No. 16-0786 - *In re: A.L.C.M.*

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LOUGHRY, Chief Justice, concurring, joined by WALKER, J.:

I concur whole-heartedly in the majority's conclusion that an abuse and neglect petition may be properly filed based upon the presence of drugs in a newborn's system. In my view, there is simply no question that a pregnant mother's drug use is child abuse of the type that must be remedied through our abuse and neglect system and prosecuted through our criminal justice system. I write separately, however, to cast a light on the majority's plainly-manifested hypocrisy and result-oriented analysis in addressing precisely the same conduct last year in *State v. Louk*, 237 W. Va. 200, 786 S.E.2d 219 (2016). The majority evades the question squarely presented in this case for the sole purpose of "distinguishing" the *Louk* decision and disguising the contradictory reasoning employed therein. In *Louk*, the majority allowed a mother to escape prosecution for her *in utero* abuse of her child by focusing exclusively on the fact that the injurious conduct occurred *in utero*. Now, the majority reverses course and completely ignores the fact that the injurious conduct occurred *in utero*, for purposes of permitting an abuse and neglect petition in this matter. While I agree entirely with the majority's ultimate conclusion that such a petition is proper, the machinations it undertakes to reach that conclusion and camouflage its previous error warrants discussion.

The facts of this case are heart-breaking and infuriating at once. A.L.C.M. is the surviving twin who was born at approximately twenty-five weeks gestation; his twin

brother died at birth. His mother, with the knowledge of the respondent, abused drugs throughout her pregnancy. A.L.C.M. was immediately life-flighted to the neonatal intensive care unit at Ruby Memorial Hospital in Morgantown at birth, where, as of the time of the below proceedings, he remained with a variety of very serious health concerns. During the course of these proceedings, A.L.C.M.'s mother voluntarily relinquished her rights to the infant. Expert testimony below described how A.L.C.M. was deprived of essential bonding and physical nurturing immediately after birth due to his mother's refusal to visit him–bonding and nurturing even more critically vital due to his premature birth and attendant health complications.

The certified question presented by the circuit court plainly and unmistakably asked this Court to answer whether an abuse and neglect petition was permissible where the abuse and/or neglect occurred while *in utero*. The majority tersely explains that since the petition was filed after A.L.C.M. was born alive, there is no "unborn child" at issue in this case and casually reformulates the certified question to suit its preferred discussion points. Without once dignifying the fact that the abuse in this case occurred *exclusively* while A.L.C.M. was *in utero*, the majority chooses to analyze the issue in a more politically comfortable manner and reaches the fairly obvious conclusion that a *post-natal* child who was abused by his or her mother's drug abuse *in utero* is properly made the subject of an abuse and neglect petition. By reformulating the question in this manner, the majority

attempts to evade the question it so badly bungled in *Louk*: whether an unborn child is in fact a "child" for purposes of our system of justice.

In *Louk*, the majority purported to simply apply the statutory definition of "child," blithely suggesting that had the Legislature intended to criminalize Louk's conduct of harming her unborn child, it could have simply indicated as much. 237 W. Va. at 206, 786 S.E.2d at 225. Therefore, it concluded, Louk could not be criminally prosecuted for child abuse resulting in death. *Id.* at 209, 786 S.E.2d at 228. As I noted in my dissent, this conclusion ignores completely West Virginia's observance of the "born alive" rule which would unquestionably have criminalized Louk's behavior and permitted prosecution. *Id.* at 215-18, 786 S.E.2d at 234-37 (Loughry, J., dissenting). Nonetheless, despite suggesting that the issue was as simple as applying the statutory definition of "child," the majority in *Louk* belabored at length the fact that the abuse in that case was "*prenatal* conduct that affects a fetus in a manner apparent *after* birth[.]" *Id.* at 206, 786 S.E.2d at 225 (emphasis added). Focusing heavily on the timing of the injurious conduct, the majority therein aligned itself with jurisdictions which likewise refused to permit prosecution "for *prenatal* conduct causing harm to the *subsequently* born child[.]" *Id.* at 207, 786 S.E.2d at 226 (emphasis added). In short, the *Louk* majority determined that because Louk's unborn child was not, in its view, a statutorily-defined "child" *at the time of the criminal conduct*, criminal liability would not lie.

In the instant case, however, the majority neglects to address whether A.L.C.M. was a statutorily defined "child" *at the time of the injurious conduct*, choosing instead to focus on whether he was a child when the abuse and neglect petition was filed.[1] In a remarkable turnabout, the majority abandons its *Louk* vantage point and ascertains that the proper measuring stick for actionable conduct is the purely procedural issue of the child's status *as of the time the abuse and neglect petition is filed*, rather than at the time of the alleged abuse and neglect. Demonstrating that the reasoning in *Louk* is completely incongruous with the majority's rationale herein, a Tennessee Court of Appeals expressly rejected the *Louk*-type reasoning regarding the timing of the harm to conclude that a finding of abuse may be based on *in utero* abuse: "[A] finding of abuse can be based on conduct that occurs at one time and injury that occurs at another. The Mother's argument that all the components of abuse must 'exist concurrently' is a prime example of circular reasoning that offers nothing other than its own weight for support." *In re Benjamin M.*, 310 S.W.3d 844, 848-49 (Tenn. Ct. App. 2009). By shifting focus to this procedural timing issue, the majority apparently believes it side-steps the issue of whether injurious conduct to an unborn child is actionable. In reality, all this analysis does is demonstrate how fickle the majority and

[1]The majority reasons that since A.L.C.M. qualified as an "abused" or "neglected" child at the time the petition was filed, the petition was statutorily compliant. However, were we to take the majority's crabbed analysis to its logical conclusion, in point of fact, A.L.C.M. would *never* have been an abused or neglect "child" since neither mother nor the respondent has so much as had the opportunity to cause or inflict any degree of abuse or neglect since his birth–the time the majority clearly believes he became a statutorily-defined "child." A.L.C.M. was never in the custody or control of either parent from the time he was born.

malleable its reasoning when faced with hot-button social issues.[2]

That said, the majority plows no new ground in determining that an abuse and neglect petition is properly based upon a mother's drug abuse during pregnancy. As one New York family court stated:

> [I]t would be incongruous to imagine the Family Court Act's clear purpose being anything other than to protect children, including unborn children, from harm. Making a child endure an unsafe environment in the womb is ludicrous when this same child is afforded protection from illegal drugs and an unsafe environment the moment it takes its first breath outside the womb.

In re Unborn Child, 683 N.Y.S.2d 366, 370 (N.Y. Fam. Ct. 1998). This Court further reasoned that "[s]ince the common law of this state protects the fetus from negligent acts of a third party, then surely it may be found to encompass protection of the fetus from intentional acts by its mother, which acts could cause the child to begin life in an impaired condition." *Id. See also In re M.M.*, 133 A.3d 379 (Vt. 2015) (finding child born, in part due to mother's substance abuse, addicted to opiates to be child in need of care of supervision); *S.P. v. Cabinet for Health & Family Servs*., No. 2012-CA-000379-ME, 2012 WL 5830076 (Ky. Ct. App. Nov. 16, 2012) (finding that neglect of child by use of illegal drugs during pregnancy); *In re Baby Boy Blackshear*, 736 N.E.2d 462, 465 (Ohio 2000)

[2]Notably absent in this case is the legion of amici curia which filed briefs in the *Louk* case imploring the Court to yield to their public policy positions.

("When a newborn child's toxicology screen yields a positive result for an illegal drug due to prenatal maternal drug abuse, the newborn is, for purposes of R.C. 2151.031(D), *per se* an abused child."); *In re Troy D.*, 263 Cal. Rptr. 869, 873 (Cal. Ct. App. 1989) ("[A] living child must be afforded the protection of the juvenile court even though he is at risk because of his mother's actions before his birth."); *In re Ruiz*, 500 N.E.2d 935, 939 (Ohio Com. Pl. 1986) (finding because "a child does have a right to begin life with a sound mind and body," viable fetus is a child under the existing child abuse statute and harm to it may be considered abuse) *Matter of Baby X*, 293 N.W.2d 736 (Mich. 1980) (finding newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child within the jurisdiction of the probate court).[3]

[3]Moreover, although not the question presently before the Court, in my view, a father's failure to act in the face of a mother's drug abuse, renders him an abusive and neglectful parent as per the objectives of our abuse and neglect system. Again, other courts have had little difficulty in agreeing with this conclusion. *See In re J.C.*, 182 Cal. Rptr. 3d 215 (Cal. Ct. App. 2014) (upholding neglect finding where there was sufficient evidence that father knew mother was taking drugs while she was pregnant and did nothing to protect his unborn child from her conduct); *Edward B. v. Arizona Dept. of Econ. Sec*., No. 1 CA-JV 11-0235, 2012 WL 1207388, at *1 (Ariz. Ct. App. Apr. 10, 2012) (finding abuse and neglect petition proper where father, while living with mother during the pregnancy and being aware of her drug addiction, "neglected his child by failing to protect the child from Mother's substance abuse while pregnant with the child."); *In re S .K.A.*, No. 10-08-00347-CV, 2009 WL 2645027 (Tex. Ct. App. Aug.19, 2009) (holding father's failure to take any action to protect unborn child from mother's drug use was sufficient to establish that he knowingly allowed the child to remain in conditions and surroundings that endangered the child's physical well-being).

In sum, as my dissent in *Louk* and the foregoing emphasize, I agree wholeheartedly that "a child has a legal right to begin life with a sound mind and body" and that our system of justice serves no higher purpose than when it endeavors to preserve that right. *Baby X*, 293 N.W.2d at 739. I trust that this Court, when faced with legal issues bearing upon this right, will resolve such matters with judicious and sound reasoning which properly venerates that right. Accordingly, I respectfully concur.