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Verdict

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[Joanna L. Grossman](#)

In Utero: The New Jersey Supreme Court Says Prenatal Drug Exposure Is Not Sufficient Evidence of Child Abuse



What legal consequences can or should result from a woman's use of illegal drugs while pregnant? This is a complicated question with neither easy, nor universally agreed upon answers. Different states have invoked criminal law, child protection law, and the law of civil commitment in order to deter, restrict or punish behavior that might endanger a fetus. But all of these approaches raise questions about state power and efficacy, as well as concerns about disproportionate targeting of poor and minority women.

The New Jersey Supreme Court recently ruled, unanimously, that the state may not find a newborn to be abused or neglected based solely on evidence of prenatal drug exposure without evidence of actual harm to the child. In *New Jersey Division of Youth and Family Services v. A.L.*, the court overturned a lower court's finding that a newborn was abused or neglected based primarily on tests of a stool sample shortly after birth, which was positive for cocaine metabolites. The court's interpretation of the applicable statute wisely forces the state child protective agency to build a stronger case that a newborn is at risk of future harm before making a finding of abuse and neglect, which might justify temporary or permanent removal of the child and even termination of parental rights.

The Problem of Drug Use Among Pregnant Women

Concern about drug use by pregnant women goes in waves; that concern peaked in the 1980s and 1990s with a media-fueled panic about an epidemic of "crack babies." In retrospect, there was no epidemic, and the "crack babies" were not nearly as condemned to a hopeless future as the public was led to believe. But drug use among pregnant women is still a real problem. According to a study by the federal Department of Health and Human Services, about 4.5 percent of pregnant women in 2009 and 2010 used illicit drugs. (Compare these statistics, though, with results from the same study showing that 10.8 percent of pregnant women use alcohol during pregnancy, and 16.3 percent use tobacco.)

Risks of prenatal drug exposure to cocaine include physical impairments like growth retardation and smaller head circumference, and behavioral and emotional complications like ADD, depression, anxiety and aggression. The long-term damage does not appear to be as severe, however, as researchers once thought. And the effects are less

severe than the effects of alcohol exposure and equal to the effects of tobacco. There is emerging concern about prenatal exposure to crystal meth, however, the effects of which may be even more severe.

State Approaches to Prenatal Drug Exposure

Concern about prenatal drug exposure has driven states in three different directions. A majority of states have prosecuted at least some women for using illegal drugs while pregnant. Charges have included homicide (when the pregnancy ends in late miscarriage or stillbirth), criminal child endangerment, and drug delivery to a “minor” (the fetus). When appealed, most of the convictions are overturned, on the grounds that the relevant statutes were not intended to include an unborn child as a potential victim. Only the South Carolina Supreme Court has upheld a homicide conviction in a case of prenatal drug exposure; courts in other states have reversed convictions in similar cases.

The Kentucky Supreme Court overturned a criminal child endangerment conviction based in part on a state law discouraging punitive actions against pregnant drug and alcohol abusers. Such tactics, the law stated, would “discourage[e] these individuals from seeking the essential prenatal care and substance abuse treatment necessary to deliver a healthy newborn.” The problem of drug abuse during pregnancy should be treated, according to this law, “solely as a public health issue.”

In recent years, some legislatures have passed criminal laws explicitly targeting drug abuse by pregnant women. These laws expressly criminalize the targeted behavior, and are thus not vulnerable to the claim that unborn children were not intended as potential victims. And they are almost certainly constitutional.

One effort to crack down on pregnant women’s drug use in South Carolina was invalidated by the Supreme Court. In *Ferguson v. City of Charleston (2001)* (<http://supreme.justia.com/cases/federal/us/532/67/case.html>), the Court held unconstitutional a state hospital’s policy of drug-testing pregnant women without their consent. When a woman tested positive, the hospital would threaten criminal charges unless she agreed to enter a rehabilitation program. Because patients had a reasonable expectation of privacy in their medical tests, and the central purpose of this testing protocol was to gather evidence used to threaten or pursue criminal prosecution, the Court held that the practice violated the Fourth Amendment.

Is Prenatal Drug Exposure Child Abuse?

Beyond efforts in the criminal arena, states have also used child-protection law to go after pregnant drug users. As with the criminal convictions, many of the states’ efforts in this regard have been overturned by courts on the theory that a fetus is not a “child” for purposes of a child abuse and neglect law.

But what if a child is born with detectable levels of drugs or alcohol in his or her system? Is that child—now clearly a “child” rather than a fetus—the victim of child abuse or neglect? That was one issue in the recent New Jersey case, *NJDYFS v. A.L.*

In some states, the civil child abuse and neglect law explicitly applies to unborn children. Child protection officials in these states have broader power to intervene during a pregnancy, including even, in some cases, to force hospitalization or other forms of restraints to prevent continued exposure. But can a statute that does not expressly provide for coverage of the unborn be applied to a case of prenatal drug exposure? The case of *NJDYFS v. A.L.* raised the issue.

The Facts in *NJDYFS v. A.L.*

In that case, the mother, A.L., tested positive for cocaine when she was admitted to the hospital in labor. As a result of that test result, the newborn baby was tested for drug exposure. A urine test two hours after birth was negative, but a test of the baby’s meconium the following day showed evidence of cocaine metabolites. The hospital called the state’s child protection agency to report the drug test results. The agency’s investigation revealed that the mother had also tested positive for marijuana during her fifth month of pregnancy.

The agency interviewed a five-year-old child of A.L., the newborn’s father (T.D.), and A.L.’s parents, with

whom A.L. still lived. A.L. denied using drugs during pregnancy, claiming that both positive test results were from accidental exposure—inhaling smoke from a friend’s joint in one case, and having cocaine spilled on her by a friend in the other. As for the baby, it had very good health scores at birth and appeared, according to the caseworker, to be physically well cared for at home after birth.

A month after the baby’s birth, the agency filed a complaint for “care and supervision” of both A.L.’s children under the state’s abuse and neglect statute. The trial court granted the agency’s request, allowed the mother only supervised contact with the children, and ordered her to submit to substance abuse evaluation and random drug testing. The older child was placed in the custody of A.L.’s parents; the baby was left with A.L. and T.D., but with A.L.’s contact to be supervised by T.D. and A.L.’s parents. Six months later, all restrictions on A.L.’s contact with the children were lifted. But still the agency moved for a finding of abuse and neglect.

The Requirements for a Finding of Child Abuse and Neglect under New Jersey Law

By statute, the agency had to show that the baby’s “physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of [A.L.’s] failure . . . to exercise a minimum degree of care . . . by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof. . . .”

At the hearing, the agency brought no witnesses. Instead, it introduced several documents to show that both mother and baby had tested positive for cocaine and that the father had conceded that they were a family in “need of services”; and also introduced a report summarizing the agency’s investigation. The agency, the court noted, “made no allegations and presented no evidence against A.L. relating to her behavior during the nearly seven months since the child’s birth.” The hearing focused on only one aspect of her parenting—the in utero transmission of cocaine, as evidenced by the test results.

The agency conceded that it could not prove actual harm to the baby. It based its complaint for abuse and neglect solely on the positive drug test and the prediction that the child would not be going home to a safe environment. The trial court made a finding of abuse and neglect based solely on the prenatal exposure to cocaine, and an appellate court affirmed the trial court’s ruling.

After two years of compliance with the agency’s restrictions and demands, the case was terminated by consent. But A.L. continued to appeal the finding against her of abuse and neglect because the finding itself, even if it does not lead to removal of the child or termination of parental rights, is harmful to her, as well as to other pregnant women who might be discouraged from seeking prenatal care for fear of being subject to agency intervention.

The case garnered a surprising amount of interest among advocates and policymakers. In “friend of the court” briefs, they argued that the lower courts in this case “relied on discredited science,” and misconstrued the applicable statute. They also warned that expanding the statute to cover unborn children “will harm newborn children by deterring some women from seeking prenatal care” and will “harm low-income and minority communities in a disproportionate way.”

The New Jersey Supreme Court ruled for the mother in this case. Without evidence of actual harm to the infant from the in utero exposure to cocaine, the agency had to offer additional evidence to support a finding of abuse and neglect. The standard has to be high given every parent’s constitutionally-protected right to the care and custody of her children, which can be overridden by the state, acting on its “*parens patriae*” power to protect the welfare of children, only when absolutely necessary. The statutory definition of abuse and neglect is supposed to draw that line between parental rights and the state’s obligation to protect children.

The court’s ruling rested on a few basic conclusions. First, the court ruled that the abuse and neglect statute applies to a child, not a fetus. The statutory definition provides that “abused or neglected child means a child less than 18 years of age.” Elsewhere in the statute, the language refers to a child as a person of an age “from birth . . . to 18,” and, in unrelated provisions, the statute expressly includes the “unborn child” when the legislature so intended.

Second, because the law only protects a child after birth, the focus must be on the child's condition at birth and afterwards. The mother's prenatal conduct can be relevant, but only to the extent that it relates to the "child's suffering or the risk of harm after birth." Actual impairment at birth as a result of prenatal drug exposure would suffice (e.g., evidence of drug withdrawal symptoms or physical impairments), but without "such proof, the critical focus is on the evidence of imminent danger or substantial risk of harm. The statute does not cover a past risk of harm during pregnancy, which did not materialize." Proof of frequent drug use during pregnancy might support a finding of imminent harm, but "not every instance of drug use by a parent during pregnancy, standing alone, will substantiate a finding of abuse. . . ."

Third, the court was hesitant to read the statute unnecessarily broadly, given the serious consequences of a parent's being found liable for abuse or neglect of a child. Based on such a finding, the parent is entered into a registry, which can disclose its records to "doctors, courts, child welfare agencies" and some employers. Having a record as a child abuser can only exacerbate other challenges the parent already faces.

On the facts before it, the court did not believe that the agency had offered sufficient proof of imminent harm to the child. It relied too heavily on documentary evidence that did nothing more than establish one instance of prenatal drug exposure. But, according to the court, "On its own, the one entry does not tell us whether the mother is an addict or used an illegal substance on a single occasion. The notation does not reveal the severity or extent of the mother's substance abuse or, most important in light of the statute, the degree of future harm posed to the child."

These cases turn on "particularized evidence," often including "expert testimony," but none was offered here. And the experts who filed amicus briefs on appeal all challenged the agency's position that prenatal drug use "poses an imminent risk of harm to a newborn" and wrote persuasively that the scientific consensus is to the contrary.

The court made clear that the agency was right to initiate an abuse and neglect investigation based on the drug test. But after evidence of imminent harm failed to materialize, the court opined that the agency should have shifted to less invasive ways to help the family. Other provisions of the child protection law allow the agency to offer services, without compelling them, and even to provide temporary care and custody to a child in need.

Conclusion

There are no easy answers to the problem of prenatal drug use. But experts agree that the most effective response is rehabilitation, rather than punishment. Pregnant women have notoriously little access to drug treatment programs, however. Wisely, though, Congress has authorized block grants to states for drug-treatment programs, including money earmarked for treatment of pregnant drug users. The New Jersey court ruling takes a balanced approach that looks out for children, without overreacting to a mother's conduct when that conduct may or may not impair her ability to be a good and caring parent.



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