

## Legal Developments in Treating and Prosecuting Pregnant Substance Abusers

During the past decade, the law has evolved regarding the imposition of additional criminal penalties for illegal drug use by pregnant women. Social workers in substance abuse treatment programs, homeless services, public welfare, and medical settings are likely to encounter female clients in need of prenatal care who may be deterred by the possibility of criminal prosecution for their activities during pregnancy. This article examines the development of case law and state statutes regarding drug use among pregnant women, and discusses NASW's activity and policy on this topic.

### Case Law

Most state courts refuse to prosecute women who have given birth to drug-addicted infants. However, South Carolina courts developed a body of case law that supports prosecution and imprisonment.

*State v. McKnight* (2003), is the most recent and outstanding court decision to address the criminalization of prenatal drug use. This case, decided by the Supreme Court of South Carolina in 2002, involved a stillbirth suffered by a woman (McKnight) who used cocaine during the pregnancy. In addition to the cocaine, McKnight smoked cigarettes and had syphilis. The prosecution relied on state child abuse statutes to charge McKnight with homicide through extreme indifference to human life. The appeals court affirmed McKnight's conviction, and her sentence of 20 years' imprisonment (to be suspended after serving 12 years). This decision was based, in large part, on interpretations of South Carolina law that have included the unborn fetus in the definition of "child" for the purposes of child abuse. McKnight's attempt to seek review of her case by the United States Supreme Court was unsuccessful, and thus, her conviction stands.

Other state courts that have examined the same issue have declined to impose a criminal penalty, based in large part, on a public policy determination that criminal sanctions would deter pregnant drug users from seeking prenatal medical care. Some of these decisions are reviewed below. A factual distinction between these cases and *McKnight* is that *McKnight* involved the death of an infant, and the other cases involved infant addiction and drug withdrawal symptoms.

In *Commonwealth v. Welch* (1993), a Kentucky mother was convicted of drug abuse and possession, as well as criminal child abuse, for ingesting oxycodone during her pregnancy. Her infant suffered mild symptoms of "neonatal abstinence syndrome," due to sudden withdrawal from the drugs after birth. Her conviction for child abuse was reversed on appeal, and the Supreme Court of Kentucky affirmed that ruling, holding that the legislature did not intend to find addicted pregnant women to be criminally responsible, but rather to pursue a public health approach to this vexing problem. The court based its ruling primarily on the existence of the Maternal Health Act of 1992, which provided for "expanded access to prenatal care and to alcohol and substance abuse education and treatment programs" as the sole approach to pregnant alcohol or substance abusers ( *Id.* , p. 284).

Another case, *Commonwealth v. Kemp* (1992), involved a defendant who was charged with recklessly endangering another person, recklessly endangering the welfare of children, and delivery of cocaine as a result of ingesting cocaine during pregnancy. The Court of Common Pleas of Pennsylvania examined the case on the basis of legislative intent, and found that—in the criminal statutes under which the defendant was charged—there was no reference to

anunborn child or fetus. The court relied on a determination that, “Absent an explicit legislative statement the term ‘child’ does not include a fetus,” ( *Id.*, citing *Burns v. Alcala* , 420 U.S. 575 (1975)). The court also referenced decisions in other states ( New York , Florida , and Michigan ) that have likewise declined to prosecute women for delivery of drugs via the umbilical cord or for child endangerment. Finally, the court stated that criminal prosecution “cruelly severs women from the health care system, thereby increasing the potential for harm to both mother and fetus” ( *Id.* , p.6).

In *Reinesto v. Arizona* (1995), a heroin-addicted pregnant woman gave birth to an addicted infant and was then prosecuted for child abuse under Arizona law. The infant experienced drug withdrawal symptoms, received specialized treatment, and was then adopted by a relative. The Court of Appeals of Arizona found that, in the absence of language in the child abuse statute suggesting that “child” was meant to apply to an unborn fetus, an intention to criminalize prenatal conduct could not be inferred. The court cited decisions in nine other states that have declined to criminalize prenatal conduct. It also described the many types of prenatal behavior that may cause harm to a fetus, such as poor nutrition, drinking alcohol, smoking cigarettes, and exposure to occupational environmental hazards. The court agreed that the state legislature was better positioned to act on the matter of prenatal substance abuse, and ordered the dismissal of criminal charges against the birth mother.

### **Summary of State Statutes**

Although state courts have declined to criminalize prenatal activity, state legislatures have been active in this area. The Alan Guttmacher Institute, which focuses on policy analysis in the area of sexual and reproductive health, reported that 13 states treat substance abuse during pregnancy as child abuse (Florida, Illinois, Indiana, Maryland, Minnesota, Nevada, Ohio, Rhode Island, South Carolina, South Dakota, Texas, Virginia, and Wisconsin) (2004). In those states, parental rights and custody could be affected by maternal drug use, but criminal prosecution would not follow. Three states would permit pregnant substance abusers to be subject to civil commitment, ostensibly for the purpose of protecting the fetus from additional harm during the remainder of the pregnancy.

Nine states require reporting of suspected prenatal substance abuse by health care professionals, such as social workers (Arizona, Illinois, Iowa, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, and Utah), and four states have enacted mandatory drug testing if illegal drug abuse is suspected (Iowa, Minnesota, North Dakota, and Virginia).

Nineteen states have chosen to address the problem of prenatal drug abuse by expanding access to drug treatment programs through increased funding and priority status for pregnant substance abusers. This is consistent with the NASW policy statement on women's issues, which recognizes that attempting to criminalize the use of illegal drugs by pregnant women “drives women away from needed prenatal care and violates their civil rights” (NASW, 2003, p. 369).

### **NASW Involvement**

NASW joined an amicus brief on behalf of McKnight, in the South Carolina case discussed above. The brief, which included other groups of health professionals, highlighted the inappropriateness of prosecution and imprisonment as a tool for treating pregnant women who experience stillbirths. The brief cited concerns that the McKnight decision opens the door for all

women who experience a stillbirth to be potentially prosecuted for their actions during the pregnancy if a causal connection can be established. The factual finding as to cocaine clearly being responsible for the stillbirth was also challenged on a scientific basis, given that other potentially harmful factors were also present in McKnight's pregnancy. Finally, the amicus brief argued that prosecution of women regarding their behavior during pregnancy interferes with the relationship of trust required when expectant patients seek treatment. This trust helps to ensure that patients provide accurate medical information to their providers, and that they remain connected with caregivers throughout their pregnancies and deliveries.

## Analysis and Conclusions

State courts have generally declined to impose additional criminal penalties for a pregnant woman's use of illegal drugs resulting in harm to the fetus, but elected officials have continued to address this social problem in a variety of ways. The trend appears to be towards increasing accountability on the part of pregnant women, and also toward enacting specific measures to protect children born to addicted mothers from further harm through the use of civil child abuse statutes. It is unclear what deterrent effect the threat of losing parental rights may have on the behavior of a pregnant substance abuser, or whether the threat of imprisonment has a greater impact. NASW supports public policy measures that utilize a public health approach to substance abuse, including funding for a full range of prevention and treatment programs, and strategies to change public attitudes.

## References

Alan Guttmacher Institute. (2004). Substance abuse during pregnancy. *State Policies in Brief* [Online]. Retrieved from [http://www.guttmacher.org/pubs/spib\\_SADP.pdf](http://www.guttmacher.org/pubs/spib_SADP.pdf) on July 12, 2004 .

*Commonwealth v. Kemp*, 18 Pa. D. & C.4 th 53 (1992).

*Commonwealth v. Welch*, 864 S.W.2d 280 (1993).

National Association of Social Workers. (2003). Women's issues. *Social work speaks: National Association of Social Workers policy statements, 2003–2006* (6th ed., p. 366–374). Washington , DC : NASW Press.

*Reinesto v. Arizona* , 182 Ariz. 190 (1995).

*State v. McKnight*, 352 S.C. 635 (2003), *cert. denied* , 124 S.Ct. 101 (2003).

## Additional Resources

National Association of Social Workers. (2003). Alcohol, tobacco, and other substance abuse. *Social work speaks: National Association of Social Workers policy statements, 2003–2006* (6th ed., p. 20–27). Washington , DC : NASW Press.

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