

Legal Aspects of Substance Misuse During
Pregnancy in Wisconsin
Wisconsin Society of Addiction Medicine
Annual Conference
Sept 30, 2016
Madison, WI

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Conflict of Interest Disclosure

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Objectives

- Describe potential legal actions relevant to pregnant women who engage in substance misuse.
- Evaluate the role of the clinician at the intersection of patient care and laws regarding pregnant women misusing substances.
- Describe the impact of legal sanctions on pregnant women misusing substances and her unborn child as well as controversies that arise.

Current Legal Action in Wisconsin

- Substance abuse during pregnancy is considered child abuse in Wisconsin.
- It is grounds for civil commitment.
- Women in Wisconsin have been prosecuted for drug use during pregnancy.

Medical Organization Recommendations

- Most major medical organizations, including:
 - American Medical Association
 - American Society of Addiction Medicine
 - American Academy of Pediatrics
 - American Academy of Family Physicians
 - Wisconsin Medical Society

oppose using drug tests and punitive measures to manage the problem of addiction during pregnancy.

- Instead, these groups advocate increased treatment options and improved prenatal care for at-risk women and fetuses

Medical Organization Recommendations

- Incarceration and the threat of incarceration have proved ineffective in reducing the incidence of alcohol or drug abuse.
- Studies indicate that prenatal care greatly reduces the negative effects of substance abuse during pregnancy. Drug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus.
- American Congress of Obstetrics and Gynecology opposes mandatory urine testing but approves of verbal, interactive questioning and screening of patients about their drug and alcohol use with CONSENT of the mother.

US Supreme Court Case Law

Ferguson v. City of Charleston (2001)

- State hospital obstetrics patients were arrested after testing positive for cocaine, in urine tests.
- Urine test were conducted by the hospital pursuant to policy developed in conjunction with police but without warrant or consent.
- Obstetric patients sued the hospital, state solicitor, city, state police, and individual medical personnel.
- They allege a violation of Fourth Amendment, which protects against unlawful search and seizure.

US Supreme Court Decision in *Ferguson v. City of Charleston*

- Urine tests were “searches” within meaning of Fourth Amendment, and tests, and reporting of positive test results to police, were unreasonable searches absent patients' consent, in view of policy's law enforcement purpose.
- The policy did not lead to a reduction in drug use, offer changes in prenatal care, improve pregnancy outcomes, prescribe special care for newborns, or increase the number of women successfully completing drug treatment programs. **The principal goal was to punish addicted women.**
- The Court recognized that this program's central feature was the use of law enforcement to coerce women into drug rehabilitation and not the creation of more treatment options for women and the unborn.
- The Court acknowledged that the invasion of patient privacy in this case was severe due to the deceit involved in the testing and the unauthorized dissemination of confidential medical information to a third party. Police received patient records detailing medical treatment and history, not simply drug test results.

Wisconsin State Case Law

Angela M.W. v. Kruzicki (1997) Wisconsin State Supreme Court ruling declared that the WI child abuse laws at that time could not be used to confine a pregnant woman who had tested positive for cocaine.

This case was initiated by the defendant's obstetrician when the defendant tested positive for cocaine and other drugs during her second and third semester of pregnancy.

The defendant refused to submit to voluntary inpatient treatment and the obstetrician filed a report of child abuse.

The State used the report to petition for protective custody of the fetus.

Wisconsin Child Code Amendments

- 1999 Wisconsin Legislation amended the Wisconsin child abuse law under an WI Act 292 that came to be known as the “Cocaine Mom” Law.
- It added “unborn child” to the Wisconsin Child abuse provisions
- The statute defines “unborn child” as a “human being from the time of fertilization to the time of birth.”
- It allows judges to confine pregnant women who abuse alcohol or drugs during their pregnancy.

Wisconsin Child Code Amendments

- An expectant mother of an unborn child suffers from a habitual lack of self-control” in the use of alcoholic beverages or controlled substances “to a severe degree” a court may “ determine that it is in the best interest of the unborn child for the expectant mother to be ordered to receive treatment, including inpatient treatment.” See Wis. Stat. 48.01(1)(a)(am).
- New law freed health professionals to disclose confidential information when “the examination of the expectant mother of an abused unborn child creates a reasonable ground for an opinion that the physical injury inflicted on the unborn child was caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.” See Wis. Stat. 905.04(4)(e)(3).
- Those health professionals named in the statute include:
 - physician,
 - registered nurse,
 - chiropractor,
 - psychologist,
 - social worker,
 - marriage and family therapist or
 - professional counselor.

Wisconsin Child Code Amendments

- Health professionals are given the latitude to “take any necessary action,” including confinement of the pregnant woman, to protect the unborn child. See Wis Stat 48.981(3)(b).
- An expectant mother can be held for up to 48 hours before a hearing when law enforcement “believes on reasonable grounds” that there is a substantial risk to the unborn child. See Wis. Stat. 48.193, .981(3).
- At the hearing the fetus is given a guardian ad litem to represent the “best interests of the unborn child.” However, there is no requirement that the pregnant women be given her own counsel. See Wis. Stat. 48.213, .235.
- The judge considers the behavioral and social history of the pregnant woman, the gestational age of the fetus, and the recommendation of the child welfare agency.
- Hearsay evidence is permitted. (i.e. second hand information or innuendo)

Wisconsin Case Law

Alicia Beltran Case

- Pregnant Wisconsin woman was arrested after she refused to take an anti-addiction drug, then was ordered to spend 2 1/2 months in a treatment facility.
- She sued to have Wisconsin's Child Code law declared unconstitutional on its face and as applied to her case, because she was denied due process, was not given a lawyer at her first court appearance (though one had been appointed for her fetus), and was subjected to unreasonable search.

Wisconsin Case Law: Alicia Beltran Case

- On July 2, she went to West Bend Clinic at St. Joseph's Hospital for a prenatal visit and disclosed that she had been taking Suboxone she got from a friend to help wean her off painkillers on which she feared she was becoming dependent in 2012.
- The physician's assistant recommended Beltran get her own Suboxone prescription and be monitored by a doctor, but Beltran declined, saying she did not want to use it anymore.
- Two weeks later, a social worker came to Beltran's home and said she really needed to continue Suboxone, and again Beltran declined.
- Two days after that, police and sheriff's deputies arrested Beltran at her home, handcuffed her and took her to a hospital. A doctor examined her and declared her and the pregnancy healthy and said in-patient treatment was unnecessary.

Wisconsin Case Law: Alicia Beltran Case

- Beltran was next taken to the Washington County Jail and held until she appeared before Court Commissioner Dolores Bomrad, who ordered she undergo in-patient drug treatment.
- Beltran was taken to a West Bend halfway house and the next day driven by police to an Appleton facility, Casa Clare.
- When she was tested upon admission, her blood showed no traces of Suboxone or opiates, according to records.
- Beltran was initially supposed to stay at Casa Clare until Oct. 15 but was released Oct. 4 — after Beltran's federal lawsuit was filed Sept. 30.

Wisconsin Case Law: Alicia Beltran Case

- Beltran said her confinement at Casa Clare cost her a waitress job in Jackson.
- On Sept 30th 2014 the Eastern District of Wisconsin federal court dismissed Alicia Beltran's petition as moot because the court concluded that it was not permitted to reach these issues because the Court no longer had the power to grant Ms. Beltran the specific relief of freeing her from detention.
- The court suggested that if a petition was brought by a class of women who had been subject to this law mootness would not be an issue.

Loertscher Case

- In December 2014 Tamara Loertscher of Medford was jailed in Taylor County, WI for 18 days, including three in solitary confinement, after a judge found her in contempt for refusing to move to a residential treatment center. Tamara is suing claiming Wisconsin Child Code statute is unconstitutional, and seeks an injunction against its further use.

Loertscher Case

- Loertscher was suffering from hypothyroidism and depression when she began using methamphetamines in winter 2014. In late July she stopped using any drugs because she thought she might be pregnant. On Aug. 1, she sought help with Taylor County social services, which referred her to the emergency room at Eau Claire Mayo Clinic.
- At the clinic, a urine test showed Loertscher was pregnant, and also revealed her past drug use. Another test confirmed she had a severe thyroid condition.
- Medical officials shared the findings with the county social services personnel, who subsequently went to court and had a guardian ad litem appointed for Loertscher's 14-week-old fetus.

Loertscher Case

- Social workers asked Loertscher repeatedly to release her medical records to county officials, and said that if she didn't, she would be jailed until she had her baby, which would then be put up for adoption.
- When Loertscher finally said she wanted to go home, she was told she was the subject of a temporary custody order obtained by Taylor County and could not leave.
- The next day, still at the Eau Claire Mayo Clinic, she was taken to a room where Court Commissioner Greg Krug was on speaker phone and told her to sign a petition — as if she was initiating protective action on the unborn child herself. She refused and said she wouldn't answer questions without a lawyer and left the room.

Loertscher Case

- The court commissioner deemed that Loertscher had waived her appearance. Taylor County legal Counsel, also on speaker, told a doctor at the Mayo Clinic that breaching Loertscher's confidentiality was not an issue for this type of proceeding and the doctor then discussed Loertscher's conditions and treatment, as well as her past drug use that she admitted to in her initial interview at the clinic.
- Krug then ordered Loertscher held. The next day, she was told, she would be taken from Mayo to a residential addiction center in Eau Claire pursuant to court order, but would first have to supply a blood sample. She refused, and demanded to go home.
- Mayo doctors then met with her, prescribed medication for depression and hypothyroidism and released her.
- About 10 days later, Taylor County officials and the guardian ad litem asked a court to order Loertscher into custody. On Sept. 14, Loertscher appeared in court without a lawyer. A judge ordered her jailed on contempt for not following the earlier orders.

Constitutional Challenge to WI Act 292

- Loertscher filed suit in federal court asking overturn the law on constitutional grounds
- The lawsuit is ongoing
- Loertscher claims Law violates:
- Substantive Due Process
 - Right to Privacy
 - Medical Decision Making
 - Procreative Decision Making
- Procedural Due Process
- Equal Protection
- First Amendment
- Fourth Amendment

The Role of the Clinician

WI Act 292 created an exception to the doctor-patient confidentiality provisions in cases where:

“the examination of the expectant mother of an abused unborn child creates a reasonable ground for an opinion...that the physical injury inflicted on the unborn child was caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.” (Wis. Stat. 905.04(4)(e)(3))

The Role of the Clinician

- The WI Act 292 did not go so far as explicitly mandate that providers disclose to child protective services when they believe an mother habitually lacks self control.
- Yet, there is a gray area here where the child abuse and neglect laws which mandate physicians to report suspected child abuse and this law intersect. See (Wis. Stat. 48.981(2))

The Role of the Clinician

- Broad interpretation could take this to a level of absurdity.
 - Ex. Could argue patient's poor eating habits endangers fetus.
- The clinician treating these women are at the center of the law because in most cases the proceeding trigger by notice to child protective services by the treating clinician.
- The primary care physician, Emergency Room (ER) physician, or ER social workers who first see this patient hold a great deal of discretion over whether the proceedings in WI Act 292 are activated.
- Good communication between specialties is key.

Other State Laws

Other State Law

- 18 states consider substance abuse during pregnancy to be child abuse under civil child-welfare statutes and 3 consider it grounds for civil commitment. (Wisconsin included)
- 15 states require health care professionals to report suspected prenatal drug abuse, and 4 states require them to test for prenatal drug exposure if they suspect abuse. (Wisconsin Does Not)
- 19 states have either created or funded drug treatment programs specifically targeted to pregnant women (Wisconsin has Not)
- 11 provide pregnant women with priority access to state-funded drug treatment programs. (Wisconsin included)

Other State Law

- In Florida, a woman was charged with delivering drugs to a minor because she gave birth to a drug-exposed infant. Florida law states that "it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years." (Fla Stat § 893.13(1)(c)).
- In Indiana, if a child is born with fetal alcohol syndrome or an addiction to a controlled substance or a legend drug, the child may be considered neglected. (Ind Code § 31-34-1-10).
- In Illinois, if a newborn has any amount of illegal drugs in its urine, the child may be considered neglected. (705 ILCS 405/2-3(1)(c)).

Tennessee Law

- In 2014, Tennessee became the only state to specifically criminalize drug use while pregnant.
- The punishment can be up to fifteen years in prison for the illegal use of a narcotic drugs while pregnant.
- At least nine women in Tennessee have been arrested since the law went into effect.
 - While their geographical and racial make up are diverse all nine of the women are low income.
- The law states that a woman's enrollment in drug treatment can be used as an affirmative defense to assault charges.
- However, using this defense is dependent on finding a drug treatment facility that has room for the woman.

What Can we Do?

- Question your own facility's policy on maternal drug testing.
 - Is consent required?
 - Are test results automatically shared with child protective services?
 - What is the policy if a patient refuses to be tested?
- Lobby
 - American Congress of Obstetrics and Gynecology, Toolkit on State Legislation Suggests the following for State Legislation on Drug Screening:
 - Testing is permitted only with the patient's consent and to confirm suspected or reported drug use.
 - Patient consent also applies to testing by hospitals when pregnant women are admitted for labor and delivery.
 - Reporting is to the health department, with direct reporting to child protective services only for actual indications of impaired parenting.
- Write an Amicus Brief to the Court in cases like the Loertscher case.
- Build a coalition with perinatal providers
 - Educate your fellow health care providers on current Wisconsin Law. See WAPC's Improving Care for Women and Infants Affected by Opioids: A Blueprint for Action

References

- Poland ML, Dombrowski MP, Ager JW, Sokol RJ. Punishing pregnant drug users: enhancing the flight from care. *Drug Alcohol Depend* 1993;31:199–203.
- Chavkin W. Drug addiction and pregnancy: policy crossroads. *Am J Public Health* 1990;80:483–7.
- Schempf AH, Strobino DM. Drug use and limited prenatal care: an examination of responsible barriers. *Am J Obstet Gynecol* 2009;200:412.e1–412.e10.
- El-Mohandes A, Herman AA, Nabil El-Khorazaty M, Katta PS, White D, Grylack L. Prenatal care reduces the impact of illicit drug use on perinatal outcomes. *J Perinatol* 2003;23:354–60.
- Laura M Betancourt, Wei Yang, Nancy L Brodsky, Paul R Gallagher, Elsa K Malmud, Joan M Giannetta, Martha J Farah, Hallam Hurt, Adolescents with and without Gestational Cocaine Exposure: Longitudinal Analysis of Inhibitory Control, Memory and Receptive Language, *Neurotoxicol Teratol*. 2011 Jan–Feb; 33(1): 36–46.
- **American College of Obstetrics and Gynecology Committee on Health Care for Underserved Women, Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist**, <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Substance-Abuse-Reporting-and-Pregnancy-The-Role-of-the-Obstetrician-Gynecologist> (Last Visited 4/24/16).
- Rosa Goldensohn and Rachael Levy, *The Nation*, The State Where Giving Birth Can Be Criminal, <http://www.thenation.com/article/192593/state-where-giving-birth-can-be-criminal> (Last Visited 4/26/16).

References

- Drug Testing Law Tech. & Prac. § 8:31
- State Policies in Brief: Substance Abuse During Pregnancy, Guttmacher Institute, April 1st 2014, http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf (Last Visited April 24st, 2016).
- *Virtual Mentor*. January 2008, Volume 10, Number 1: 41-44.
- De Ville, K. A. and Kopelman, L. M. (1999), Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy. *The Journal of Law, Medicine & Ethics*, 27: 332–342.
- Milwaukee Journal Sentinel, Pregnant woman fights Wisconsin's fetal protection law, Pregnant woman fights Wisconsin's fetal protection law, Pregnant woman fights Wisconsin's fetal protection law, October 24th 2013, <http://www.jsonline.com/news/crime/pregnant-woman-fights-wisconsins-fetal-protection-law-b99127289z1-229077121.html> (last visited 4/24/16).
- National Advocates for Pregnant Women, Press Release: Wisconsin Alicia Beltran Case Federal District Court Avoids Ruling on Constitutionality, September 30, 2014, <http://advocatesforpregnantwomen.org/blog/2014/09/wisconsin-alicia-beltran-case.php> (Last Visited 4/24/16)
Milwaukee Journal Sentinel, Pregnant woman challenging Wisconsin protective custody law, January 2nd 2015,
<http://www.jsonline.com/news/wisconsin/pregnant-woman-challenging-wisconsin-protective-custody-law-b99411705z1-287395241.html> (Last Visited 4/25/16).
- **American Congress of Obstetrics and Gynecology, Toolkit on State Legislation: Pregnant Women and Prescription Drug Abuse, Dependence and Addiction**, <http://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/NASToolkit.pdf> (Last Visted 4/24/16).
- Leticia Miranda, Vince Dixon and Cecilia Reyes, Pro Publica How States Handle Drug Use During Pregnancy, <https://projects.propublica.org/graphics/maternity-drug-policies-by-state>, September, 30, 2015

Question?