal syndrome.

On appeal the mother argued there were alternative medical explanations for her baby's condition at birth. She claimed she had been participating in a medically prescribed treatment program and was taking a drug prescribed by her doctor to treat her opiate use disorder. She had complied with the medical directives of her treatment program and had only one positive urine test in three years of treatment (a year before the child's birth). Within 24 hours of her child's birth, the mother lost her prescribed medicine and took heroin to avoid withdrawal symptoms. The mother argued there was no proof that her baby's positive drug screen and withdrawal diagnosis resulted from her one-time heroin use before birth instead of the prescribed drug she had been taking as part of treatment.

The appellate court agreed that the cause of the child's positive drug test and withdrawal symptoms was unresolved. Given its ruling in *Y.N.*, which predated the family court's order, it remanded the case to the family court to determine if the harm suffered by the child resulted from the mother's course of treatment.

CASE SUMMARY ►

***In re Annie B.*, 2015 WL 5940032 (Cal. Ct. App.). (unreported).**

The California Court of Appeals considered a case involving a mother whose child was born with a positive toxicology screen for methadone requiring hospitalization for several weeks to address withdrawal symptoms. The mother, who also tested positive for methadone when the child was born, had a 20-year history of opiate and methamphetamine use that resulted in her losing custody to two older children. When she became pregnant, she stopped using opiates and sought methadone treatment at a treatment center to address her withdrawal symptoms. She enrolled in an outpatient treatment clinic specializing in treating opiate use disorders; including medication assisted treatment (mother was prescribed methadone).

...even though the mother made efforts to treat her substance addiction after learning she was pregnant by joining a methadone program, her continued substance use, even if lawful, endangered her child by causing the child to test positive for methadone at birth and to experience withdrawal for several weeks.

The Department of Children and Family Services filed a dependency petition on behalf of the newborn under California Welfare and Institutions Code §300(b), which applies when the child "has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent ... to adequately supervise or protect the child, ... or by the inability of the parent ... to provide regular care for the child due to the parent's ... substance abuse...." The department's petition alleged the child was born with a positive toxicology screen for methadone and was hospitalized and received treatment due to withdrawal resulting from unreasonable acts by her mother.

At a hearing on the petition, the mother explained she had been using methadone to address her Vicodin addiction before her baby was born. She had enrolled in an outpatient treatment clinic that specialized in treating opiate addiction and was committed to living a drug-free life. While she knew her baby would experience withdrawal at birth, she had been informed by medical staff at her treatment program that her child would not suffer harm.

The juvenile court sustained the §300(b) allegations and declared the newborn dependent and placed her with the presumed father with agency supervision. The father appealed the juvenile court's order declaring his daughter dependent, claiming the mother's use of legally prescribed methadone and history of substance use did not support dependency jurisdiction over the child.

The appellate court disagreed, finding the mother's current and past substance use supported dependency jurisdiction. The appellate court stressed that even though the mother made efforts to treat her substance use disorder after learning she was pregnant by joining a methadone program, her continued substance use, even if lawful, endangered her child by causing the child to test positive for methadone at birth and to experience withdrawal for several weeks. The appellate court noted the mother's long-term addiction to opiates and

that even though she had switched from Vicodin to prescribed synthetic opiates (methadone) as part of her drug detoxification treatment program, she remained addicted to opiates with no effort to taper her methadone use. The court found her substance use disorder and long-term illicit substance use met the definitions of “substance abuse” and “substance use disorders” in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders. It concluded her actions substantially harmed her newborn and squarely fell within §300(b).

Key Takeaways

- ✓ The New Jersey cases recognize that mothers struggling with a substance use disorder during pregnancy should not be penalized for securing medically recommended treatment to address their disorder and promote healthy outcomes for their children.
- ✓ The New Jersey cases highlight protections for parents who seek to protect an unborn child by seeking medically prescribed treatment. For example, New Jersey’s civil child abuse and neglect statute requires not only establishing harm to a child, but also whether the harm was “unreasonable” or performed with “gross negligence or recklessness.”
- ✓ The New Jersey cases recognize the high stakes parents face, such as inclusion in a child abuse registry, when an abuse and neglect finding is substantiated and stresses the need to address all statutory requirements to ensure the parent receives due process and statutory protections.
- ✓ The California case highlights how participating in substance use treatment during pregnancy may not avoid child welfare system involvement when a court also considers a parent’s long-term history of substance use and finds that participating in treatment did not change the mother’s substance use disorder but rather continued a pattern of substance use that resulted in harm to a newborn.

Question 5

Can a finding of abuse or neglect based on prenatal substance use be made when a mother lacks knowledge of her pregnancy when using illegal substances?

A mother's lack of awareness of her pregnancy when using illegal substances raises questions about whether she should be held accountable for harming her child. One state appellate court that has considered the issue concluded a mother who did not know of her pregnancy when she used illegal substances could not be found to have abused or neglected her child.

CASE SUMMARY ►

***South Carolina Dep't of Soc. Servs v. Jennifer M.*, 744 S.E.2d 591 (S.C. Ct. App. 2013).**

Although the court found the mother's substance use before the child's birth could qualify as abuse or neglect under the state's child protection statute, it did not believe such a finding could be made absent evidence the mother knew or should have known she was pregnant with a viable fetus when she used substances.

The South Carolina Court of Appeals held a mother could not be found to have abused or neglected her child, or have her name placed on a central registry, based on ingesting illegal substances while pregnant since she was unaware of her pregnancy. In reversing the family court's decision, the appellate court found the evidence in the case established the mother did not know she was pregnant until she went to the hospital with stomach pains and delivered the child. The mother testified she had two previous pregnancies and knew what it felt like to be pregnant, yet she had not experienced any typical signs of pregnancy. She had also not participated in prenatal care or secured items that a pregnant woman usually gets in anticipation of giving birth.

The court disagreed with the family court's determination that by participating in sexual activity, the mother knew or should have known she could become pregnant, and that because she had been pregnant before she should have been aware of the changes in her body signaling pregnancy.

Although the court found the mother's substance use before the child's birth could qualify as abuse or neglect under the state's child protection statute, it did not believe such a finding could be made absent evidence the mother knew or should have known she was pregnant with a viable fetus when she used substances. The court cautioned that to hold otherwise would mean "every woman who engages in sexual intercourse and becomes pregnant as a result could be found to have abused and neglected her unborn child based upon any conduct potentially harmful to the unborn child, even though the woman had no knowledge of her pregnancy."

Key Takeaways

- ✓ This decision recognizes a mother's prenatal substance use does not qualify as abuse or neglect when she lacks knowledge of her pregnancy when using illegal substances.
- ✓ The decision cautions against imputing knowledge of pregnancy as a rule for all women who engage in sexual activities, raising the concern that it could result in unjust abuse and neglect allegations.
- ✓ The decision also cautions against assuming a mother who has been pregnant before should know when she's pregnant for purposes of evaluating if prenatal substance use is abuse or neglect.

Question 6

Can a finding of abuse or neglect be made against a respondent father who knows of the mother's prenatal substance use but fails to intervene?

When a pregnant mother uses substances, the father's knowledge of that substance use and his role in either facilitating it or failing to stop it may become a focus in court. Three state appellate courts have determined a father's knowledge of a mother's prenatal substance use and failure to intervene is a basis for an abuse or neglect finding.

CASE SUMMARY ►

In re A.L.C.M., 801 S.E.2d 260 (W. Va. 2017).

The West Virginia Supreme court held West Virginia's statute governing civil abuse and neglect proceedings permits an abuse or neglect finding to be based on a parent's knowledge that another person is harming his or her child. In this case, a child was born with illegal substances in her system, forming the basis of an abuse and neglect petition against the mother and father. The allegations against the father claimed he knew or should have known of the mother's substance use during pregnancy but failed to intervene to protect the child. Citing West Virginia's child protection statute, which "defines an abused child to include one whose parent knowingly allows another person to commit abuse," the court found an abuse and neglect finding could be made against the father. The court emphasized that a parent charged with abusing a child need not commit the abuse him or herself as long as he or she knew the abuse was being perpetrated (citing *West Virginia Dep't of Health & Human Resources ex rel. Wright v. Doris S.*, 475 S.E.2d 865 (W. Va. 1996)).

CASE SUMMARY ►

In re Garvin M., 2014 WL 1887334 (Tenn. Ct. App.).

The Tennessee Court of Appeals upheld a trial court's finding of severe child abuse by a father based on his role in providing illicit drugs to the mother and his knowledge of the mother's prenatal substance use during her pregnancy, which resulted in their baby's death a day after birth. The appellate court also affirmed the trial court's decision to terminate the father's parental rights to the newborn's two older siblings based on the ground of severe child abuse.

In this case, a newborn died a day after birth from a stroke caused by his mother's prenatal substance use. The evidence established that the father and mother used substances together while she was pregnant, they were found together using substances the day a medical transport arrived to take the mother to the hospital when she was in labor, the father admitted to supplying substances to the mother during pregnancy, and he admitted knowing the mother panhandled for drug money while she was pregnant.

The appellate court agreed with the trial court's determination that there was clear and convincing evidence of "severe child abuse," defined in Tennessee Code Annotated § 37-1-102(b)(23) as: "The knowing exposure of a child to *or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death* and the knowing use of force on a child that is likely to cause serious bodily injury or death...."

The court also cited its decision in *In re Joshua*, 2012 WL 1691620 (Tenn. Ct. App.) that a father may have his parental rights terminated based on the ground of severe child abuse for failing protect an unborn child from illicit substance use by the mother during pregnancy.

The Tennessee Court of Appeals upheld a trial court's finding of severe child abuse by a father based on his role in providing illicit drugs to the mother and his knowledge of the mother's prenatal substance use during her pregnancy, which resulted in their baby's death a day after birth.

CASE SUMMARY ►***In re J.C.*, 233 Cal.App.4th 1 (2015).**

The California Court of Appeals considered a father's challenge to a trial court order assuming jurisdiction over his child after the child was born with methamphetamine in his system. The trial court assumed jurisdiction based on the child's positive drug screen at birth, the mother's substance abuse, and the father's failure to protect the child from the mother's substance abuse. The father claimed there was insufficient evidence to show he knew or could have done anything to stop the mother's substance abuse during pregnancy or that he posed a risk of harm to the child.

The appellate court concluded there was substantial evidence to support the trial court's findings. The mother and father began using drugs together starting when they were 15 years old. They were a couple for about 10 years and had two children together before the child in this case was born. Although they had separated at the time of the child's conception, they were still romantically involved during the separation. Despite the father's claim that the mother had told him she was in a substance rehabilitation program and was no longer using substances so he thought she was doing well, he admitted to using substances with the mother when she was five months pregnant. He also stated, before paternity was confirmed, that the child was likely his, yet he did nothing to stop the mother's drug use but instead aided and encouraged it.

CASE SUMMARY ►***In re Annie B.*, 2015 WL 5940032 (Cal. Ct. App.). (unreported)**

The California Court of Appeals reversed a trial court ruling finding a father's knowledge of the mother's drug use during pregnancy and his failure to protect their unborn child supported dependency court jurisdiction over him. The appellate court found the father had supported the mother's efforts to obtain prenatal care by attending prenatal care visits with her. He knew about and supported the mother's medically supervised treatment for her substance use disorder. In fact, he and the mother had both sought methadone treatment for their substance use disorder. He also supported the mother's attendance at narcotics anonymous meetings. Evidence also showed the father was unaware the mother's methadone use would harm their child based on information provided by medical staff at the mother's treatment program.

The appellate court distinguished the father's actions in this case from those in *In re J.C.*, where the father's actions of aiding and abetting a mother's substance use supported dependency court jurisdiction. Here, the father did not aid and abet the mother to use illegal substances. Instead, he and the mother were actively involved in addressing their substance dependency issues through their medically supervised use of methadone. The mother had sought methadone treatment on a physician's recommendation when she learned of her pregnancy and the father supported her treatment. The court found this evidence showed the father's acts were not consistent with a failure to protect the child and did not support a finding that he caused serious physical harm or illness to the child or put her at substantial risk of such harm.

Key Takeaways

- ✓ These decisions recognize the influential role fathers can play in cases involving prenatal substance use.
- ✓ Some decisions highlight how fathers may be held accountable when they know of a mother's prenatal substance use but fail to take steps to intervene or protect the child.
- ✓ The Tennessee case also shows that beyond an abuse or neglect finding, termination of parental rights to a child's siblings may be imposed in cases of severe child abuse when the father's knowledge of prenatal substance use and failure to intervene results in serious bodily injury to or death of the child, as in the Tennessee case.
- ✓ One decision highlights how a father's actions to actively support the mother's efforts to address her substance use and recovery was influential in concluding he did not fail to protect the child or put her at serious risk of harm to support dependency jurisdiction over him based on his knowledge of the mother's substance use.

Question 7

Can a parent's name be included in a state child abuse registry based on prenatal substance use?

When an abuse and neglect finding is substantiated against a parent based on prenatal substance use, the parent's name is often required to be listed in the state's child abuse and neglect registry. Some courts have weighed inclusion in the registry as a factor when considering if prenatal substance abuse constitutes abuse. Courts have also considered arguments by mothers against having their names listed in the state registry based on using drugs while pregnant.

CASE SUMMARY ►

***In re L.J.B.*, 199 A.3d 868 (Pa. 2018).**

The Pennsylvania Supreme Court found a mother could not be a perpetrator of child abuse against her unborn fetus for using illicit drugs during her pregnancy because the state's statutory definition of "child" does not include a fetus. (See above for a thorough discussion of this case.) As part of its analysis, the court noted that finding the mother was a child abuse perpetrator would result in her name in the statewide child abuse and neglect database, which would impact her ability to secure a job, find housing, and join volunteer activities. The court countered the child welfare agency's argument that an abuse finding and registry listing would protect future children from harm. It stressed that labeling a mother a child abuse perpetrator and including her name in the registry would challenge her ability to join the workforce and join her child's activities and would interfere with the goal of preserving family unity and creating a supportive environment for the child.

CASE SUMMARY ►

***New Jersey Division of Child Protection & Permanency v. Y.N.*, 104 A.3d 244 (N.J. 2014).**

The Supreme Court of New Jersey reversed a ruling finding a mother abused and neglected her newborn based solely on evidence of the newborn's methadone withdrawal after the mother timely participated in a treatment program prescribed by a licensed healthcare professional to whom she had disclosed her substance use upon learning she was pregnant. (See above for a discussion of this case.) The supreme court weighed the state's central registry listing requirement as a factor when evaluating the abuse and neglect finding against the mother. It emphasized the high stakes a parent faces and the long-term negative consequences when an abuse and neglect finding is made, including the statutory requirement to list the parent's name and information in the state's central registry and disclose the information to future employers, doctors, courts, and child welfare agencies.

CASE SUMMARY ►

***South Carolina Dep't of Soc. Servs v. Jennifer M.*, 744 S.E.2d 591 (S.C. Ct. App. 2013).**

The South Carolina Court of Appeals considered a mother's argument on appeal that since she lacked knowledge of her pregnancy she could not be found to have abused or neglected her child or ordered to have her name listed in the state's child abuse registry based on her prenatal substance use. (See above for a discussion of this case.) South Carolina statute requires courts to order a person's name entered in the state's child abuse registry upon finding the "person physically or sexually abused or willfully or recklessly neglected the child." The appellate court reversed the lower court's abuse and neglect ruling and order placing the mother's name on the registry based on the mother's lack of knowledge of her pregnancy. The court stated, "It is difficult to see how a finding of abuse or neglect or inclusion of a person's name on the Central Registry for ingestion of harmful drugs during pregnancy will promote the prevention of children's problems where the mother is not aware of the pregnancy at the time of her drug use."

CASE SUMMARY ►

C.W. v. Georgia Dep't of Human Servs., 2019 WL 6694903 (Ga. Ct. App. 2019).

The Georgia Court of Appeals considered a mother's appeal of a lower court decision ordering the listing of her name in the state's child abuse and neglect registry based on her use of marijuana while pregnant. The mother had admitted to using marijuana during pregnancy to alleviate nausea and vomiting. In reversing the lower court's order, the appellate court held that marijuana is not a controlled substance as defined by Georgia statute. Therefore, the mother's use of marijuana while pregnant was not prenatal abuse subject to listing in the state's central registry.

Key Takeaways

- ✓ These decisions show that courts recognize that a listing in the state's child abuse and neglect registry has long-term consequences that can work against the child welfare system's goal of supporting parents and promoting family stability.
- ✓ Courts have shown a willingness to weigh registry listing as a factor when evaluating an abuse and neglect finding based on prenatal substance use.
- ✓ Challenges to lower court decisions ordering the listing of a parent's name in the state's child abuse and neglect registry have generally succeeded if the facts show the underlying abuse and neglect finding based on prenatal substance use was unsupported based on the circumstances in the case (e.g., the parent lacked knowledge of pregnancy, prenatal substance exposure resulted from parent's participation in medically prescribed treatment, parent's substance use involved a non-controlled substance).

Question 8

Is prenatal substance use a basis to terminate parental rights at birth?

Terminating a mother's parental rights based on prenatal substance use is a harsh consequence that permanently severs family relationships. Some courts have considered if prenatal substance use is a basis to terminate a parent's rights. Tennessee and Michigan appellate courts have recognized prenatal substance use as "severe abuse" and a ground for termination. In contrast, the Connecticut Supreme Court held a mother's prenatal substance use was not "parental conduct" subject to termination of parental rights since an unborn child is not a "child" as defined by the state's child protection statute. Another Michigan court held termination was not supported by a mother's prenatal marijuana use absent evidence of actual harm to the baby.

CASE SUMMARY ►

In re Envy J., 2016 WL 5266668 (Tenn. Ct. App. 2016).

The Tennessee Court of Appeals held evidence of a mother's prenatal substance use amply supported the trial court's finding of severe abuse, a statutory ground to terminate parental rights to her newborn child.

The Tennessee Court of Appeals held evidence of a mother's prenatal substance use amply supported the trial court's finding of severe abuse, a statutory ground to terminate parental rights to her newborn child. The mother had a history of child welfare system involvement based on her substance use involving two older children. One of those children had recently entered state custody based on the mother's positive drug screen. When her baby was born, the mother and baby tested positive for illegal substances. Evidence also established the baby was born with an enlarged heart with a flap of skin covering his airway and would likely have lifelong respiratory issues and special needs.

Tenn. Code Ann. § 37-1-102(b)(21)(A)(i) defines "severe abuse" as: "The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death and the knowing use of force on a child that is likely to cause serious bodily injury or death."

Tenn. Code. Ann. § 36-1-113(g)((4) further provides that a parent's rights may be terminated if:

[t]he parent or guardian has been found to have committed severe child abuse as defined in Tenn. Code Ann. § 37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against the child who is the subject of the petition or against any sibling or half-sibling of such child, or any other child residing temporarily or permanently in the home of such parent or guardian

The court cited a line of Tennessee appellate cases⁴ that have held a mother's use of substances while pregnant constitutes severe child abuse warranting termination of parental rights. It discussed its decision in one of those cases, *In re M.J.J.*, 2005 WL 873305 (Tenn. Ct. App.), where it found evidence of prenatal substance use alone, without a showing of any lasting impact on the child, was sufficient to establish severe abuse for the purpose of terminating a mother's parental rights. In this case, the evidence of the mother's prenatal substance use and its impact on the newborn's physical health, clearly supported a finding of severe abuse to warrant termination of the mother's parental rights. (Also see *In re Garvin*, discussed above, in which a Tennessee appellate court upheld the termination of a father's parental rights to siblings based on severe abuse resulting from the death of a newborn due to a mother's prenatal substance use and the father's failure to intervene.)

CASE SUMMARY ►

The Michigan Court of Appeals upheld the termination of a mother's parental rights to her newborn child at the initial dispositional hearing based on the mother's excessive alcohol consumption during pregnancy resulting in severe harm to the child.

In re Rippy, 2019 WL 6050376 (Mich. Ct. App. 2019).

The Michigan Court of Appeals upheld the termination of a mother's parental rights to her newborn child at the initial dispositional hearing based on the mother's excessive alcohol consumption during pregnancy resulting in severe harm to the child. It also found the evidence supported the judicial determination that the mother subjected the child to aggravated circumstances as defined by Michigan statute and therefore reasonable efforts were not required.

The child was born premature at 32 weeks and suffered severe FAS symptoms, including microcephaly, thin upper lip, clenched jaw, lower set ears, webbed feet, and no testes. He also had an intraventricular hemorrhage, fluid in the brain, cystic encephalomalacia, heart murmur, suspected brain bleed, and little brain activity. The agency claimed the mother admitted to drinking alcohol throughout her pregnancy and did not intend to plan for her child.

The trial court determined the child was medically fragile based on his FAS symptoms. It found the agency established statutory grounds to terminate the mother's parental rights at the initial dispositional hearing under MCL 712A.19b(3)(b)(i) (the parent's act caused physical injury and there is a reasonable likelihood that the child will suffer from injury or abuse in the future in the parent's home); MCL 712A.19b(3)(b)(g) (the parent failed to provide proper care and custody for the child); and MCL 712A.19b(3)(b)(j) (there is a reasonable likelihood that child will be harmed if returned to the parent's home).

The mother appealed the termination order, claiming the agency failed to make reasonable efforts to reunite her with her child. The appellate court disagreed, explaining that the trial court had found the mother's excessive alcohol consumption during pregnancy constituted severe abuse resulting in life-threatening injury to her child and that the mother was the perpetrator of this abuse. These findings supported a judicial determination that the mother subjected the child to aggravated circumstances as defined by MCL 722.638(1) and (2) and therefore reasonable efforts were not required under MCL 712A.19b(2)(a).

CASE SUMMARY ►

The court determined the mother's unborn child was not a "child" under the state's child protection statute, therefore the mother was not a "parent" when she used illegal substances and her prenatal substance use was not "parental conduct" subject to termination of parental rights.

In re Valerie D., 613 A.2d 748 (Conn. 1992).

The Connecticut Supreme Court reversed a trial court order terminating a mother's parental rights based on her prenatal substance use. The court determined the mother's unborn child was not a "child" under the state's child protection statute, therefore the mother was not a "parent" when she used illegal substances and her prenatal substance use was not "parental conduct" subject to termination of parental rights.

In the underlying case, a mother with a history of substance use and child welfare system involvement used cocaine within hours of giving birth. At birth the baby had poor muscle tone, was pale, and required oxygen. Cocaine metabolites were found in her urine and she suffered cocaine withdrawal symptoms.

The state petitioned for temporary custody of the newborn on the basis that the mother's prenatal substance use "put the child 'in great risk of life-threatening medical complications' and this conduct constituted 'intentional and severe parental neglect.'" The state also filed a coterminous petition for termination of parental rights, claiming that "due to the respondent's use of cocaine throughout the pregnancy resulting in the child having been born 'drug addicted' and 'suffering from withdrawal,' the child 'had been denied by reason of act or acts of commission or omission, the care, guidance or control necessary for [her] physical, educational, moral or emotional well-being' under Conn. Gen. Stat. § 45a-717(f) (2).

The trial court granted the coterminous petitions. Regarding the termination of parental rights petition, the trial court found clear and convincing evidence that the mother's

intravenous substance use in the last stages of her pregnancy denied the child, by reason of acts of omission or commission, of care, guidance or control necessary for her well-being and that termination of her parental rights and placement of the child for adoption was in the child's best interests. The appellate court⁵ affirmed, holding that "a judgment of termination of parental rights can be supported solely by evidence of a mother's prenatal conduct."

On appeal, the mother claimed Conn. Gen. Stat. § 45a-717(f)(2) does not permit termination of parental rights based on prenatal conduct. The supreme court considered the legislative history and legislative intent in enacting the statute, concluding "parental conduct justifying termination of parental rights pursuant to § 45a-717(f)(2) must occur after birth and that the statute does not contemplate termination of parental rights upon the basis of prenatal conduct."

In reaching its conclusion, the supreme court considered the definition of "parent" under Conn. Gen. Stat. § 45a-717, concluding a parent is one who "brings forth offspring." Therefore, the mother was not a "parent" until she gave birth and her conduct towards her child was not "parental conduct" until the child was born. The court also found the legislature's definition of "child" as a person "under sixteen years of age" limited its application to a person who has been born. The court reasoned that until the moment of birth, the baby was not a "child" within the meaning of § 45a-717(f)(2). Therefore, "the 'act ... of parental commission' that took place before that moment cannot be considered to be parental conduct that 'denied [her] ... the care ... necessary for [her] physical ... well-being.'"

The court declined to extend the statute's application to prenatal conduct that occurs hours before a child's birth or to confine its application to prenatal conduct that is illegal.

CASE SUMMARY ►

In re Richardson, 329 Mich. App. 232 (Mich. Ct. App. 2019).

In a termination of parental rights proceeding brought after a child tested positive for marijuana at birth, the Michigan Court of Appeals held the evidence was insufficient to support a finding that the mother had an issue with continued substance use that presented an actual risk of harm to her child to support termination of her parental rights. The mother had epilepsy and used medical marijuana to treat her seizures, her parenting ability would be affected if she had frequent seizures, mother's neurologist and physician testified that medical marijuana was a valid treatment for epilepsy, and mother was not impaired during parent-child visits and understood the importance of not being impaired while caring for child.

Key Takeaways

- ✓ These decisions represent opposing views on imposing termination of parental rights based on a prenatal substance use. All rely on statutory interpretation. Tennessee and Michigan recognized that a mother's prenatal substance use met the state's statutory definition of "severe abuse" and was a ground to terminate parental rights. Michigan also found reasonable efforts were not required to reunify the mother with her child since her prenatal substance use constituted aggravated circumstances. Connecticut declined to read its termination of parental rights statute to permit termination based on a parent's prenatal conduct, concluding such conduct is not "parental conduct" when it involves an unborn child. Another Michigan decision held termination of parental rights based on mother's medical marijuana before and after child's birth was improper absent evidence of actual harm to her child.

Considering Court Rulings When Implementing Plans of Safe Care

In 2016, the Child Abuse Prevention and Treatment Act (CAPTA) was amended by the Comprehensive Addiction and Recovery Act (CARA).⁷ CAPTA requires states to operate a statewide program to address the needs of infants born with and affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure, or a Fetal Alcohol Spectrum Disorder (FASD), and their affected family or caregivers. This includes developing a plan of safe care (POSC), which is “a plan designed to ensure the safety and well-being of an infant with prenatal substance exposure following his or her release from the care of a healthcare provider by addressing the health and substance use treatment needs of the infant and affected family or caregiver.”⁸

As states adopt and implement policies and procedures to address this population, several rulings highlighted above may inform state approaches to implementing POSC. Key policy and practice reforms and intersections with court rulings include:

Developing state definitions of infants “affected by substance abuse, withdrawal, and a Fetal Alcohol Spectrum Disorder” to help health care providers and courts make decisions that address the needs of affected children and families.

As states align their practice with the 2016 CARA amendments to CAPTA, they should consider developing definitions of “infants born with and identified as being affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure, or a Fetal Alcohol Spectrum Disorder.” CAPTA further requires that “health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition of such infants.” As states develop these definitions, they may consider:

- ❑ Rulings on prenatal substance exposure and whether exposure could be interpreted as child abuse or imminent risk of harm. Clear definitions of “affected by” can minimize variation in equating prenatal substance exposure with child abuse and neglect.
- ❑ Delineating definitions for infants who only require notice and a POSC from those infants who require a POSC and a report to child welfare due to child abuse, neglect, or imminent risk of harm. For infants with no other risk or safety concerns requiring only a notification and a POSC, states may consider an aggregate notification process as an alternative to a child protection services report. Under this approach, community agencies could develop the POSC for infants and families. Aggregate or non-case specific notification may minimize reporting biases and

reduce the number of family referrals to child protective services.

- ❑ Identifying prenatal healthcare providers and hospital practices for screening women for substance use. The American College of Obstetricians and Gynecologists (ACOG) recommends providers verbally screen all women for substance use.⁹ Ideally, this screening would occur during each trimester with an evidence-based screening tool to complete the screening. Universal substance use screening of women during pregnancy can decrease decision biases by healthcare providers and ensure women have early opportunities to access treatment and supports as needed. In the absence of universal screening, selection bias results in disproportionate screening and testing of low-income patients and patients of color.

Implementing prenatal POSC to support pregnant women using medically approved substance treatment.

States can consider working with community providers to implement prenatal POSC for pregnant women receiving medically approved treatment or for those continuing to use substances. CAPTA mandates that POSC be implemented at birth. However, providers working with pregnant women could prepare pregnant women by implementing the POSC prenatally. The prenatal POSC can be provided to child welfare or healthcare providers as a record of the mother’s work to address her substance use disorder and prepare for the arrival of her infant.

A prenatal POSC may mitigate the need for a mandated report to child protection services when an infant is born. It may also provide the needed family supports and interventions to prevent removal of an infant by child protection services. States should be aware of case law rulings within their state that could result in a finding of child abuse or neglect, or criminal prosecution, for a mother who voluntarily participates in a POSC or substance use disorder treatment while pregnant. Protections for parents who voluntarily participate in prenatal treatment encourage mothers to seek treatment without fear of a punitive response. The prenatal POSC can be developed by:

- ❑ Medically approved substance use disorder treatment providers
- ❑ Therapeutic substance use disorder treatment providers
- ❑ Home visitors (e.g., Nurse Family Partnership)
- ❑ Prenatal Care providers

For more information on state implementation of the plan of safe care, see:
[Plan of Safe Care Learning Modules](#)

Conclusion

The legal system's response to mothers who use substances during pregnancy is evolving. State supreme and appellate courts are answering many challenging questions, among them whether and how to intervene to protect a prenatally substance exposed child before and after birth, the evidence needed to support intervention, and several unique issues involving parental knowledge of prenatal substance use, treatment for prenatal substance use, state child abuse and neglect registries, and termination of parental rights. Courts' decisions often reflect a balance between protecting the child, honoring parental rights, holding parents accountable, and keeping families together.

Endnotes

1. Haight, S., et al. (2018). "[Opioid Use Disorder Documented at Delivery Hospitalization—United States, 1999–2014](#)." *Morbidity and Mortality Weekly Report* 67 2018, 845–849. A; Ko, J.Y. et al. (2016). "[Incidence of Neonatal Abstinence Syndrome – 28 States, 1999–2013](#)." *Morbidity and Mortality Weekly Report* 65, 2015, 799–802.
2. This recognition aligns with protections included in the requirement included in CAPTA and the CARA Amendments for states to develop Plans of Safe Care for infants born prenatally exposed to substances. See Quality Improvement Center and National Center for State Courts. *Plans of Safe Care: An Issue Brief for Judicial Officers*, undated.
3. Twenty-three states and the District of Columbia consider substance use during pregnancy to be child abuse under civil child-welfare statutes, and three consider it grounds for civil commitment. Guttmacher Institute. [Substance Use During Pregnancy](#), May 1, 2020.
4. In re B.A.C., 317 S.W.3d 718 (Tenn. Ct. App. 2009); In re Benjamin M., 310 S.W.3d 844 (Tenn. Ct. App. 2009); Cornelius v. State, Dep't of Children's Servs., 314 S.W.3d 902 (Tenn. Ct. App. 2009; In re Shannon P., 2013 WL 3777174 (Tenn. Ct. App.); In re Joshua E.R., 2012 WL 1691620 (Tenn. Ct. App.); In re M.J.J., 2005 WL 873305 (Tenn. Ct. App.).
5. In re Valerie D., 595 A.2d 922 (Conn. Ct. App. 1991).
6. Kunins, H. V. et al. (2007). "[The Effect of Race on Provider Decisions to Test for Illicit Drug Use in the Peripartum Setting](#)." *Journal of Women's Health* 16(2), 2007, 245–255.
7. P.L. 114-198. The Comprehensive Addiction and Recovery Act of 2016, Section 503
8. U.S. Department of Health and Human Services Administration for Children and Families Administration on Children, Youth and Families Children's Bureau. Plans of Safe Care for Infants With Prenatal Substance Exposure and Their Families. Child Welfare Information Gateway, August 2019.
9. American Society of Addiction Medicine, Committee on Obstetric Practice. Opinion No. 711: Opioid Use and Opioid Use Disorder in Pregnancy, August 2017.



Quality Improvement Center
Collaborative Community Court Teams



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