Prenatal Drug Exposure as **Aggravated Circumstances**

By Frank E. Vandervort

In Michigan, "a child has a legal right to begin life with sound mind and body."[1] Yet the family court may not assert Juvenile Code jurisdiction until after birth.[2] *In re Baby X* addressed the question of whether a parent's prenatal conduct may form the basis for jurisdiction upon birth. It held that a mother's drug use during pregnancy is neglect, allowing the court to assert jurisdiction immediately upon the child's birth.

In deciding *Baby X*, the Court specifically reserved the question of whether parental drug use during pregnancy might be sufficient to permanently deprive a parent of custody. In the 40 years since that April 1980 decision, our knowledge regarding the impact of prenatal exposure to drugs and alcohol has grown dramatically and the law has evolved. These developments suggest prenatal exposure is an aggravating circumstance and should result in immediate termination of parental rights when a petition is filed, at least in some cases.

The impact of prenatal substance use

The impact on the developing child of prenatal exposure to these substances has been a concern for decades. Alcohol's impact has been the subject of some 50 years of intensive medical research. The effects of drugs like cocaine, methamphetamines, and opioids (both prescribed and illegal, such

At a Glance:

With the opioid epidemic, more children are being born prenatally exposed to a variety of toxic drugs and alcohol. These children often suffer numerous, serious, and lifelong injuries. Because the child protection system's paramount consideration is the safety and timely permanency for these children, the children may meet the statutory criteria for aggravated circumstances, and courts should consider early termination of parental rights.

as heroin) have also been the subject of a great deal of research.[3] Exposure to these teratogens "can have long-lasting implications for brain structure and function."[4] The effects range from mild to devastating. The precise impact of prenatal substance exposure on a particular child depends on many factors, including the combination of alcohol and drugs used, the timing of use, the amount of use, whether the mother binged or was a steady user, the mother's diet, whether the mother used nicotine during pregnancy, the frequency of prenatal medical care, and general stressors in the environment (e.g., whether the mother was involved in a relationship characterized by domestic violence). The child's postnatal environment may exacerbate or ameliorate the impact of exposure.

Following is a brief overview of the effects of various substances.

Alcohol

Exposure to alcohol is harmful to a developing child's brain even in small doses; no amount is safe. The impact of its use falls along a spectrum from relatively mild to truly devastating. For instance, prenatal alcohol use is the leading cause of developmental delay.[5] Summarizing the effects of alcohol, researcher Tina Birk Irner writes that exposure results in "cognitive and behavioral deficits that impair both the social and occupational future of the person exposed with a need in severe cases for lifelong assistance."[6] Tragically, children in foster care may go undiagnosed or be improperly diagnosed when they have been prenatally exposed to alcohol.[7]

Marijuana

Exposure to marijuana in utero may have a range of effects, including sleep disturbances, increased startle responses, tremors, and a decrease in cognitive functioning by nine months. School-aged children exposed to marijuana suffer negative cognitive impacts, particularly in higher-order thinking, sometimes referred to as executive functioning; verbal and memory deficits by age 4; overall cognition and language deficits by ages 5–6; attention deficits, increased impulsivity, and hyperactivity by age 6; and increased juvenile delinquency.[8]

Cocaine

The cocaine epidemic of the 1980s and 1990s created a crisis for the child protection system. Cocaine use during pregnancy continues to cause severe problems for exposed children. In infancy, these may include premature birth, general growth retardation, lower arousal, and excitability. Later, growth retardation has been shown to continue until age 10 in some children, and older children may experience language deficits (which persist at least into adolescence), behavior problems, and executive functioning deficits. These children may also suffer "long-term structural alterations" in the cortical and limbic regions of the brain.[9] Research suggests these infants fare better when removed from their biological parents.[10]

Opioids

The present opioid epidemic has hit Michigan hard, resulting in a substantial increase in the number of exposed babies.[11] These neonates tend to have low birthweights and often experience withdrawal, necessitating intensified medical treatment in a neonatal intensive care unit. These children commonly experience small head circumference, which is associated with lower brain volume.[12] As Dr. Emily J. Ross and her colleagues summarize, "[t]he damage of prenatal opiate exposure is debilitating and long lasting."[13]

Among the longer-term defects these children may experience are heart defects, motor skills impairments, cognitive deficits, attention deficits, and hyperactivity. Because experiencing withdrawal during pregnancy is quite harmful to a fetus, the preferred treatment for opioid-addicted pregnant women is medication-based (e.g., methadone, Buprenorphine). Unfortunately, medication-based treatment is not readily available in some areas of the state.[14] Additionally, these medications are themselves harmful to the developing fetus, imposing on these children at least some of the same harms, including withdrawal upon birth, seen in illicit opioid use.[15]

Child protection law

When *Baby X* was decided in 1980, the federal government was not deeply involved in child protection. By contrast, today, through a detailed funding structure, federal law dominates the field, albeit indirectly.[16] Federal law makes clear that "the child's health and safety shall be the paramount concern" when determining whether reasonable efforts to reunify the family are appropriate.[17]

Drug-exposed newborns are at risk of languishing in foster care as agency staff and courts focus on rehabilitating the parents.

To operationalize this requirement, federal law allows each state to define a set of "aggravated circumstances" cases in which the state need not make efforts to reunify an abused or neglected child with his or her parent, but may instead seek immediate termination of parental rights.[18] Michigan has defined a set of aggravated circumstances that includes cases in which a parent's acts cause a child to suffer "serious impairment of an organ" or "life threatening injury."[19] Additionally, these babies sometimes experience parental abandonment.[20]

As this summary of impacts demonstrates, many newborns exposed to drugs and alcohol experience serious, potentially life-threatening injuries—particularly to their brains, but also to their hearts, lungs, and other organs (e.g., opioid exposure may cause serious stomach and digestive problems)—that persist through childhood and into adolescence. Prenatal exposure, therefore, constitutes aggravated circumstances. A petition alleging prenatal exposure must seek termination of parental rights at the initial disposition.

Conclusion

In many of these cases, the parents have long histories of addiction, repeated failures in treatment, and multiple babies exposed to substances. We must not disregard fathers. Their drug use may contribute to the harm these children experience. For example, paternal cocaine use may "influence offspring brain development and neurobehavioral development."[21] Fathers are often complicit in the mothers' obtaining and using drugs and alcohol during pregnancy. Parental substance use often accompanies myriad other functioning problems that affect parenting capacity—mental illness, domestic violence, and criminality and incarceration to name a few.[22] Drug-exposed newborns are at risk of languishing in foster care as agency staff and courts focus on rehabilitating the parents.[23] With an understanding of the actual harm done to prenatally exposed children and a proper application of the law, there is no reason these children cannot achieve more timely permanence. ■

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ENDNOTES

1. *In re Baby X*, 97 Mich App 111, 115; 293 NW2d 736 (1980).
2. *In re Dittrick Infant*, 80 Mich App 219; 263 NW2d 37 (1978).
3. For a detailed discussion, see Weisberg & Vandervort, *A Liberal Dilemma: Respecting Autonomy While Also Protecting Inchoate Children From Prenatal Substance Abuse*, 24 William & Mary Bill of Rights J 659 (2016), available at <https://scholarship.law.wm.edu/wmborj/vol24/iss3/6/> [https://perma.cc/9FET-BP37] and Vandervort & Palusci, *"Of Sound Mind and Body": A Call for Universal Drug Screening for All Newborns*, in Dwyer, ed, *The Oxford Handbook of Children and the Law* (New York: Oxford University Press, forthcoming 2020). All websites cited in this article were accessed September 21, 2019.
4. Ross et al, *Developmental Consequences of Fetal Exposure to Drugs: What We Know and What We Still Must Learn*, 40 Neurophsyopharmacology Rev 61, 61 (2015), available at <https://www.nature.com/articles/npp2014147.pdf> [https://perma.cc/S4LC-QF5X].
5. Malbin, *Fetal Alcohol Spectrum Disorder (FASD) and the Role of Family Court Judges in Improving Outcomes for Children and Families*, 55 Juv and Family Court J 53 (2004), available at <https://isc.idaho.gov/cp/docs/FASD%20and%20the%20Role%20of%20Family%20Court%20Judges%20in%20Improving%20Outcomes.pdf> [https://perma.cc/M9FH-YBQW].
6. Irner, *Substance exposure in utero and developmental consequences in adolescence: A systemic review*, 18 Child Neuropsychology 521, 524 (2012).
7. Chasnoff, Wells & King, *Misdiagnosis and Missed Diagnoses in Foster and Adopted Children with Prenatal Alcohol Exposure*, 135 Pediatrics 264 (2015), available at <https://pediatrics.aappublications.org/content/pediatrics/135/2/264.full.pdf> [https://perma.cc/V3YD-3X7H].
8. *Developmental Consequences of Fetal Exposure to Drugs* at 67 and *A Liberal Dilemma: Respecting Autonomy* at 659.
9. *Developmental Consequences of Fetal Exposure* at 67.
10. *Id.* at 66.
11. See, e.g., Kovanis, *The tiniest addicts: How U.P. babies became part of the opioid epidemic*, Detroit Free Press (May 30, 2018) <https://www.freep.com/story/news/local/michigan/2018/05/03/opioid-epidemic-drug-addicted-babies/335398002/> [https://perma.cc/596F-NT6K].
12. *"Of Sound Mind and Body."*
13. *Developmental Consequences of Fetal Exposure* at 68.
14. Bohnert, Erb-Downward & Ivacko, *Opioid Addiction: Meeting the Need for Treatment in Michigan*, Policy Briefs, Poverty Solutions, Univ of Michigan (April 2019) available at <https://poverty.umich.edu/research-publications/policy-briefs/opioid-addiction-meeting-the-need-for-treatment-in-michigan/> [https://perma.cc/ULF9-XDXB].
15. *Developmental Consequences of Fetal Exposure* at 68–70.
16. *In re Mason*, 486 Mich 142,157 n 8; 782 NW2d 747 (2010).
17. 42 USC 671(a)(15)(A).
18. 42 USC 671(a)(15)(D)(i).
19. MCL 722.638 and MCL 712A.19a(2).
20. *The tiniest addicts.*
21. *Developmental Consequences of Fetal Exposure* at 62.
22. See, e.g., *In re Nash*, 165 Mich App 450; 419 NW2d 1 (1987) and *In re LaFrance*, 306 Mich App 713; 858 NW2d 143 (2014).
23. *Id.*