

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
425 5th NORTH
NASHVILLE, TENNESSEE 37243-0497

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Opinion No. 02-136

Drug tests on pregnant women and infants and the child abuse reporting statute

QUESTIONS

1. Does a situation where a pregnant woman tests positive for methamphetamine trigger the child abuse reporting statute codified at Tenn. Code Ann. § 37-1-403?
2. Under the reporting statute, is the hospital and/or the attending physician required to report when a child is born with illegal drugs in his or her system?
3. If the reporting statute is triggered, at what point does the reporting requirement attach?

OPINIONS

1. No. Tenn. Code Ann. § 37-1-403 uses the term “child,” not the term “fetus,” and, therefore, the statute is not triggered before the birth of a child.
2. Yes. The hospital or attending physician is required to report when a child is born with illegal drugs in his or her system under the reporting statute.
3. The reporting requirement is triggered once the child is born and tests positive for illegal drugs.

ANALYSIS

You have asked a series of questions regarding positive drug testing of pregnant women and newborn babies. You first ask whether a woman who tests positive for drugs before the birth of the infant invokes Tenn. Code Ann. § 37-1-403. That statute provides in pertinent part:

- (a) (1) Any person who has knowledge of or is called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition shall report such harm immediately if the harm is of such a nature as to reasonably indicate that it has been caused by brutality, abuse or neglect or that,

on the basis of available information, reasonably appears to have been caused by brutality, abuse or neglect.

Tenn. Code Ann. § 37-1-403 (a).

This statute uses the term “child” to define upon whom harm must be inflicted to invoke the reporting requirement; it does not use the term “fetus.” When a fetus is to be covered by a statute, the term “fetus” is specifically included. *See, e.g.*, Tenn. Code Ann. § § 39-13-107, 39-13-214, 20-5-106. Since Tenn. Code Ann. § 37-1-403 does not use the term “fetus,” it does not trigger the child abuse reporting requirement before the birth of a child. *See* Tenn. Op. Atty. Gen. No. 95-023 (March 27, 1995) (opining that drug use by an expectant mother does not constitute child abuse under Tenn. Code Ann. § 39-15-401); *Cf. Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (striking down a policy which required drug testing of pregnant women suspected of using cocaine as violating the Fourth Amendment of the United States Constitution).

Second, you ask whether a hospital or attending physician is required to report when a child is born with illegal drugs in his or her system. It is the opinion of this office that once the child is born Tenn. Code Ann. § 37-1-403 is implicated and a hospital or physician must report a positive drug test on that infant. Although the mother’s ingestion of the illegal drugs takes place before the birth of the child, Tenn. Code Ann. § 37-1-403 (a) requires that when a person has knowledge of “any child who is suffering from . . . any wound, injury, disability, or physical or mental condition” caused or reasonably appearing to have been caused by brutality, abuse or neglect, that person must report the harm. Title 37 contains the following definition of abuse:

(1) "Abuse" exists when a person under the age of eighteen (18) is suffering from, has sustained, or may be in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inactions of a parent, relative, guardian or caretaker.

Tenn. Code Ann. § 37-1-102 (b)(1).

Further, we note that the statute uses the present tense - “is suffering” - in referring to the state of the child and uses the past tense - “has been caused by” - in referring to the actions that produced the child’s present suffering. Neither of these statutes requires that the harm be inflicted after birth. Thus, in our view, once a child is born with illegal drugs in his or her system, that child **is suffering** from a physical condition that was caused by “neglect or other actions or inactions of” its parent within the meaning of the statute.

Finally, you ask when the reporting requirement attaches. Because Tenn. Code Ann. § 37-1-403 uses the term “child,” the reporting requirement cannot attach before the birth of the child. *See* Tenn. Op. Atty. Gen. No. 95-023 (March 27, 2001). Consequently, it is the opinion of this office

that the reporting requirement attaches after the child is born when someone becomes aware the child was born with drugs in his or her system.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ELIZABETH C. DRIVER
Assistant Attorney General

Requested by:

Honorable William E. Gibson
District Attorney General, Thirteenth Judicial District
1519A East Spring Street
Cookeville, TN 38506