

Case Law Review

Child Welfare Court Cases Involving Prenatal Substance Use: A Primer for Professionals Serving Mothers and Families

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Introduction

State supreme and appellate courts presiding over civil child protection cases often decide legal issues relating to a mother's prenatal use of substances. These court decisions affect the work of professionals who serve mothers, infants, and family members affected by prenatal substance use. As courts answer questions that arise during child welfare proceedings, they shape the legal landscape in which child welfare professionals, substance use disorder treatment practitioners, health care professionals, and others who work with these families practice.

Understanding how courts have ruled on these issues is helpful to professionals serving mothers and families affected by prenatal substance because it:

- highlights key legal challenges communities face in these cases,
- informs decision making in day-to-day practice,
- provides guidance by interpreting relevant state statutes and court precedent, and
- identifies areas of consensus and disagreement that can signal where reform is needed to create greater uniformity and consistency in practice.

This brief, drawn from *Key Legal Issues in Civil Child Protection Cases Involving Prenatal Substance Exposure*, an in-depth review of court decisions around the country, highlights legal themes that have emerged over the last 10-15 years in child welfare court cases involving prenatal substance use. It highlights key legal questions courts have answered, relevant cases, and key takeaways for the field. A separate section explores practice considerations for professionals serving mothers and their families.

Case Law Themes

Key legal issues that have emerged in court decisions include:

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

States largely limit protections in civil child protection statutes in cases involving prenatal exposure to substances to children from birth to age 18. Courts generally do not permit states to intervene when a child is in utero when the mother is using substances during pregnancy based on this statutory definition. And at least one state supreme court declined to find prenatal substance use was abuse and neglect under the state’s civil child protection statute because there was no “child” at the time of the alleged harm.

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.

Evaluating special issues when determining if state intervention is warranted.

A few scenarios create unique issues for courts when determining if prenatal substance use 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 use disorder 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. 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 addiction 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 use disorder treatment and stop her prenatal substance use has been considered in finding the father’s actions did not support an abuse or neglect finding.

Legal Issues and Key Takeaways

Court cases addressing prenatal substance use and child welfare reflect a tension between defining who is a “child,” protecting children, holding parents accountable, honoring parental rights, and protecting the public. While these legal issues are distinct, they are also interrelated. Eight legal issues courts have considered are highlighted below. Short summaries of courts’ holdings are provided, followed by key takeaways. Readers are encouraged to read the full review [hyperlink] for complete summaries and analyses.

LEGAL ISSUE ▶

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.

Relevant Cases ▶

- ❑ *In re Unborn Child of Starks*, 18 P.3d 342 (Okla. 2001). The Oklahoma Supreme Court held Oklahoma’s Children’s Code applies to human beings who have been born and are under age 18 and does not protect a child who was a fetus at the time of the mother’s alleged abuse (prenatal drug use).
- ❑ *Arkansas Dep’t of Human Servs. v. Collier*, 95 S.W.3d 772 (Ark. 2003). The Arkansas Supreme Court held the trial court improperly declared an unborn fetus dependent neglected, placed the pregnant mother in state custody, and assessed costs of prenatal care to the state. The Supreme Court of Arkansas determined a juvenile is statutorily defined as an individual from “birth to age 18” and does not include 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.

LEGAL ISSUE ▶

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.

Relevant Cases ▶

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

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 find 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.

LEGAL ISSUE ▶

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.

Relevant Cases ▶

- *In re A.L.C.M.*, 801 S.E.2d 260 (W. Va. 2017). The West Virginia Supreme Court held the presence of illegal substances in a child’s system at birth, based on the mother’s admitted use of substances during pregnancy, was sufficient evidence of abuse or neglect within West Virginia’s civil child abuse and neglect statute. The court emphasized that the harm to the child need not be consummated, but rather can be attempted, to constitute abuse.
- *In re M.M.*, 133 A.3d 379 (Vt. 2015). The Vermont Supreme Court upheld the trial court’s decision that a newborn was a ‘child in need of services’ under Vermont’s child protection statute based solely on evidence of prenatal substance exposure.
- *In re Baby Blackshear*, 736 N.E.2d 462 (Ohio 2000). The Ohio Supreme Court held a newborn 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. 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.
- *In re T.T.*, 128 P.3d 328 (Colo. Ct. App. 2005). 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, which met state child protection statute’s definition of a dependent or neglected child.

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.
- ✓ 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.

LEGAL ISSUE >

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 needed to establish abuse and 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.

Relevant Cases >

- *New Jersey Dep’t of Children & Families v. A.L.*, 59 A.3d 576 (N.J. 2013). The New Jersey Supreme Court held a finding of abuse or neglect under the state’s civil child abuse and neglect statute 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.
- *N.J. Div. of Child Protection & Permanency v. Z.S.*, 2017 WL 5248414 (N.J. Super. Ct. App. Div. 2017). 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 who experienced severe withdrawal symptoms at birth requiring intensive hospital care and treatment with morphine for a month.
- *In re V.R.*, 2008 WL 834368 (Ohio Ct. App.). The Ohio Court of Appeals held 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.
- *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 court jurisdiction to bring dependency action. Evidence showed mother stopped using marijuana when asked and

claim that mother’s marijuana use harmed child was speculative. Mother’s prenatal marijuana use did not result in “injury, injuries, or detrimental condition” to her baby to trigger 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. Speculation is not enough to establish harm.
- ✓ 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, mother’s compliance with request to stop using substances).

LEGAL ISSUE ▶

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

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.

Relevant Cases ▶

- *New Jersey Division of Child Protection & Permanency v. Y.N.*, 104 A.3d 244 (N.J. 2014). The New Jersey Supreme Court held a finding of abuse or neglect could not be sustained based solely on a newborn’s enduring methadone withdrawal following the mother’s timely participation in a bona fide treatment program prescribed by a licensed healthcare professional to whom she made full disclosure.
- *New Jersey Div. of Child Protection and Permanency v. J.G.*, 2015 WL 3538907 (N.J. Super. Ct. App. Div.). The New Jersey Court of Appeals held the family court improperly determined a mother abused and neglected her newborn based on prenatal substance use, which the mother claimed occurred during treatment for her substance use. The cause of the child’s positive drug test and withdrawal symptoms was unresolved, requiring remand to the family court.
- *In re Annie B.*, 2015 WL 5940032 (Cal. Ct. App.). The California Court of Appeals held a mother’s current and past substance use supported dependency jurisdiction despite her recent efforts to treat her substance addiction after learning she was pregnant. Mother had enrolled in an outpatient treatment clinic specializing in treating opiate use disorders; including medication assisted treatment (mother was prescribed methadone). Her continued substance use, even if lawful, endangered and caused her child to test positive for methadone at birth and to experience withdrawal for several weeks.

Key Takeaways ▶

- ✓ The New Jersey cases recognize that mothers struggling with drug addiction during pregnancy should not be penalized for securing medically recommended treatment to address their addiction 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 addiction but rather continued a pattern of substance use (prescribed methadone to manage her disorder) that resulted in harm to a newborn.

LEGAL ISSUE ▶

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.

Relevant Cases ▶

- *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 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.

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.

LEGAL ISSUE ▶

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.

Relevant Cases ▶

- *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 supported an

abuse or neglect finding against a father based on his knowledge that the mother was harming their child by using substances during pregnancy and his failure to intervene.

- ❑ *In re Garvin M.*, 2014 WL 1887334 (Tenn. Ct. App.). The Tennessee Court of Appeals held a finding of severe child abuse could be based on the father’s 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 court also affirmed the trial court’s decision to terminate the father’s parental rights to the newborn’s two older siblings.
- ❑ *In re J.C.*, 233 Cal.App.4th 1 (2015). The California Court of Appeals held the Trial court properly assumed jurisdiction over the father’s newborn, who was born drug exposed; substantial evidence showed the father aided and abetted the mother’s drug use during pregnancy and did nothing to protect the child.
- ❑ *In re Annie B.*, 2015 WL 5940032 (Cal. Ct. App.). The California Court of Appeals held the trial court should not have assumed jurisdiction over a father who attended prenatal care visits with the mother and supported her medically supervised treatment for her drug addiction and attendance at narcotics anonymous – actions that were not consistent with a failure to protect the child or cause 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 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.

LEGAL ISSUE ▶

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.

Relevant Cases ▶

- ❑ *In re L.J.B.*, 199 A.3d 868 (Pa. 2018). The Pennsylvania Supreme Court held a mother could not be a perpetrator of child abuse against her unborn fetus for using illicit drugs during pregnancy because the state’s statutory definition of “child” does not include a fetus. The court noted as part of its analysis that finding the mother was a child abuse perpetrator would result in listing her name in the statewide child abuse and neglect database, which would impact her ability to secure a job, find housing, and join volun-

teer activities, and would interfere with the goal of preserving family unity and creating a supportive environment for the child.

- ❑ *New Jersey Division of Child Protection & Permanency v. Y.N.*, 104 A.3d 244 (N.J. 2014). The New Jersey Supreme Court weighed the state’s central registry listing requirement as a factor when evaluating an abuse and neglect finding against mother based on evidence of the newborn’s methadone withdrawal (See above case, *New Jersey Division of Child Protection & Permanency v. Y.N.*, 104 A.3d 244 (2014). The court emphasized the high stakes a parent faces and the negative consequences of an abuse and neglect finding, including the statutory requirement to list the parent’s name and information in the state’s central registry.
- ❑ *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 reversed the trial court’s abuse and neglect ruling and order placing a mother’s name on child abuse registry based on her 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.”
- ❑ *C.W. v. Georgia Dep’t of Human Servs.*, 2019 WL 6694903 (Ga. Ct. App. 2019). The Georgia Court of Appeals reversed the trial court’s order listing a mother’s name in the state child abuse registry based on her marijuana use while pregnant since marijuana is not a controlled substance as defined by Georgia statute.

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).

LEGAL ISSUE ▶

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. A line of Tennessee appellate decisions, using statutory interpretation, recognize 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.

Relevant Cases ▶

- ❑ *In re Envy J.*, 2016 WL 5266668 (Tenn. Ct. App. 2016). The Tennessee Court of Appeals held that evidence of a mother’s prenatal substance use supported the trial court’s

finding of severe abuse, a statutory ground to terminate parental rights to her newborn child.

- ❑ *In re Rippy*, 2019 WL 6050376 (Mich. Ct. App. 2019). The Michigan Court of Appeals held the trial court properly terminated a mother’s parental rights to her newborn at the initial dispositional hearing based on the mother’s excessive alcohol consumption during pregnancy resulting in severe abuse 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.
- ❑ *In re Valerie D.*, 613 A.2d 748 (Conn. 1992). The Connecticut Supreme Court held a 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 Richardson*, 329 Mich. App. 232 (Mich. Ct. App. 2019). The Michigan Court of Appeals held evidence was insufficient to find 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.

Practice Considerations

In 2016, the Child Abuse Prevention and Treatment Act (CAPTA) was amended by the Comprehensive Addiction and Recovery Act (CARA).¹ 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.”²

The 2016 amendments included removing the term “illegal” in regard to substance abuse, requiring that POSC address the needs of both the infant and the affected family or caregiver, and specifying data to be reported by states.

As states adopt and implement policies and procedures to address this population, several rulings highlighted above may inform state approaches to implementing POSC.³ 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 those infants who only require a notification to child protective services and a plan of safe care from those infants who require a plan of safe care 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 biases in reporting and reduce the number of families referred 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.⁴ 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. A study on the effect of race on provider decisions to test for illicit drug use found “Black women and their newborns were 1.5 times more likely to be tested for illicit drugs as nonblack women in multivariable analysis...[though] We found equivalent positivity rates among tested black and nonblack women.”⁵ In the absence of universal screening, selection bias results in disproportionate screening and testing of low-income patients and patients of color. Including universal substance use screening in policies and practices related to this population would help ensure all infants and their families affected by substance abuse, withdrawal, or an FASD receive the services and supports they may need.

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. The CAPTA legislation mandates that POSC be implemented at birth. However, providers working with pregnant women could help 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 to 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 (ex: Nurse Family Partnership)
- Prenatal Care providers

For more information on state implementation of the plan of safe care see: *Plans 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. The Comprehensive Addiction and Recovery Act, Pub. L. No. 114-198, § 503 (2016).
2. 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.
3. A summary of state laws can be found on the Child Welfare Information Gateway: <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safecare/>
4. American Society of Addiction Medicine, Committee on Obstetric Practice. Opinion No. 711: Opioid Use and Opioid Use Disorder in Pregnancy, August 2017.
5. Kunins, H. et al. “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.



Quality Improvement Center
Collaborative Community Court Teams



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