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Idaho Attorney General Opinions 1991.

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February 1, 1991

OPINION NO. 1991-O-0001

ATTORNEY GENERAL OPINION NO. 91-1

The Honorable Cecil D. Andrus Governor, State of Idaho

STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED

Does the State of Idaho have the authority to intervene into the pregnancy of a woman suspected of using illegal drugs in an effort to control the woman's conduct and protect the health of the fetus?

CONCLUSION

The state does have a compelling interest in protecting potential human life from gestational drug abuse and in further protecting a child's right to be born with a sound mind and body. In the instance of known gestational drug abuse the state's compelling interest will override the woman's interest in personal privacy, bodily integrity and parental autonomy and permit some degree of state intervention.

ANALYSIS

Minnesota is the only state in the nation which has enacted legislation permitting intervention into the pregnancy of a woman suspected of using illegal drugs. Minn. Stat. § 626.5561 (1990). The constitutionality of that statute has not been tested, nor are there any judicial decisions defining the state's interest in protecting the fetus from gestational drug abuse. The following analysis, therefore, draws upon case law and statutes in related fields of law and represents this office's best attempt to determine the probable judicial reaction to legislation permitting the state to intervene into a woman's pregnancy in order to protect a fetus.

1. Protection of Fetus Under Current Idaho Law

Idaho's Child Protective Act, Idaho Code §§ 16-1601, *et seq.*, presently would not permit the state to intervene in the case of gestational drug abuse in order to protect the fetus. Idaho Code § 16-1602(e) defines a child as "an individual who is under the age of eighteen (18) years." This definition does not extend to the unborn.

Attempts to intervene under similar child protection statutes on behalf of the fetus have failed in other jurisdictions. In *In Re Dittrick*, 80 Mich. App. 219, 263 N.W.2d 37 (1977), the Bay County Department of Social Services petitioned for and received a probate court order granting temporary custody of an unborn child. The Department argued that the parents' parental rights over another child had been permanently terminated earlier in the year and the parents were not fit to care for the unborn child. The court of appeals reversed, holding that the probate court lacked jurisdiction over an unborn fetus:

We recognize that the word "child" could be read as applying even to unborn persons. However, our reading of other sections of Chapter XIIA of the Probate Code convinces us that the Legislature did not intend application of these provisions to unborn children. . . .

The Legislature may wish to consider appropriate amendments to the Probate Code. Indeed, the background of the present case has convinced us that such amendments would be desirable. However, the Code as now written did not give the probate court jurisdiction to enter its original order in the present case.

263 N.W.2d at 39.

Similarly, in *In Re Steven S.*, 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981), the State of California, under provisions similar to the Idaho Child Protective Act, filed a petition to detain a pregnant woman who allegedly suffered from an undiagnosed psychiatric illness and was viewed as a threat to her unborn child. The trial court entered an order of detention, and the child was born approximately two months later. The Court of Appeals of California dismissed the mother's appeal for mootness, but took the opportunity to rule that a fetus did not come within the definition of "child" for purposes of the Act:

[W]hen the Legislature determines to confer legal personality on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms; the corollary, of course, is that when the Legislature speaks generally of a 'person,' as in section 377, it impliedly but plainly excludes such fetuses. . . .

. . . .

Accordingly, we strictly construe the language of this section and find the order of the juvenile court sustaining jurisdiction over the unborn fetus lacking in statutory authority.

178 Cal. Rptr. at 527-28.

Idaho's Child Protective Act could be amended by the Idaho Legislature to provide specific legal rights and protections for the unborn. New Jersey, for instance, has incorporated the unborn into its child protection statutes. N.J.S.A. § 30:4C-11 provides:

Whenever it shall appear that any child within this State is of such circumstances that his welfare will be endangered unless proper care or custody is provided, an application setting forth the facts in the case may be filed with the Bureau of Children's Services by a parent or other relative of such child, by a person standing in loco parentis to such child, by a person or association or agency or public official having a special interest in such child or by the child himself, seeking that the Bureau of Children's Services accept and provide such care or custody of such child as the circumstances may require. Such application shall be in writing, and shall contain a statement of the relationship to or special interest in such child which justifies the filing of such application. The provisions of this section shall be deemed to include an application on behalf of an unborn child when the prospective mother is within this State at the time of application for such services.

(Emphasis added.)

It has been argued that this statute empowers the state to intervene into a pregnancy on behalf of the fetus. Note, *Fetal Rights Proposal*, 21 St. Mary's L.J., 259, 292 (1989). However, there have been no reported cases showing that New Jersey has in fact used this provision to intervene during pregnancy.

In summary, the present Idaho Child Protective Act does not provide protection for the unborn. An action brought under the Act on behalf of a fetus would in all likelihood be dismissed for lack of jurisdiction. The Act could be amended, as done in New Jersey, to provide for the unborn. However, the procedural structure of the Child Protection Act as presently structured comes into play only after the birth of the child and would require significant amendment to cover this situation.

2. Fetal Rights---the Abortion Case Law

In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court held the State of Texas' anti-abortion statutes unconstitutional. In doing so the Court addressed the conflict between the state's interest

in potential life (a fetus) and a woman's right to terminate the pregnancy as a right of personal privacy protected by the fourteenth amendment. After detailed discussion regarding the judicial evolution of a person's right to privacy, the Court held:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

410 U.S. at 153. The Court further stated that this fundamental right to privacy, although broad enough to encompass the decision to terminate a pregnancy, was not absolute or unqualified. The state may limit this fundamental right to privacy when the state's interest becomes "compelling." 410 U.S. at 155. Further, the Court held that the state's interest in potential life becomes compelling at viability. 410 U.S. at 163.

The Court's opinion in Roe v. Wade, however, does not stand for the proposition that a state's interest in potential life does not begin until the fetus reaches viability. Declining to resolve the question of when life begins, the Court stated:

Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

410 U.S. at 150.

In the recent U. S. Supreme Court opinion in Webster v. Reproductive Health Services, 492 U.S. ---, 106 L. Ed. 2d 410, 109 S. Ct. --- (1989), a three-justice plurality (Rehnquist, White, Kennedy) effectively eliminated viability as the point when the state's interest is deemed compelling:

[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability. The dissenters in *Thornburgh*, writing in the context of the *Roe* trimester analysis, would have recognized this fact by positing against the "fundamental right" recognized in *Roe* the State's "compelling interest" in protecting potential human life throughout pregnancy. "[T]he State's interest, if compelling after viability, is equally compelling before viability." *Thornburgh*, 476 US, at 795, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (White, J., dissenting); see id., at 828, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (O'Connor, J., dissenting) ("State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy'").

106 L. Ed. 2d at 436.

Justice O'Connor, in a separate opinion, refused to join the plurality opinion in overturning the *Roe* trimester framework because the issue presented in *Webster* did not warrant reexamination of *Roe v. Wade* or its trimester analysis. Nonetheless, Justice O'Connor noted in her separate opinion a previous dissent in which she criticized the trimester framework:

The state interest in potential human life is likewise extant throughout pregnancy. In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the potential for human life. . . . The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.

Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 460 (1983) (emphasis added). See also Thornburgh v. American College of Obstetrics and Gynecology, 476 U.S. 747, 828 (1986).

Justice Scalia in a separate opinion in *Webster* was prepared to overrule *Roe v. Wade*. Thus, Justice Scalia assuredly would join Justices Rehnquist, White, Kennedy and O'Connor in the view that the state's interest in potential life is compelling at all stages of pregnancy.

In the context of personal privacy and the freedom to choose whether to carry a fetus to term, five justices presently on the United States Supreme Court have rejected the view that fetal viability is the benchmark for establishing a "compelling" state interest in potential life. The impact of this change in the abortion context remains to be seen. However, in the instance of gestational drug abuse the state is faced with a completely different issue: the live birth of a child intentionally carried to term by its mother. The impact of the *Webster* decision is dramatic in that it eliminates fetal "viability" as the threshold for state assertion of

a compelling interest and therefore makes possible intervention into the early stages of fetal development.

3. Fetal Rights in Other Contexts

Although the United States Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), held that a fetus is not considered a person for purposes of the Fourteenth Amendment, *id.* at 158, the Court expressly recognized that in certain areas of the law a fetus does possess legal rights. *Id.* at 161. Roe does not prohibit the state from extending to the fetus legal benefits and protection in these other areas.

In Idaho, for example, the Probate Code recognizes children conceived before yet born subsequent to a decedent's death. Idaho Code §§ 15-2-108, 15-2-302. Idaho's Worker's Compensation Law similarly includes posthumously-born children as dependents under the Act. Idaho Code § 72-102(8)(c). For purposes of domestic relations, Idaho Code § 32-102 provides: "A child conceived, but not yet born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth."

Dramatic changes toward the legal status of the fetus have likewise occurred in tort law. A century ago a fetus in this country possessed no legal rights that would enable it upon birth to seek damages for injuries sustained while in its mother's womb. Dietrich

v. Inhabitants of Northampton, 138 Mass. 14 (1884). Justice Holmes reasoned that a fetus was merely a part of the mother and, as such, possessed no independent cause of action for prenatal injury. Similarly, until recent years wrongful death statutes were held inapplicable to the death of a fetus and provided no cause of action for the surviving parents. W. Prosser, Handbook of the Law of Torts § 55 (4th ed. 1971).

The common law perception that the fetus is a legal nonentity for tort purposes has now been thoroughly rejected. In regard to a child's cause of action for prenatal injuries, § 869(1) of the Restatement of Torts (Second) states:

One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive.

The drafter's comment to this section provides:

The rule stated in Subsection (1) is not limited to unborn children who are "viable" at the time of the original injury, that is, capable of independent life, if only in an incubator. If the tortious conduct and the legal causation of the harm can be satisfactorily established, there may be recovery for any injury occurring at any time after conception.

In Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982), the Idaho Supreme Court rejected the common law legal status of the fetus and held that a cause of action can be brought for the death of a viable fetus under Idaho's wrongful death statutes. Idaho Code §§ 5-310, 5-311. The court expressly declined to address whether a wrongful death action could be based upon the death of a non-viable fetus. In regard to prenatal injury to a child, the court stated:

Based on what we deem to be the modern trend and the clear weight of authority, we hold that in Idaho a cause of action will lie on behalf of a viable child who sustains prenatal injuries, but is subsequently born alive. Our holding is limited to the instant circumstances where it is alleged that the fetus was viable at the time of injury. We intimate no view, and reserve for another time any view, on whether such a cause of action will lie on behalf of a child for such negligence committed prior to its conception. *See, e.g., Jorgensen v. Meade-Johnson Laboratories, Inc.*, 483 F.2d 287 (10th Cir. 1973) (a cause of action for prenatal injuries held to be stated when mother took birth control pills prior to conception of mongoloid twins, and pills caused chromosomal abnormalities in mother's womb). Likewise we state no opinion today as to the existence of a cause of action for injuries to a fetus subsequent to conception but prior to viability. *See e.g., Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108, 110 (1958) (fetus is a separate organism from the time of conception).

Hence we hold that if the Volk child had survived the injuries, it would have been able to pursue a cause of action on its own behalf for any injury sustained subsequent to viability.

103 Idaho at 572-73.

As the law evolved toward recognizing legal remedies for prenatal injuries, the right to recover was premised upon the strong principle that a child had a right to be born with a sound mind and body. The Supreme Court of New Jersey articulated this principle in Smith v. Brennan, 157 A.2d 497, 503 (1960):

The semantic argument whether an unborn child is a "person in being" seems to us to be beside the point. There is no question that conception sets in motion biological processes which if undisturbed will produce what everyone will concede to be a person in being. If in the meanwhile those processes can be disrupted

resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being. And regardless of analogies to other areas of the law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child.

(Emphasis added.) See also Womack v. Buckhorn, 187 N.W. 2d 218 (Mich. 1971) (child recovered for prenatal injury sustained as result of automobile accident during fourth month of pregnancy); Gordon v. Gordon, 301 N.W. 2d 869 (Mich. App. 1981) (child held to have right to bring action against his mother for prenatal injury sustained as result of negligent use of prescription drug).

Thus, we conclude that in the case of gestational drug abuse the child's right to be born with a sound mind and body is further enhanced by the state's compelling interest as *parens patriae* in protecting potential human life from unwarranted harm or birth defects.

4. A Woman's Right to Privacy and Bodily Integrity Does Not Encompass Gestational Drug Abuse

The pregnant woman who is abusing drugs has several legal interests of her own at stake. The woman has a fundamental right to privacy, which incorporates the right to be free from unwarranted governmental intrusion into her personal life. Similarly, she has the right to her own bodily integrity. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Schmerber v. California, 384 U.S. 757 (1966). This right to privacy includes the right to make decisions which will impact her and the fetus she is carrying, Roe v. Wade, *supra*. (Like the U.S. Constitution, the Constitution of Idaho does not specifically provide a personal "right to privacy." There is no case law in Idaho which would afford citizens of Idaho greater protection in their right to privacy than afforded by the U.S. Constitution and federal case law enunciating that right.)

The woman's right to privacy in this instance differs from the conduct in question in Griswold, Eisenstadt, and Roe. A woman's right to privacy does not include the right to use illegal drugs. State v. Kelly, 106 Idaho 268, 678 P.2d 60 (App. 1984), *cert. denied*, 469 U.S. 918; State v. Kincaid, 98 Idaho 440, 566 P.2d 763 (1977); State v. O'Bryan, 96 Idaho 548, 531 P.2d 1193 (1975); State v. Erikson, 574 P.2d 1 (Alaska 1978). The Supreme Court of Alaska stated in Ravin v. State, *supra*:

[W]e think this right [privacy] must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare. No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely. Indeed, one aspect of a private matter is that it *is* private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.

537 P.2d at 504. Here there can be no serious argument that the use of illegal drugs which can badly damage a fetus is protected under the fourteenth amendment. To the extent that intervention into a woman's pregnancy involves her right to privacy, the state does have a compelling state interest throughout the pregnancy to ensure the health of potential human life and ensure that a fetus is born drug-free and free from the birth defects associated with gestational drug use.

This office perceives no contradiction between a woman's right to an abortion during the early stages of pregnancy and the right of the state during those same stages of pregnancy to require a certain degree of prenatal care once the woman elects not to have an abortion and to carry the child to full term. Alan M. Dershowitz, a professor of law at Harvard University, explains this distinction:

Now, I am not a "fetal-rights" advocate. I favor *Roe v. Wade*. I believe that a pregnant woman should have the right to choose between giving birth or having an abortion. But I am a human-rights advocate, and I believe that no woman who has chosen to give birth should have the right to neglect or injure that child by abusing their collective body during pregnancy.

Once a woman has made the decision to bear a child, the rights of that child should be taken into consideration. What happens to the child in the womb may have significant impact on his or her entire life.

...

There is a principled distinction between totalitarian intrusions into the way a woman treats her body, and civil-libertarian concerns for the way a woman treats the body of the child she has decided to bear. That principled distinction goes back to the philosophy of John Stuart Mill and is reflected in the creed that "your right to swing your fist ends at the tip of my nose." In the context of a pregnant woman's rights and responsibilities in relation to the child she has decided to bear, the expression might be: "Your right to abuse your own body stops at the border of your womb."

A principled person can fully support a woman's right to choose between abortion or birth, without supporting the very different view that the state should have no power to protect the health of a future child.

Congressional Record, Senate, August 1, 1989, S 9323.

5. The Woman's Right to Parental Autonomy Does Not Encompass Gestational Drug Use

The final right the woman may assert is her right to parental autonomy. This right is also not absolute. The state, acting in the capacity as *parens patriae*, has the right to intervene to protect innocent children from harmful decisions of their parents and has exercised that right even when such intervention subordinates the fundamental right to freedom of religion.

Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 170 (1944). See also Jehovah's Witnesses v. King County Hospital Unit No. 1, 278 F. Supp. 488 (W.D. Wash. 1977), *aff'd*, 390 U.S. 598 (1968); In Re Clark, 185 N.E.2d 128 (Ohio 1962); Hoener v. Bertinato, 171 A.2d 140 (N.J. 1961).

The Supreme Courts of New Jersey and Georgia have, in fact, ordered medical treatment for pregnant women in the final stages of pregnancy in order to save the life of the fetus. In Raleigh Fitkin-Paul Morgan Memorial Hospitals v. Anderson, *supra*, a pregnant woman was at high risk of hemorrhaging, which if left untreated would probably result in her death and the death of the unborn child. Based upon her religious beliefs, the woman would not consent to a blood transfusion. The Supreme Court of New Jersey reversed the trial court's refusal to enter an order requiring such medical treatment, and held:

We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.

We have no difficulty in deciding with respect to the infant child. The more difficult question is whether an adult may be compelled to submit to such medical procedures when necessary to save his life. Here we think it is unnecessary to decide that question in broad terms because the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them with respect to the sundry factual patterns which may develop. The blood transfusions (including transfusions made necessary by the delivery) may be administered if necessary to save her life or the life of her child, as the physician in charge at the time may determine.

201 A.2d at 538.

In Jefferson v. Griffin Spalding County Hospital, 274 S.E.2d 457 (1981), the Supreme Court of Georgia ordered a Caesarian section as well as all necessary blood transfusions to be performed upon a woman who refused the operation due to her religious beliefs. The medical evidence showed that the woman had complete placenta previa which indicated a 99% certainty that the child would not survive natural childbirth. The Georgia Supreme Court held per curiam:

The Court finds that the State has an interest in the life of this unborn, living human being. The Court finds that the intrusion involved into the life of Jessie Mae Jefferson and her husband, John W. Jefferson, is outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live.

274 S.E.2d at 460. Justice Smith stated in his concurring opinion:

In the instant case, it appears that there is no less burdensome alternative for preserving the life of a fully developed fetus than requiring its mother to undergo surgery against her religious convictions. Such an intrusion by the state would be extraordinary, presenting some medical risk to both the mother and the fetus. However, the state's compelling interest in preserving the life of this fetus is beyond dispute. See Roe v. Wade, *supra*; Code § 26-1202 et seq. Moreover, the medical evidence indicates that the risk to the fetus and the mother presented by a Caesarean section would be minimal, whereas, in the absence of surgery, the fetus would almost certainly die and the mother's chance of survival would be no better than 50 per cent. Under these circumstances, I must conclude that the trial court's order is not violative of the First Amendment, notwithstanding that it may require the mother to submit to surgery against her religious beliefs.

274 S.E.2d at 461. See also Application of Jamaica Hospital, 491 N. Y. Supp. 2d 898 (Sup. Ct. 1985) (physician appointed as guardian of unborn child and ordered to do all necessary to save life of eighteen-

week-old fetus, including administering blood transfusions to the mother over her objections); Crouse Irving Memorial Hospital, Inc., v. Paddock, 485 N. Y. Supp. 2d 443 (Sup. Ct. 1985) (court ordered pregnant woman to receive blood transfusions to protect the welfare of fetus that was to be prematurely delivered).

It must be noted that the conflict between the mother and the fetus in the preceding cases involved a basic fundamental right enumerated in the First Amendment to the U.S. Constitution. The mother's right to religious freedom was nonetheless overridden by the state's interest in protecting potential human life. An individual's penumbral right to privacy, in the context of illegal drug use, cannot logically ascend to so heightened a level of protection as religious freedom. It follows that if a state has the right to intervene and order drastically intrusive medical treatment for a pregnant woman over her objections in an effort to save the life of an unborn child, the state also has the ability to regulate the conduct of pregnant women shown to be abusing illegal drugs. The harm prevented by intervention is great, and the intrusion into the mother's life, forced abstinence, is minimal in comparison.

6. The State's Interest Justifies Intervention

Idaho's present interest in the context of gestational drug abuse is in protecting potential human life, Webster, *supra*, and protecting a child's right to be born with a sound mind and body. Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 201 A.2d 537 (N.J. 1964); Jefferson v. Griffin Spalding County Hospital, 274 S.E.2d 457 (Ga. 1981). Further, the state has an interest in protecting society from long-term financial burdens associated with gestational child abuse. "The state is under no obligation to allow otherwise 'private' activity which will result in numbers of people becoming public charges or otherwise burdening the public welfare." Ravin v. State, 537 P.2d 494, 509 (Alaska 1975). *See also* State v. Albertson, 93 Idaho 640, 470 P.2d 300 (1970) (Idaho statute requiring use of a helmet when operating a motorcycle held to be a permissible infringement upon an individual's right to privacy due, in part, to the public expense of providing health care for injuries sustained as a result of improper safety equipment.); State v. Laitinen, 459 P.2d 789 (Wash. 1969).

The effects of cocaine and narcotic drug use upon fetal development have come under increasing scrutiny within the medical profession in the last five years. Recent studies indicate that the use of illegal drugs, especially cocaine, can have devastating effects upon a developing fetus. Cocaine has been scientifically linked to perinatal strokes, myocardial infarctions, intrauterine growth retardation, kidney and genitourinary tract malformation, and significantly reduced head circumference. Cocaine use at all stages of pregnancy is linked to a higher incidence of abruptio placenta and neurobehavioral deficiencies. The instances of newborn infants with cocaine or narcotics in their systems are well documented, and the physical difficulties they face are dramatic and heartbreaking. In addition, infants born to drug-addicted mothers face a much higher risk of hepatitis and human immunodeficiency virus (HIV). Chasnoff, *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 JAMA 1741 (1989); Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 Pediatric Clinics of North America 1403 (1988); Lynch, *Cocaine Use During Pregnancy*, 19:4 JOGNN 285 (1990); Keith, *Substance Abuse in Pregnant Women*, 73 Obstetrics and Gynecology 715 (1989).

The medical evidence indicates that drug use at all stages of pregnancy places the fetus at risk of significant damage. The evidence further indicates that intervention into the first trimester of the pregnancy will significantly improve the chances of normal development and childbirth. Chasnoff, *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 JAMA 1741 (1989).

An informal survey performed by the State of Idaho Department of Health and Welfare indicates there were seventeen documented cases of prenatal illegal drug use in the year 1990. A national survey estimates that the frequency of drug use by pregnant women is one in ten. Chasnoff, 1986-1987, *Cocaine and Pregnancy*, Childbirth Educator, Winter: 34-12. Drug abuse is more concentrated in the urban areas of the country, but nonetheless there is no reason to assume the problem does not exist in Idaho and that a significant risk of harm exists for a significant number of children to be born in Idaho in the future.

CONCLUSION

The state does have a compelling interest in protecting potential human life from gestational drug abuse and in further protecting a child's right to be born with a sound mind and body. In the instance of known gestational drug abuse the state's compelling interest will override the woman's interest in personal privacy, bodily integrity and parental autonomy and permit some degree of state intervention.

The prospect of state intervention on behalf of the fetus and the newborn has brought a wide variety of suggested remedies. Such suggestions include criminal prosecution for gestational drug abuse, mandatory drug testing for all pregnant women, civil commitment for pregnant women shown to be using drugs, mandatory reporting requirements for medical providers in instances of gestational drug abuse, postnatal reporting requirements of medical providers for newborns showing symptoms of withdrawal, state child protective actions on behalf of newborns showing symptoms of withdrawal, and finally, educational and

prenatal care programs for pregnant women known to be using illegal drugs or with past histories of drug use. Each proposal for state intervention carries policy and cost considerations as well as legal parameters limiting state action. Once the focus for state intervention has been determined this office will be readily available to assist in further legal analysis and preparing appropriate legislation.

AUTHORITIES CONSIDERED

1. Constitutions:

First Amendment, U. S. Constitution. Fourth Amendment, U. S. Constitution.

2. Idaho Statutes:Idaho Code §§ 5-310, 5-311. Idaho Code §§ 15-2-108, 15-2-302. Idaho's Child Protective Act, Idaho Code § 16-1601, et seq. Idaho Code § 16-1602(e). Idaho Code § 32-102. Idaho Code § 72-102(8) (c).

3. Other State Statutes:Minn. Stat. § 626.5561 (1990). N.J.S.A. § 30:4C-11.

4. United States Supreme Court Cases:

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

Eisenstadt v. Baird, 405 U.S. 438 (1972).

Griswold v. Connecticut, 381 U.S. 479 (1965).

Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944).

Roe v. Wade, 410 U.S. 113 (1973).

Schmerber v. California, 384 U.S. 757 (1966).

Thornburgh v. American College of Obstetrics and Gynecology, 476 U.S. 747 (1986).

Webster v. Reproductive Health Services, 492 U.S. ---, 106 L. Ed. 2d 410, 109 S. Ct. --- (1989).

5. Federal Cases:

Jehovah's Witnesses v. King County Hospital Unit No. 1, 278 F. Supp. 488 (W.D. Wash. 1977).

6. Idaho Cases:State v. Albertson, 93 Idaho 640, 470 P.2d 300 (1970). State v. Kelly, 106 Idaho 268, 678 P.2d 60 (App. 1984). State v. Kincaid, 98 Idaho 440, 566 P.2d 763 (1977). State v. O'Bryan, 96 Idaho 548, 531 P.2d 1193 (1975). Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982).

7. Other State Cases:

Application of Jamaica Hospital, 491 N. Y. Supp. 2d 898 (Sup. Ct. 1985).

In Re Clark, 185 N.E.2d 128 (Ohio 1962).

Crouse Irving Memorial Hospital, Inc., v. Paddock, 485 N. Y. Supp. 2d 443 (Sup. Ct. 1985).

Dietrich v. Inhabitants of Northhampton, 138 Mass. 14 (1884).

In Re Dittrick, 80 Mich. App. 219, 263 N.W. 2d 37 (1977).

Gordon v. Gordon, 301 N.W. 2d 869 (Mich.App. 1981).

Hoener v. Bertinato, 171 A.2d 140 (N.J. 1961).

Jefferson v. Griffin Spalding County Hospital, 274 S.E.2d 457 (1981).

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