SUBSTANCE-EXPOSED INFANTS: PERPLEXING SOCIAL AND LEGAL ISSUES

Juvenile Judge's Corner

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Each year an estimated 400,000 – 440,000 babies (10-11% of all births) are affected by **prenatal alcohol** or **illicit drug exposure** nationally.[1] In America, a baby is born dependent on opioids every 19 minutes.[2] In California between 60,000 and 75,000 children are born exposed to drugs or alcohol each year.[3] These numbers underestimate reality, as many hospitals do not test mothers or babies for exposure to drugs or alcohol or test at higher rates for women of color.[4]

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[1] *Substance-Exposed Infants: State Responses to the Problem*, U.S. Dept. of Health and Human Services, ACF, Washington, D.C. 2009, at p. 9. ,

[2] Wilcon, D., & Shiffman, J., "Newborns die after being sent home with mothers struggling to kick drug addictions," http://www.reuters.com/investigates/special-report/baby-opioids/ December 2015.

[3] Fetal Alcohol Spectrum Disorders, Department of Health Care Services, Sacramento; "[W]omen at risk for substance use during pregnancy due to alcohol, tobacco, or marijuana use in the month prior to knowledge of pregnancy, was 23.7%." Chasnoff, I., et.al., "Perinatal Substance Use Screening in California, NTI Upstream, Chicago, 2008, at p. x.

[4] Chasnoff, Ira,"The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County Florida, 322 New England Journal of Medicine, 1202, 1204-06 (1990).

Moreover, these statistics do not include over-the-counter and prescription drugs which the mother may be taking, but which are not included in the testing at birth. Some of these drugs, particularly alcohol and nicotine, can have serious adverse effects for the fetus[5]. **Fetal alcohol syndrome** "remains the most common cause of diagnosable **mental retardation** in the U.S. as well as one of the leading causes of behavioral problems in children."[6] The health cost of caring for these babies has grown dramatically to an estimated **1.5 billion dollars in hospital expenses** alone, leading one doctor to conclude that this is a **public health emergency**.[7]

State legislatures have responded differently to mothers who ingest drugs during pregnancy. California law declares that "a positive toxicology screen is not in and of itself a sufficient basis for reporting child abuse or neglect."[8] The law further states that a positive toxicology screen "shall lead to an assessment of the needs of the mother and child," and may lead to a referral to a child welfare or probation department but not to a law enforcement agency.[9] Other states take a dramatically different approach. Tennessee and Alabama have laws criminalizing maternal use of drugs during pregnancy,[10] and the Missouri legislature is considering similar legislation.[11] Prosecutors in South Carolina, Hawai'i, Oklahoma, Utah, Wisconsin, Mississippi, and Kentucky have used existing criminal statutes to prosecute mothers for using drugs during pregnancy.[12]

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[5] Ondersma, S., et.al., "Prenatal Drug Exposure and Social Policy: The Search for an Appropriate Response,: 5 Child Maltreatment 93 (95-97) (2000); Lembke,A., & Stanford, M., "Clinical Management of Alcohol Use Disorders in the Neurology Clinic," *Handbook of Clinical Neurology*, Vol. 125(3rd Series) *Alcohol and the Nervous System*, Sullivan and Pfefferbaum Editors, (2014) "Alcohol & Drug-Related Birth Defects Research at the NICHD, found at http://www.hih.gov/news/resources/spotlight/Pages/062712-alcohol-drug-related-birth-defects.aspx#alcohol-drugs; Chasnoff, I., et.al, op.cit. footnote 2 at pp. vii and 3.

[6] Chasnoff *op.cit.* footnote 3 at p. 1.

[7] Patrick, S.W., et al. "Increasing incidence and geographic distribution of neonatal abstinence syndrome: United States 2009-1012", *Journal of Perinatology,* (2015) 23, 650-655.

[8] California Penal Code §11165.13; this legislation was passed in 1990 as a part of SB 2669.

[9] *Id.*

[10] Culp-Ressler, T., 'Tennessee Arrests First Mother Under its New Pregnancy Criminalization Law," THINKPROGRESS, July 11, 2014; Tenn. Code Ann. Sections 39-13-107 & 39-13-214; Calhoun, A., "The Criminalization of Bad Mothers," The New York Times Magazine, April 12, 2012.

[11] "Mo. Child Abuse Bill Might Not be Deterrent to Moms," *Public News Service*, Wednesday, 2nd of March, 2016.

[12] Guttmacher Institute, "Substance Abuse During Pregnancy," February, 2015; "Fentiman, L., "In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (and Other Countries Don't)," 18 Columbia Journal of Gender & Law, (2009) at pp. 648-669. South Carolina has the only reported case where a woman was successfully prosecuted for the transmission of controlled substances to her child *in utero*. See *Whitner v. State of South Carolina*, 492 S.E.2d 777 (S.C. 1997).

As of 2014 **substance use during pregnancy** is officially **considered child abuse** in 18 states and is grounds for civil commitment in Minnesota, South Dakota, and Wisconsin.[13] Additionally, in these and other states a positive toxicology screen will lead to removal of the child from the mother's care.

Congress has also attempted to address these issues with the passage and enactment of **Senate Bill 799**, The Protecting Our Infants Act of 2015. This legislation requires the Department of Health and Human Services to report on neonatal abstinence syndrome and ways of preventing and treating prenatal opioid use disorders, including the effects of those disorders on infants. As stated by Senate Majority Leader Mitch McConnell, previous federal legislation has been ineffective in addressing these issues.

How do these issues impact a juvenile dependency court judicial officer in California?

How do these issues impact a juvenile dependency court judicial officer in California? After all, we see these cases only after the agency has filed a petition on behalf of a child who was born with drugs in her or her system.

There are a number of steps we can take. As you know, juvenile court judges have a different mandate than criminal and civil judges. We are governed by Standard of Judicial Administration 5.40(e), embodied in Welfare & Institutions Code §202(d). In that SJA, we are encouraged among other things to **(1)** Provide active leadership in the community in determining the needs of and obtaining and developing resources and services for at-risk children including dependents; **(2)** Investigate and determine the availability of services for these children; **(3)** Exercise our authority to review, order, and enforce the delivery of specific services and

[13] Guttmacher Institute, (2014).

treatment for these children; and **(4)** Take an active part in the formation and maintenance of permanent programs of interagency cooperation and coordination among the court and the various agencies that serve these children.

First, we should **determine the services available** for these infants in our community. The social service agency can give us an idea, but we should check with hospitals, public health nurses, and First 5 to determine what they are currently providing for these infants and their mothers.[14] We can have the local hospitals, social workers, First 5, and public health nurses make a presentation to the judges, attorneys, CASA volunteers, and other interested parties about their practices and services for drug-exposed infants. Children and Family Futures has developed a resource inventory format that will yield a matrix of current services divided into the five stages of response to prenatal exposure.[15]

Second, we need to learn how hospitals and the social service agency **interact** when a baby is born with a **positive toxicology screen for drugs or alcohol**. Interventions at the hospital vary from county to county. In Orange County a high percentage of substance-exposed infants are removed at the hospital,[16] while in Sonoma and Santa Clara Counties the substance abusing mother is usually referred to treatment.[17] The judicial effort to understand hospital and social service practices is consistent with SJA 5.40(e)(8), which recommends that judges

> [e]valuate the criteria established by child protection agencies for initial removal and reunification decisions and communicate the court's expectations of what constitutes "reasonable efforts" to prevent removal or hasten return of the child.

Monthly or quarterly cross-trainings provide a useful means to learn about agency practices. Judges should invite all members of the dependency system to these trainings.

Third, **creating and/or expanding a Family Drug Treatment Court** offers a promising judicial intervention. While this intervention starts after the birth of a substance-exposed infant, one of the goals of these courts is to have subsequent babies born drug-free. These treatment courts have proven their effectiveness and are now recognized as a best practice.[18] A number of

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[14] See First 5 California, www.ccfc.ca.gov. I will send you the annual report from First 5 of Santa Clara County if you email me at judgeleonardedwards@gmail.com

[15] Contact Phil Breitenbucher at Children and Family Futures for further information: pbreitenbucher@cffutures.org

[16] Gardner, S., "The Case for Improved Data Collection in DSS for Parental Drug and Alcohol Abuse," available from Children and Family Futures and from the author; Anderson, T. "Drug War on Moms" Daily News 6/29/08; http://www.dailynewss.com/20080629/drug-war-on-moms.

[17] "Data from Other Perinatal Substance Use Screening Tools: Sonoma County 2007 Data; data from Santa Clara County received by the author from Social Worker Stanley Lee at the Department of Family Social Services.

[18] Edwards, L., "Family Drug Courts: A Best Practice That Works," found on the publications blog at judgeleonardedwards.com; *Substance-Exposed Infants: State Responses to the Problem*, U.S. Dept. of Health and Human Services, ACF, Washington, D.C. 2009, at p. 46.

these courts report high percentages of "drug-free" infants from drug court participants.[19] At least one treatment court (Sacramento County) created a new drug court program to involve those parents who could be diverted from the court process. The Early Intervention Family Drug Court Program (EIFDC) is a voluntary program implemented in 2008 and has served approximately 1,200 parents and 1,700 children. Participation in the program has been associated with significant reductions in the length of time children spent in out-of-home care, increased reunification rates, increases in access to alcohol and other drug (AOD) treatment for the parent, and significant decreases in child maltreatment recurrence rates.[20]

Fourth, as judges we should discuss the importance of remaining **drug free during pregnancy in court hearings**. We should also make certain that parenting and other classes that parents attend pursuant to court order contain information about the impact of drugs on the fetus.

Fifth, we could ask **6 questions** to the social service and other county agencies about **prenatal exposure and substance-exposed infants** in our community:

1. Does our county have policies for Medicaid-funded pregnancy services that include screening for substance use with validated screening tools?
2. Does our county make CAPTA reports to child welfare as required by the CAPTA legislation? How many reports were made in the most recent reporting period, and what services resulted for mothers and infants?
3. Does our county refer 0-3-year-olds in the child welfare caseload for IDEA Part C developmental screening as required by CAPTA?
4. Do early childhood agencies participate in any county-wide body to respond to the problem of prenatally exposed infants and pre-school-aged children? Do maternal and child health agencies participate in such a body?
5. What is the total allocation from First 5 and MHSA funding sources in our county that responds to the problems of prenatal exposure? What other funds from county or external sources in the county budget are targeted upon this problem?
6. What annual agency reports on this problem are available to the judge for review to understand trends and the effectiveness of responses to this problem?

Juvenile court judicial officers can have a significant impact on the health and well-being of infants and can **help create working partnerships** and **improved procedures** that will reduce the numbers of substance-exposed infants. California law makes it our job to take these and similar steps.

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[19] Chatham County, Georgia, Family Dependency Treatment Court Peer Learning Profile http://www.cffutures.org/files/PLC_Profile_ChathamGA.pdf; Jefferson County, Alabama Family Treatment Court Profile. http://www.cffutures.org/files/PLC_Profile_JeffersonAL.pdf; FAMILY DRUG TREATMENT COURTS: PROCESS DOCUMENTATION AND RETROSPECTIVE OUTCOME EVALUATION, HHS, at p. 151.

[20] Sacramento County Family Drug Court Programming Annual Evaluation Report, 2014.