Safe Children, Stable Families, Supportive Communities

February 8, 2022
Opponent Testimony SB216
Senate Judiciary Committee
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Chair Manning, Vice-Chair McColley, Ranking Member Thomas, and Members of the Committee, my name is Mary Wachtel, and I am the director of public policy for the Public Children Services Association of Ohio (PCSAO). PCSAO is a membership-driven association of Ohio's county public children services agencies (PCSAs) that advocates for and promotes children services program excellence and sound public policy for safe children, stable families, and supportive communities. Thank you for the opportunity to testify in opposition to SB216.

Beginning in 2015 and until recently, Ohio saw rising numbers of children entering foster care, in large part driven by the opiate epidemic. Notably, the level of trauma that children experience related to parental substance use has changed the nature of children services; many PCSAs report that infants and children are staying in foster care longer, and more are coming into permanent custody.

PCSAO and our member agencies appreciate that over the last several years, the General Assembly and the DeWine administration have responded to this crisis by investing additional resources to help communities respond and to establish state and local initiatives to assist families impacted by substance use disorder. We have seen success with the evidence-based and research-driven programs that those initiatives have created, including Ohio START, the MOMs program, implementation of plans of safe care for infants born exposed to illegal and legal substances as mandated by federal law (CARA implementation), and the expansion of family treatment courts[1]. It is critical to support and grow these initiatives, as the addiction epidemic is far from over.[2]

[1] Family treatment courts (FTCs), also referred to as family drug courts and dependency drug courts, use a multidisciplinary, collaborative approach to serve families with substance use disorders (SUDs) and who are involved with the child welfare system

[2] Both Ohio and the U.S. as a whole experienced a record-high number of overdose deaths from April of 2020 to April of 2021 according to the National Center for Health Statistics. Experts indicate that this rise in overdose deaths can be largely attributed to the increased presence of fentanyl in other illegal substances as well as the isolation and mental health struggles that many people have experienced as a result of the COVID-19 pandemic.

It is within this context that PCSAO and our member organizations have reviewed SB216 and have concluded that we must oppose the bill. The bill requires all substance-exposed infants (except for those whose mothers are in medication-assisted treatment) to enter children services custody for at least six months; prohibits parent/infant contact and parent/infant residing together until certain conditions are met; and sets the conditions under which infants may return home.

While PCSAO agrees with the underlying intent of SB216, to ensure that infants born exposed to substances are safe and receive the care they need to recover and thrive, we oppose the bill for the following primary reasons:

1) **SB216's one-size-fits-all mandate would prevent community providers and children services agencies from treating infants and families according to their unique situations and will result in many infants being unnecessarily separated from parents and from other family members who can care for them.**

   Research and best practice demonstrate that children and families have better outcomes when they are able to stay together during recovery. Substance use disorder is a family disease, and a family-centered approach to recovery serves the needs of parents, children, and the family.

   With the right services and supports, many parents who struggle with addiction can stay involved in their children's lives, safely care for their children, and gain and maintain long-term recovery. For some families, those services and supports occur while the infant remains in the home or with another family member; for others, those services and supports occur while the infant is in foster care, and in most instances, the parent maintains contact.

   For example, Ohio START (Sobriety, Treatment and Reducing Trauma) is a children services-led intervention model for families experiencing both substance use disorder and children services involvement. It brings together children services caseworkers, behavioral health providers, and family peer mentors into teams that can wrap supports around the family. Ohio START helps families with additional needs related to housing, employment, food, parenting skills and education. In 2021, Ohio START family peer mentors spent over 6,700 hours with the families they serve, providing support and oversight during the recovery process. Since its creation by Governor DeWine when he served as attorney general, 944 Ohio families and over 1,600 children have been served by this program which has recently expanded to 54 Ohio counties.

2) **Mandating removal of infants based solely on evidence of substance use can harm mothers and infants.** By requiring the removal of infants even when no safety concerns are present, SB216 would erode trust and reduce the likelihood of pregnant women to seek prenatal care and substance use treatment, resulting in increased prenatal exposure. Further, by preventing contact with the infant for a minimum of six months, these removals jeopardize mother-infant bonding during a critical developmental period. (For an in-depth discussion of this and other legal issues regarding child welfare and prenatal substance use, see attached Case Law Review from the American Bar Association's Center on Children and the Law.)

3) **SB216 will dramatically increase the number of children in foster care even when there are no safety concerns.** The National Center on Substance Abuse and Child Welfare estimates that 15 percent of infants are affected by prenatal alcohol or illicit drug exposure.[3] With an average of 135,000 babies born in Ohio every year, this means that approximately 20,000 infants in our state are born exposed. Given that SB216 only exempts infants whose mothers were on medication-assisted treatment, it is expected that a high percentage of these 20,000 infants would be required to enter Ohio's foster care system, regardless of safety concerns.

   Many of us know a family member, friend, colleague, or neighbor who struggles with addiction or loves someone who does. Now imagine that person's family not being able to step in to care for their baby, not allowing for bonding, contact, or family connections while the baby's parent works on sobriety.

   Recognizing this balance, the federal Comprehensive Addiction and Recovery Act (CARA) was enacted in 2016 to amend portions of the Child Abuse Prevention and Treatment Act (CAPTA), including provisions relating to infants affected by substance abuse. This law explicitly *did not* establish prenatal substance abuse as a form of child abuse and instead focused on ensuring that the health and treatment needs of both the infant and their parent/caregiver are met through a plan of safe care. Federal guidance instructs that plans of safe care should be created collaboratively with parents/caregivers, caseworkers, and other professionals working with the family. In Ohio, if a plan of safe care is not in place, or is not sufficient, those cases are referred to children services agencies who then work with the families.

In closing, I want to acknowledge 15 written testimonies from 11 local public children services agencies providing their front-line perspective on working with families struggling with addiction and the impact of SB216. For these reasons, PCSAO opposes SB216 and urges the Committee to do the same. I am available to answer any questions you may have. Thank you.

[3] National Center on Substance Abuse and Child Welfare. (n.d.) *Infants with Prenatal Substance Exposure*. https://ncsacw.samhsa.gov/resources/substance-exposed-infants.aspx?platform=hootsuite

Quality Improvement Center
Collaborative Community Court Teams

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Case Law Review

Child Welfare Court Cases Involving Prenatal Substance Use: Policy Considerations

May 2021

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. As courts answer questions that arise during child welfare proceedings, they often interpret state civil child abuse and neglect statutes and policies. Understanding the role of state statutes and policies in case outcomes can help identify opportunities to build on, reform, or reimagine statutes and policies so they keep pace with the current evidence and knowledge base regarding best practices to support mothers, infants, and families touched by prenatal substance use.

This brief, drawn from *Key Legal Issues in Civil Child Protection Cases Involving Prenatal Substance Exposure*, a 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 issues courts have addressed, relevant cases, key takeaways for the field, and policy considerations. The policy considerations identify potential negative consequences and harm from punitive responses to prenatal substance use and offer evidence and strength-based approaches to working with mothers and families that support healthier outcomes.

Policy Considerations at a Glance

- Understand how punitive state policies related to substance use during pregnancy may harm the health of pregnant women and newborns.
- Be aware of the consequences of statutes permitting state intervention and punitive responses based on evidence of substance use alone.
- Explicitly define "actual harm," or "imminent risk of harm" to a child resulting from prenatal substance use in state statutes and policies.
- Support universal screening and drug testing to determine prenatal substance exposure.
- Avoid penalizing mothers who seek medically approved treatment in good faith.
- Support implementing prenatal Plans of Safe Care (POSC) to help and encourage pregnant women's use of medically approved substance treatment.
- Support implementing POSC even in the absence of child maltreatment.
- Promote implementation of the Family First Prevention Services Act to expand prevention and treatment services.
- Support harm-reduction strategies that keep families together while promoting good health care and minimizing court and child welfare agency involvement in families' lives.
- Develop supportive interventions for mothers who become aware of their pregnancies while using illegal substances.
- Support fathers who intervene to protect the child and support the mother's treatment and recovery.
- Avoid statutory schemes that automatically terminate a mother's parental rights based on prenatal substance use alone without a review of the individual circumstances in the case.

Key Legal Issues

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. 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.

Whether 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 before a child is born.

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 Department of Human Services v. Collier,* 95 S.W.3d 772 (Ark. 2003). The Arkansas Supreme Court held the trial court improperly declared a fetus in need of child protection, 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 Takeaway ➢

- ✔ 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 on behalf of a fetus. They recognize that a mother cannot be penalized for using illegal substances during pregnancy when the alleged harm occurred before the "child" existed.

Whether state civil child protection statutes' definition of "child" support a finding of child abuse at birth based on prenatal conduct to support state intervention

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 Case ➢

- ❒ *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 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 public health approach that includes primary prevention, prenatal Plans of Safe Care, and linkages to substance use disorder treatment during pregnancy is likely to improve health outcomes for infants and mothers.

Policy Considerations

› **Understand how punitive state policies related to substance use during pregnancy may harm the health of pregnant women and newborns.** A 2019 study[1] published in the *Journal of the American Medical Association Network Open* analyzed nearly 4.6 million live births in eight states between 2003-2014. Policies that criminalized substance use during pregnancy, included substance use during pregnancy as grounds for civil commitment, or considered it child maltreatment were associated with greater rates of neonatal abstinence syndrome. A public health approach that includes primary prevention, prenatal Plans of Safe Care, and linkages to substance use disorder treatment during pregnancy is likely to improve health outcomes for infants and mothers.

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

Fourteen states and the District of Columbia include "prenatal exposure of a child to harm due to the mother's use of an illegal drug or other substance" in statutory definitions of child maltreatment.[2] 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.

Finding abuse or neglect based on evidence of prenatal substance exposure alone.

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 the 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.

Policy Considerations

› **Permitting state intervention and punitive responses based on evidence of substance use alone can have negative consequences for mother and infant.**

Treatment access. Statutes or regulations that state evidence of prenatal substance exposure alone is enough to support state intervention, including an infant being removed at birth, can result in women avoiding prenatal care and substance use disorder treatment, resulting in increased prenatal exposure. Statutes and policies must recognize that substance exposure alone does not always mean a child's health or welfare has been harmed.

Mother-infant bond. State statutes that permit an abuse and neglect finding and state intervention based on evidence of prenatal substance use alone can lead to infants being removed from the mother at birth, even without safety concerns, jeopardizing mother-infant bonding during a critical developmental period. Home visiting and other in-home services, such as those approved by the Title IV-E Clearinghouse established under the Family First Preservation and Services Act support mother-infant bonding during the post-partum period while helping to assure child safety.[3]

Statutes and policies must recognize that substance exposure alone does not always mean a child's health or welfare has been harmed.

› **Support reasonable efforts to prevent removal of the child from the home.** Federal law requires child welfare agencies to make reasonable efforts (and active efforts in cases involving Native American families) to prevent the removal of children from their homes and placement into out-of-home care.[4] Such efforts may include access to comprehensive treatment services, development and implementation of a Plan of Safe Care, or continuing care and recovery supports.[5]

Finding abuse or neglect based on evidence of harm or imminent risk of harm.

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 Department 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.

- ❒ *New Jersey Division 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 (Ct. App. 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).

Policy Considerations

- › **Explicitly define "actual harm" or "imminent risk of harm" to a child resulting from prenatal substance use in state statutes and policies.** State statutes that require evidence of actual harm or an imminent risk of harm from prenatal substance exposure to support an abuse or neglect finding and state intervention force a deeper inquiry into the facts and circumstances surrounding a mother's prenatal substance use. However, some state courts have interpreted a pregnant mother's substance use alone as constituting actual harm or risk of harm to the child, which risks equating prenatal substance exposure with abuse and neglect.

  Most states' statutes do not include prenatal substance exposure, in the absence of safety and risk concerns or harm to the infant, in their definition of child maltreatment. The Child Abuse Prevention and Treatment Act (CAPTA) (P.L. 114-198) requires health care providers involved in the delivery or care of an infant born with and identified as affected by substance abuse or withdrawal symptoms resulting from prenatal substance exposure or a Fetal Alcohol Spectrum Disorder (FASD) notify child protective services of the birth. CAPTA further states that such notification shall *not* be construed to establish a definition under federal law of child abuse or neglect. CAPTA requires developing a Plan of Safe Care for infants identified under this section that addresses the health and substance use disorder treatment needs of the affected family or caregiver.

Most states' statutes do not include prenatal substance exposure, in the absence of safety and risk concerns or harm to the infant, in their definition of child maltreatment.

Including universal substance use screening in policies and practices for 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.

› **Support universal screening and drug testing to determine prenatal substance exposure.** The American College of Obstetricians and Gynecologists (ACOG) recommends providers verbally screen *all* women for substance use.[6] Regulations that do not implement universal screening and drug testing to determine prenatal substance exposure can result in selection bias in screening and testing patients of color and disproportionate involvement in the child welfare system. 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."[7] 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 for 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.

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.

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 continues a pattern of substance use that harms a child.

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 Division 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 20-year history of opiate and methamphetamine use that resulted in losing custody of two older children 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 (1) 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; (2) highlight protections for parents who seek to protect an unborn child by seeking medically prescribed treatment; and (3) 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.

Policy Considerations

› **Avoid penalizing mothers who seek medically approved treatment in good faith.** Mothers who seek medically approved substance use treatment in good faith to address their addiction and promote healthy outcomes for their children should not be penalized if prenatal substance exposure results from that treatment. The American College of Obstetricians and Gynecologists issued an opinion that the standard of care for pregnant women with opioid use disorder is opioid-assisted therapy.[8] Punitive responses to such exposure, including state intervention, removal of the child, and listing of the mother's name in a state central registry, can serve as a disincentive to the mother to seek prenatal care and substance use disorder treatment, resulting in poorer health outcomes for infants and mothers at birth. Such determinations should be made case-by-case, considering the mother's drug use history, prior involvement in the child welfare and legal systems, and current circumstances.

Courts, child welfare agencies, and other covered entities must understand how Section 504 of The Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 may protect the rights of individuals in recovery from an opioid use disorder and receiving medication-assisted treatment. In 2020, the West Virginia Department of Health and Human Resources entered into a voluntary agreement with the Office of Civil Rights at the U.S. Department of Health and Human Services to protect the rights of persons with disabilities, including persons in recovery from an opioid use disorder who take prescribed medication for the disorder, to be free from discrimination in state child welfare programs. In that case, an aunt and uncle were improperly denied placement of their niece and nephew based on the uncle's recovery from opioid use disorder and his long-term use of Suboxone medication to treat his disorder.[9]

Mothers who seek medically approved substance use treatment in good faith to address their addiction and promote healthy outcomes for their children should not be penalized if prenatal substance exposure results from that treatment.

› **Support implementing prenatal Plans of Safe Care (POSC) to help and encourage pregnant women's use of medically approved substance treatment.** States can work with community providers to implement prenatal POSC for pregnant women receiving medically approved treatment or for those continuing to use substances. While not required by CAPTA, 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 needed family supports and interventions to prevent removal of an infant by child protection services.

- **Support implementing POSC even in the absence of child maltreatment.** CAPTA requires notifying child protective services of infants born with and identified as affected by substance abuse and makes no exception when there are no concerns of child abuse or neglect. While many states only develop POSC with families with open child welfare cases, other states implement POSC for families that are screened out by child protection services after the notification. These POSC are implemented through partnerships with community-based agencies. This approach is reinforced in the Children's Bureau Program Instruction (ACYF-CB-PI-17-02), stating, "…the development of a plan of safe care is required whether or not the circumstances constitute child maltreatment under state law." States should also consider creating a notification pathway in lieu of an abuse report for women adhering to a legally prescribed medication, such as medications for an opioid use disorder, where there are no safety or risk concerns for infants and children. While POSC are an important safeguard for families affected by substance use, care should be used to ensure they are used fairly and to support the family. They should not be used as a surveillance mechanism for mothers living in poverty.

- **Promote implementation of the Family First Prevention Services Act (Family First) to expand prevention and treatment services.** This legislation, signed into law in 2018, offers an opportunity for state child welfare and substance use disorder treatment agencies to expand prevention and treatment services to prevent children being removed from their homes and support reunification. Family First allows states to claim Title IV-E foster care maintenance payments for a child in foster care who is placed with a parent in a licensed residential family-based treatment facility. Family First also allows Title IV-E funds to be used for prevention services intended to prevent a child's placement in foster care.[10]

- **Support harm-reduction strategies that keep families together while promoting good health care and minimizing court and child welfare agency involvement in families' lives.** Programs like the Families in Recovery (FIR) rooming-in program, founded by Dr. Ron Abrahams in Canada 15 years ago, help women and their newborns stabilize and withdraw from substances while keeping them together to improve their health.[11] Rooming-in programs "base their understanding about the effects of drug use during pregnancy on scientific evidence, and view mothers who have used drugs as entitled to high-quality, evidence-based care if they need it, along with respect and support."[12] Such programs can also support efforts to ensure reasonable efforts are made to prevent removal and keep families together.

Rooming-in programs "base their understanding about the effects of drug use during pregnancy on scientific evidence, and view mothers who have used drugs as entitled to high-quality, evidence-based care if they need it, along with respect and support."

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 substances 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.

Relevant Case ➢

❒ *South Carolina Department of Social Services 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 Takeaway ➢

✔ 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. It 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. It also cautions against assuming a mother who has been pregnant before should know when she is pregnant for purposes of evaluating if prenatal substance use is abuse or neglect.

Policy Considerations

Public health approaches that promote harm-reduction strategies, universal screening of pregnant women, prenatal Plans of Safe Care, and access to treatment services and other supports will result in healthier outcomes for the mother and infant.

› **Develop supportive interventions for mothers who become aware of their pregnancies while using illegal substances.** The findings in the South Carolina case match what we know about substance use during pregnancy. The National Survey on Drug Use and Health reports that women's substance use (alcohol, tobacco, illicit substances) during pregnancy goes down after the first trimester, suggesting most women will reduce their substance use during pregnancy once they realize they are pregnant.[13] Policies that create legal consequences (criminal or child abuse) through statutes that sanction pregnant women with substance use create barriers to seeking essential prenatal health care or treatment for substance use. This can harm the mother and infant's health. Not treating pregnant women with an opioid use disorder, in particular, increases the risks of preterm delivery and low infant birth weight. Public health approaches that promote harm-reduction strategies, universal screening of pregnant women, prenatal Plans of Safe Care, and access to treatment services and other supports will result in healthier outcomes for the mother and infant.

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.

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 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.
- ✔ 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.

Policy Considerations

› **Support fathers who intervene to protect the child and support the mother's treatment and recovery.** When applying statutes that hold a father accountable for abuse or neglect based on his knowledge of a mother's substance use, consider what steps he took to protect the child and support the mother's treatment and recovery. Substance use disorders are family diseases; a family member with a substance use disorder affects the whole family. Family-centered treatment provides services and supports to each affected family member. Family-centered treatment is associated with a range of positive outcomes for both children and parents, including improved child welfare outcomes[14] (e.g., increased rates of reunification), better treatment outcomes[15] (e.g., reduced mental health symptoms and trauma effects, fewer risky behaviors, and long program retention), and enhanced parent-child relationship outcomes[16] (e.g., parent-child bonding). These services can strengthen a parent's or partner's capacity to safely care for their children while supporting their spouse's recovery.[17]

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Terminating parental rights based on prenatal substance use

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 court 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.
- ❒ *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 to reunify the mother and child 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 the evidence was insufficient to find a 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 Takeaway ➢

- ✔ 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 a mother's medical marijuana before and after child's birth was improper absent evidence of actual harm to her child.

Policy Considerations

- › **Avoid statutory schemes that automatically terminate a mother's parental rights based on prenatal substance use alone without a review of the individual circumstances in the case.** State statutes and policies that define prenatal substance use as "severe abuse" or "aggravated circumstances" to automatically permit termination of parental rights sever the mother-child relationship permanently. A deeper inquiry into the individual circumstances in the case and whether parents have received services and supports could mitigate the need for termination of parental rights.

- › **Ensure reasonable and active efforts are made to reunify the family and achieve timely permanency**. Federal law requires child welfare agencies to make reasonable efforts (and active efforts in cases involving Native American families) to reunify or achieve timely permanency for children who are removed from their homes and placed in out-of-home care.[18] For families affected by substance use disorders, reasonable efforts may include access to comprehensive treatment services, development and implementation of a Plan of Safe Care,[19] continuing care and recovery supports, routine visitation and family time, family-centered practices, supportive resource parents, and services for all family members.[20]

Federal law requires child welfare agencies to make reasonable efforts (and active efforts in cases involving Native American families) to reunify or achieve timely permanency for children who are removed from their homes and placed in out-of-home care.

Conclusion

The case law highlighted in this brief offers insights into the way appellate courts throughout the country are ruling in decisions to intervene when mothers use substances during pregnancy. Court decisions on a variety of legal issues in these cases often turn on the interpretation of state statutes and policies. The policy considerations offered in this brief seek to ensure these statutes and policies align with best practices, federal guidance, and current science and knowledge about strength-based approaches to working with mothers and families affected by substance use exposure.

Endnotes

1. Faherty, Laura J. et al. "Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy with Rates of Neonatal Abstinence Syndrome," *JAMA Open Network,* November 13, 2019. doi:10.1001/jamanetworkopen.2019.14078

2. Child Welfare Information Gateway. Definitions of Child Abuse and Neglect, March 2019.

3. Research supports placing mothers and babies together during a mother's recovery from substance use. *See* Abrahams, Dr. Ron, and Nancy Rosenbloom. "Effective Strategies for Courtroom Advocacy on Drug Use and Parenting." *Child Law Practice Today,* October 2, 2019.

4. 45 C.F.R. 1356.21(b)(2).

5. For more guidance, *see* Center for Children and Family Futures & ABA Center on Children and the Law. *Reasonable and Active Efforts, and Substance Use Disorders: A Toolkit for Professionals Working with Families in or at Risk of Entering the Child Welfare System,* 2019.

6. American College of Obstetricians and Gynecologists, Committee on Obstetric Practice. "ACOG Committee Opinion No. 711: Opioid Use and Opioid Use Disorder in Pregnancy." August 2017.

7. 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. https://doi.org/10.1089/jwh.2006.0070

8. "For pregnant women with an opioid use disorder, opioid agonist pharmacotherapy is the recommended therapy and is preferable to medically supervised withdrawal because withdrawal is associated with high relapse rates, which lead to worse outcomes. Opioid agonist pharmacotherapy in combination with prenatal care has been demonstrated to reduce the risk of obstetric complications." *See* The American College of Obstetricians and Gynecologists, August 2017.

9. U.S. Dep't of Health and Human Servs. "OCR Secures Agreement with West Virginia to Protect Persons in Recovery from Opioid Use Disorder from Discrimination on the Basis of Disability," May 13, 2020.

10. Children and Family Futures, ChildFocus, & National Association of State Alcohol and Drug Abuse Directors. *Implementing the Substance Use Disorder Provisions of the Family First Act: A Toolkit for Child Welfare and Treatment Stakeholders,* undated.

11. *See* Abrahams & Rosenbloom, 2019.

12. Ibid.

13. Substance Abuse and Mental Health Services Administration, Center for Behavioral Health Statistics and Quality. *2015 National Survey on Drug Use and Health: Detailed Tables.* Rockville, MD: Substance Abuse and Mental Health Services Administration, 2016.

14. Grella, C. E., Y.I. Hser, & Y.C. Huang. "Mothers in Substance Abuse Treatment: Differences in Characteristics Based on Involvement with Child Welfare Services." *Child Abuse & Neglect* 30(1), 2006, 55–73. *doi:10.1016/j.chiabu.2005.07.005*

15. Zweben, J. E. et al. "Enhancing Family Protective Factors in Residential Treatment for Substance Use Disorders." *Child Welfare* 94(5), 2015, 145–166.

16. Wong, J. "Understanding and Utilizing Parallel Processes of Social Interaction for Attachment-Based Parenting Interventions. *Clinical Social Work Journal* 37(2), 2009 163–174.

17. National Center on Substance Abuse and Child Welfare. Implementing a Family-Centered Approach, 2021.

18. 45 C.F.R. 1356.21(b)(2).

19. *See* 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,* August 2019.

20. Center for Children and Family Futures & ABA Center on Children and the Law, 2019.

Quality Improvement Center
Collaborative Community Court Teams

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