



ARGUMENT DOCKET
WVU COLLEGE OF LAW
FEBRUARY 28, 2017

Argument #1
In the matter of: A.L.C.M., No. 16-0786

Case Summary

(In order to protect the privacy of the parties involved, the documents in this case are not available online. The case summary was prepared by the Clerk's Office for general informational purposes only.)

The Circuit Court of Ohio County submits to this Court a certified question pursuant to W.Va. Code § 58-5-2:

Is a Petition for Relief from Parental Abuse and Neglect alleging abuse and/or neglect of an unborn child who is subsequently born alive, actionable under West Virginia Law?

On February 23, 2016, a mother gave birth to twin boys via emergency C-section. She was a little over 35 weeks pregnant. One of the twins died immediately after birth. The surviving child, A.L.C.M.'s umbilical cord tested positive for cocaine, opiates, hydrocodone and oxycodone. The mother tested positive for the same drugs. Mother admitted to a history of drug abuse and abusing drugs while pregnant. Respondent mother claims she found out she was pregnant with twins when she went to the hospital after an overdose on May 31, 2015.

On March 4, 2016, a petition for relief from parental neglect and abuse was filed alleging that father knew or should have known of the mother's drug use during her pregnancy and took no steps to try and stop the same. The petition also alleged that the respondent father filed a mental hygiene application against the respondent mother after the birth, reporting that the

mother had been “shooting herself up with needles using heroin, crack, cocaine and pills.” The petition further alleged respondent father’s history of criminal activity with drugs- drug abuse, drug dealing and history of drug related incarcerations.

On April 18, 2016, the matter came for the Adjudicatory Hearing for respondent mother. The mother stipulated to the adjudication by admitting that she abused illegal drugs during pregnancy. She also admitted to using prescription pills, heroin and Subutex and overdosing on Xanax. She admitted to prior abuse/neglect case in Ohio, during which her parental rights to that child were terminated. She admitted that her other two children are in the care of her grandparents. The mother relinquished her parental rights to A.L.C.M. on or around July 11, 2016.

On August 9, 2016, the father filed a motion to dismiss the petition for relief from parental neglect and abuse in which he denied that he did not try to stop the mother’s drug use during her pregnancy; claimed that he informed the mother’s OB/GYN about her drug use; claimed that he assisted the mother in obtaining treatment; and claimed that he encouraged her to go to rehab. Father further claimed that he filed a mental hygiene petition that ultimately led to mother’s involuntary commitment.

In its certification order entered August 17, 2016, the circuit court concluded that the definition of “child” under West Virginia Code § 49-1-202 includes “unborn child” or “fetus.”

In its brief, the guardian ad litem (GAL) argues that the West Virginia abuse and neglect statutes, being remedial in nature, should be liberally construed to define “child” to include the “unborn child” or “fetus” so as to afford the child all the protections under those statutes. The GAL argues that the respondent father’s reliance on *State v. Louk*, 237 W. Va. 200, 786 S.E.2d 219 (2016) is incorrect. The Court held, in *State v. Louk*, that the mother could not be held criminally responsible under W.Va. Code § 61-8D-4a for prenatal acts she omitted against her fetus. The GAL argues that the respondent father’s analysis is incorrect because W.Va. Code § 61-8D-4a is a punitive statute and must be strictly construed. “Penal statutes are construed strictly against the State and favorably to the liberty of the citizen,” *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970). The GAL further argues that W.Va. Code § 49-1-201 is significantly different in its purpose and application and cannot be compared with the criminal statute definition of “child” as the respondent father argues. W.Va. Code § 49-1-201 defines an abused child as: “...a child whose health or welfare is being harmed or threatened by: (A) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury upon the child or another child in the home.” Further, the GAL argues that this abuse and neglect case is a remedial civil proceeding and as such the statute should be liberally construed.

The GAL argues that many other jurisdictions have interpreted their abuse and neglect statutory definition of “child” to include “unborn child” or “fetus” and several states have enacted statutes allowing pregnant women to be deemed negligent if her unborn child tests positive for drugs after birth.

In its brief, the DHHR argues first that, consistent with its broad remedial purposes, the West Virginia Child Welfare Act should be construed to permit a petition for relief from abuse or neglect of an unborn child that is later born alive. The DHHR further argues that respondent’s

reliance on this Court's decision in *State v. Louk* is misplaced because that case concerned a criminal statute, which must be read narrowly, rather than a remedial statute, which must be read broadly.

The DHHR asserts that the Child Welfare Act (the "Act") is a broad remedial statute that charges DHHR with protecting the health and welfare of children in West Virginia by, among other things, petitioning a court to terminate parental rights and reassign custody in cases of parental abuse or neglect. DHHR further argues that the statute is broad enough to permit DHHR to petition to terminate parental rights to protect a child born alive after having suffered abuse or neglect *in utero*. In this case, the DHHR petitioned for termination of the father's parental rights based on his knowingly allowing the mother to ingest drugs while pregnant, which inflicted physical, mental and emotional injury on the unborn child, who was subsequently born with extensive medical issues.

DHHR argues that the Act's definition of a "child" as any "person" under eighteen years of age is broad enough to encompass the unborn, and the plain meaning of the word "child" extends to a "baby or fetus." Further, the Act is designed to "[p]rovide for early identification of problems of children and their families, and respond appropriately to prevent abuse." W.Va. Code § 49-1-105(b)(8). DHHR argues that it would be contrary to the purposes of the Act for DHHR to wait for additional abuse or neglect to occur to a newborn infant that has already suffered significant harm *in utero* before filing a petition to show that the child's health and welfare are presently threatened. DHHR argues that evidence of abuse or neglect *in utero* is probative of whether a newborn child is living in an abusive or neglectful environment.

In his brief, respondent father argues that the West Virginia Child Welfare Act does not encompass prenatal acts that result in harm to a subsequently born child and thus does not permit a petition for relief from abuse or neglect of an unborn child that is later born alive. The respondent father properly relies on *State v. Louk* to support his position that a petition for relief from abuse or neglect of an unborn child that is later born alive is not actionable under West Virginia Law. Respondent father denies that he took no steps to stop mother's drug use during her pregnancy and testified that he tried to get her help several times. He also filed a mental hygiene petition against mother after she gave birth. Father denied abusing drugs or providing the mother with drugs during her pregnancy. Father testified that after the birth of A.L.C.M., he attended baby classes, which included CPR training at Ruby Memorial Hospital, and that he visited the child on once in February 2016, four times in March 2016, and consistently visited after April 2016.

Respondent father relies on this Court's ruling in *State v. Louk*. The Court based its ruling on the following:

The Legislature did not make any reference to an "unborn child" or "fetus" in W.Va. Code § 61-8D-4a [1997]. The statute only refers to a parent neglecting "a child" under his or her care, custody or control. Therefore, W.Va. Code § 61-8D-4a, our child neglect resulting in death statute, does not encompass prenatal acts that result in harm to a subsequently born child. Syl. pt. 2.

Respondent father argues that if the legislature intends to include a “fetus” or “unborn child” in a code section, it explicitly references the terms separate and apart from a “child.” Respondent further argues that the plain language of West Virginia Code § 49-1-202 must prevail and that this Court is without authority to broaden the definition of “child” to include a “fetus” or “unborn child.” Respondent father further argues that if this Court were to answer this certified question in the affirmative, many questions would arise surrounding a father’s duty to protect his unborn child from harms caused by the unborn child’s mother. This would impose duties on a father which he has little control over. These are duties that the legislature never intended to impute on a father nor did the legislature ever intend for this Court to develop.