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Opinion No. 13-01 (Revised)

Liability for Infants Born with Narcotic Drug Dependency

QUESTION

If a child is born with a narcotic drug addiction or with birth defects resulting from maternal use of narcotic drugs, may the child's condition result in a finding of criminal or civil liability against either the mother or other individuals who were involved in unlawfully furnishing these drugs to the mother?

OPINION

Provided that the essential elements are established by sufficient proof, individuals involved in unlawfully furnishing narcotic drugs to the mother may be found liable in a criminal action for a newborn child's addiction or birth defects resulting from the maternal drug use. Recent amendments to Tennessee law would preclude any criminal liability of the mother for the newborn child's addiction or birth defects. The civil liability of the mother or other individuals involved in unlawfully furnishing these drugs to the mother would depend upon the specific facts and circumstances presented.

ANALYSIS

Pursuant to Tenn. Code Ann. § 39-13-107(a), "a human embryo or fetus at any stage of gestation in utero" may be a victim of any of the assaultive offenses listed in Title 39, Chapter 13, Part 1. Prior to July 1, 2012, this statute was broad enough to include finding a mother criminally liable for ingesting narcotic drugs while pregnant if her child was born addicted to or harmed by the drugs, assuming sufficient proof of causation and of intent or knowledge. Tenn. Code Ann. § 39-13-107 (2011); Tenn. Att'y Gen. Op. 08-114 (May 21, 2008). Likewise, these circumstances prior to July 1, 2012, might have subjected the mother to criminal liability for criminal homicide under Title 39, Chapter 13, Part 2, if her baby were to die as a result of maternal use of narcotic drugs. *See* Tenn. Code Ann. § 39-13-214(c) (2011). However, effective July 1, 2012, the General Assembly amended these governing statutes, substituting language that expressly exempts from criminal liability "any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant." Tenn. Pub. Acts ch. 1006, §§ 2 & 4. *See also* Tenn. Code Ann. § 39-13-107(c); Tenn. Code Ann. § 39-13-214(c). Because the statute is clear

and unambiguous, the natural and ordinary meaning of the language must be applied. *See, e.g.*, *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004); *Austin v. Memphis Publ'g Co.*, 655 S.W.2d 146, 148 (Tenn. 1983). As applied, these statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. Accordingly, the 2008 opinion of this Office, Tenn. Att'y Gen. Op. 08-114 (May 21, 2008), no longer reflects the applicable law.

The 2012 amendment also exempts from criminal liability "any lawful medical or surgical procedure to which a pregnant woman consents, performed by a health care professional who is licensed to perform such procedure." Tenn. Pub. Acts ch. 1006, §§ 2 & 4; Tenn. Code Ann. § 39-13-107(c); Tenn. Code Ann. § 39-13-214(c). The statute thereby affords a defense to prosecution for assaultive offenses and criminal homicide in favor of medical personnel. For any other individuals who may have furnished narcotic drugs to the mother, the unlawful provision of such narcotics to a pregnant woman could be a source of criminal liability assuming sufficient proof of injury or death to the fetus, causation, and culpable mental state. *See* Tenn. Code Ann. § 39-13-107; Tenn. Code Ann. § 39-13-214.

A mother's drug use also does not qualify as criminal child abuse, neglect, or endangerment, or criminal aggravated child abuse, neglect, or endangerment, because the applicable statutes do not encompass actions committed against a fetus. *See* Tenn. Code Ann. §§ 39-15-401 and -402; *State v. Hudson*, No. M2006-01051-CCA-R9-CO, 2007 WL 1836840, at *1-2 (Tenn. Crim. App. June 27, 2007); *Richards v. State*, No. E2004-02326-CCA-R3-PC, 2005 WL 2138244, at *4 (Tenn. Crim. App. Sept. 2, 2005); Tenn. Att'y Gen. Op. 95-023 (March 27, 1995). However, prenatal drug use may be found to constitute abuse or severe child abuse in the civil context of juvenile court proceedings. *Cornelius v. State*, 314 S.W.3d 902, 910-11 (Tenn. Ct. App. 2009); *In re Benjamin M.*, 310 S.W.3d 844, 848-51 (Tenn. Ct. App. 2009).

As for potential civil liability, the Tennessee Drug Dealer Liability Act authorizes actions for damages by individuals who were "exposed to an illegal drug in utero." Tenn. Code Ann. § 29-38-106(a)(2). The Act provides for the recovery of economic, noneconomic, and exemplary damages and for attorney fees and the costs of suit. Tenn. Code Ann. § 29-38-106(c). Actions under the Act may proceed against those who distributed illegal drugs to the user or who participated in the chain of distribution or in the drug market. Tenn. Code Ann. § 29-38-106(b).

In addition, a child harmed by prenatal narcotic drug exposure or the child's representative may be able to pursue claims for negligence. Since 1962, Tennessee courts have recognized that an infant has a cause of action for prenatal injuries negligently caused by another. *Shousha v. Matthews Driveurself Serv., Inc.*, 358 S.W.2d 471, 476 (Tenn. 1962). "[A] viable child receiving prenatal injuries proximately resulting from negligence of another has a cause of action conditioned only upon his being born alive. His right to prosecute his remedy for such injuries commences from the time of his live birth." *Id.* If the child dies as a result of the maternal drug use, the claim may become one for wrongful death. Tenn. Code Ann. § 20-5-106. "A claim of negligence requires proof of each of the following elements: a duty of care owed by the defendant to the plaintiff; conduct falling below the applicable standard of care that amounts to a breach of that duty; an injury or loss; cause in fact; and proximate cause." *White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998). Whether a child harmed by prenatal narcotic

drug exposure or the child's representative may legally establish these elements will be dependent on all of the circumstances underlying the child's claim.

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