

LEGAL ISSUES



IU ECHO OUD
PREGNANCY TRACT

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Echo Legal Disclaimers

- NOT LEGAL ADVICE
- Meant to be “quick-hitters” on variety of topics
 - Scratch the surface only - issues—too complex for short didactic

Overview

- OUD in Pregnancy Issues/Goals
- Best Interests of the Child concept
- Pregnancy in the Criminal Justice System
- IDOC's W.O.N. program
- Family Law/DCS Issues
- Discrimination/Civil Rights
- Drug Courts/Criminal Justice
- Social Security Disability
- Advance Directives
- HIPAA
- DEA, IN Atty General/PLA Investigations

CHILDREN IN PREGNANCY LEGAL ISSUES

Goal of the US legal system, in any phase, related to children is to **PROTECT THE BEST INTERESTS OF THE CHILD(REN)**.

Key question: What is in the infant's best interests?

This question guides Courts in deciding:

- a. What type of services are needed?
- b. What type of action/intervention is needed?
- c. What order(s) would best effectuate the child's best interests?

"Best Interests" of children in the legal context is defined as:

Determination made considering a number of facts related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, all with the child's ultimate safety and well-being the paramount concern.

BESTS INTERESTS OF THE CHILD

Fundamental guiding principles of "best interests"

- Importance of family integrity and preference for avoiding removal of the child from his/her home.
- The health, safety, and protection of the child.
- The importance of timely permanency decisions.
- Assurance that a child removed from his/her home will be given care, treatment, and guidance that will assist the child in developing into a self-sufficient adult.

BESTS INTERESTS OF THE CHILD

BEST INTERESTS FACTORS:"

- Emotional ties and relationship between child and parents, siblings, family, household, caregivers.
- Capacity of parents to provide a safe home and adequate food, clothing, and medical care.
- Mental and physical needs of the child.
- Presence of domestic violence in the home.

- Less Common Factors:
 - Importance of maintaining sibling and other close family bonds
 - State Constitutional protections
 - Child's wishes (when Court deems the child is old enough and mature enough to express a preference)

BESTS INTERESTS OF THE CHILD

A few states also list factors that should *not* be considered in the "best interests" analysis:

- Connecticut – determination of BI cannot factor in socio-economic status of birth parent/caregiver.
- Delaware – prohibits the sex of the a single parent to be considered in term of better qualified.
- Idaho – prohibits a disability to the parent(s)/caregiver from being considered.

INDIANA LAW ON BESTS INTERESTS OF THE CHILD

Indiana Code on BI § 31-34-19-6

- Consistent with the safety of the community and the best interests of the child, the court *shall* enter a dispositional decree that:
 - Is in the least restrictive (most family-like) and most appropriate setting available.
 - Is close to the parents' home, consistent with the best interests and special needs of the child.
 - Interferes least with family autonomy.
 - Is least disruptive of family life.
 - Imposes the least restraint on the freedom of the child and parents, guardian, custodian.
 - Provides a reasonable opportunity for participation by the child's parent, guardian, custodian.



PREGNANCY IN THE CRIMINAL JUSTICE SYSTEM

Indiana, along with 23 other states, consider substance use in pregnancy to be *child abuse*, however 2016 legislation softened this stance.

When SUD is suspected by a healthcare provider, *testing* is required (not reporting)

- Reporting to Law Enforcement, DCS prohibited without patient's consent.
- Does not remove obligation to report child abuse if other signs are present.
- Court ordered – must disclose.

ISDH *has* formed specific programs for treatment of SUD in pregnancy.

Punitive approach is detrimental to women obtaining care and treatment for SUD.

Providers upon presentation of new pregnancy *must* do verbal screening.

- Can do urine test
- Can also do a blood test

MAT DURING PREGNANCY APPROVED

Indiana cites ACOG Opinion Paper 711, August 2017 *Opioid Use and Opioid Use Disorder in Pregnancy* in supporting MAT during pregnancy.

-Opinion paper supports use of methadone and/or buprenorphine during pregnancy as safe to treat OUD.

-Women who are allowed to stay with their children during treatment are more likely to start treatment and maintain sobriety. OWH. White Paper: *Opioid Use, Misuse, and Overdose in Women* (2016).

WOMEN IN PRISON

Number of women in prison is increasing at twice the rate of men.

-70% of women in prison are mothers

-typical incarcerated female is

- of child rearing age,
- unmarried,
- a minority group member,
- a mother of minor children,
- undereducated,
- economically marginal,
- and has considerable experience with or is dependent on drugs or alcohol

INDIANA DOC's WEE ONE'S NURSING PROGRAM

Voluntary program at IN Women's Prison

- provides parenting education and to ensure quality time to strengthen the mother-infant bond during the initial months after the infant's birth.
- Mothers and their babies have private rooms in one housing unit.
- A small cadre of trained nannies from the offender population also live on the housing unit, and assist the mothers in caring for their infants while the mothers attend classes, counseling appointments, and/or similar obligations.
- The program also included ongoing training of the mothers in child development and attachment

INDIANA DOC's WEE ONE'S NURSING PROGRAM

W.O.N. Criteria

Offender is pregnant at the time she is delivered into the custody of the Department of Correction

Offender's earliest possible release date is not more than eighteen months after the projected delivery date

Offender must have a conduct history free of any Class A findings of guilt for the past 12 months and free of any Class B findings of guilt for the past 6 months

Offender has never been convicted of a violent crime or any type of child abuse or child endangerment determined by the pediatrician

Offender and her child must meet established medical and mental health criteria determined by the Pediatrician

Offender has at least an eighth grade reading level.

Offender is legal custodian of the child; no one else has been granted custody or shared parenting privileges

Offender must be willing to sign a covenant agreeing to abide by all the rules of the W.O.N. program and indicating she will participate fully in the program

INDIANA COUNTY JAILS & PREGNANCY

Reality – County jails do not want pregnant inmates

-Huge liability issue

-expensive treatment

-capacity issues

Criminal justice system works to keep pregnant offenders out of jail

- No or low bond

Essentially, fair to consider: "a pregnant defendant would have to *want* to remain in jail" in most Indiana county jails.

Family Law/D.C.S.

Indiana DCS is overwhelmed (epidemic/OUN factors into that)

- Quality/attitudes vary greatly by caseworker
- Real role for providers to explain nature/course of treatment to DCS and CHINS court
 - Slowly starting to appreciate the OUN epidemic and shifting/opening minds.
- Attitudes towards MAT vary greatly

True that in Indiana, DCS will *not* get involved with a pregnant mother with no other children

If pregnant mother has children and is substantiated/CHINS, DCS will become involved with infant once born.

TPR – Indiana has no registry for parents who terminate their parental rights upon birth of a child (see, e.g., Michigan).

Serious miss – DCS involved, mother/parents TPR, DCS releases the case, they have more children.

Family Law/D.C.S.

Other family law issues

- The myth of the “notarized statement”
 - Only *court order* can change custody/child support
 - Common situation: both parents are individuals with O[S]UD, one enters recovery and assumes primary care of the child, but parties never formally change custody
- Standby guardianship/third party POA
- Grandparents taking over custody (legal intervention)

Family Law/D.C.S.

Child Support—major re-entry barrier

It really depends upon what the incarceration is for:

- Incarcerated for failure to pay child support
 - Criminal Non-support (PUNISH)
 - Rare, severe sanction
 - All states have, felony or misdemeanor
 - Civil Contempt (PROMPT COMPLIANCE)
 - Much more common.
 - Usually less severe penalties
- Incarcerated (for other conviction) with child support order
 - Indiana (and most states) allow for modification during incarceration
 - Need to be proactive as incarcerated, non-custodial parent

Civil Rights Issues

SUD is a protected “disability” under civil rights laws (ADA/FHA). Protects employment and housing.

Two elements:

1. The person is in active treatment AND
2. “not currently engaging in illegal use of drugs”

NOTES:

What “currently” means is unclear.

Employers/landlords (and many others) cannot take adverse actions on the basis of the disability.

Protection provided:

1. Discrimination against adverse treatment because of protected class, including disability
2. Employer has a duty to make reasonable accommodations

Civil Rights Issues

If Individual is engaged in illegal drug use, they are NOT an “individual with a disability.”

This does NOT include a person with a *history* of drug addiction, but is not *currently* using. This person qualify for protection.

An employer MAY prohibit the illegal drug use *and* use of alcohol in the workplace.

An employer MAY test employees for illegal use of drugs.

An employer MAY discharge or deny employment for illegal use of drugs.

An employer MAY require disabled employees to meet the same standards of performance as other employees.

Source: United States Commission on Civil Rights

Civil Rights Issues

Can an employer require disclosure of prescriptions/medical treatment?

- Before job offer? No. Unless it is directly related to job duties.
- After job offer, but before employment starts? Yes, as long as the same inquiries are made of all employees.
- After employment starts? No, as long as the request is job-related and “consistent with business necessity.”

Civil Rights Issues

FMLA applies to substance abuse treatment, but be careful of pretextual adverse actions

Specific MAT issues:

- Reasonable Accommodation from Employer to participate in therapy.
- Recovery Homes prohibiting MAT
 - Unwilling vs. not-equipped
- Professional Licenses (including those in the medical field)
 - MAT is disfavored.
 - Outright rule banning probably violates ADA, but Indiana's licensing boards generally do NOT allow MAT patients to obtain/maintain license
 - Area for advocacy/policy change
 - Other licenses vary (EX: CDL license holders cannot be on methadone).

In general with discrimination claims—major proof/evidence issues

- Indiana is an “at will” state.

Drug Courts/Criminal Justice

Drug Courts have proliferated as a means to be less punitive and encourage treatment.

Some Drug Courts offer additional benefit of withholding, or rescinding, convictions.

Drug Courts are focused on “highest risk” individuals, with goal of diverting from prison.

In practice, options and management are largely dependent on program, Judge, and Prosecutor.

Best practice: “Sanction schedule” (Graduated sanctions for missing treatment or failed drug test, eventually resulting in jail time)

Best practice: “wrap around services” with a focus on more than drug testing, including employment, health care, and social issues.

Most serious issues for individuals: failing to appear for court dates

Drug Courts/Criminal Justice

DUI with MAT

- Methadone: Yes, but it is a defense if drug was prescribed and administered for legitimate medical purpose.
- Buprenorphine/Naltrexone: No

Providers are strongly encouraged to educate and participate with local drug courts

Social Security Disability

Basic Eligibility: disability substantially impairs you from working

Addictions are not considered in this context

To get disability with addictions, must show that, even if there was no addiction, other disabilities would prevent work

Really important role for providers to explain interactions between addictions and other medical conditions, especially co-occurring mental illness

Medical records usually aren't enough (need provider participation)

Expungements

Variance between what is really a “Sealing” of a conviction versus a true “Expungement.”

Time limitations:

- 8 years for felony.
- 5 years for misdemeanor.
- Can receive permission to “file early” with prosecutor’s consent.

One time only

Effect: person is treated (outside of the legal system) as if the conviction or arrest never occurred:

- Employment
- Licensure (including professional)
- Can still be utilized if arrested in future of bail and enhancement purposes.

Specialized Driving Privileges

- For any reason, including multiple OWIs, HTV, Child Support, Failure to provide insurance, etc.
- Relatively recent (2015) provision that dramatically permitted people to obtain driving privileges
- Applies to:
 - Suspensions related to criminal convictions.
 - Suspensions related to administrative (i.e. BMV) issues such as unpaid reinstatement fees.
 - Suspensions related to child support.
 - Suspensions related to arrest.
- Two basic types (not necessarily mutually exclusive):
 - “time/place/manner” (certain hours, locations, etc.)
 - Prior restraint (Ignition interlock, mandatory treatment etc.).
- Completely up to the court.
- Insurance is a hurdle, and some courts require proof of prepayment and/or SR-22.
- ONLY EXCEPTION: Refusal to take chemical test.

Advanced Directives

WHAT

- Written directive by individual instructing healthcare providers on wishes relative to medical treatment in event of incapacitation

Doesn't need to be overly-formal

- Part I Appointment of Healthcare Surrogate / POA
- Part II Indiana Declaration
 - Living Will Declaration
 - Life-prolonging Procedures Declaration
- Part III Signatures (witnessed by two *independent* adults) (if granting POA – **notarized** as well)

Can attach organ donation instructions, formal form

Can be revoked orally or in writing

Advance Directives (Cont'd.)

Psychiatric Advance Directives

Instructive PAD: gives instructions about specific mental health treatment a person wants should he or she experience a mental health crisis

- Wishes can be overridden for health or practical reasons (Ulysses Clause)
Proxy PAD: names a healthcare proxy or agent to make treatment decision

Advance directives for substance use

Not codified anywhere

Being studied by some states

Could be a useful tool, some ideas for provisions:

Proxies

Individuals that hinder or negatively impact recovery

Temporary custody of children, pets

Brand new area—open for examination and creativity

HIPAA

First and foremost, of the love of all things great and small....

- SPELL IT CORRECTLY (2 A's!!!)

Way too broad to really scratch the surface

No private cause of action for violation of HIPAA

BUT

- Understand how serious it is
- licensure issues
- employment issues

Walgreen Co. v. Hinchy, 21 N.E.3d 99 (Ind. Ct. App. 2014)

- PLEASE DON'T BE A WITHERS!

DEA Investigations

DEA is *ESPECIALLY* aggressive in investigating both prescribers and dispensers of opioids, methadone, buprenorphine

Common, sneaky DEA tactic is to scare you into signing a surrender of prescribing/dispensing *for cause* certificate (DEA-104) but "don't worry, you can get it back in 6 months...."

- WRONG, incredibly difficult to regain a certificate to prescribe/dispense controls.
- Immediate right to counsel – exercise it
- Don't sign ANYTHING

Attorney General Investigations/Complaints

WHO

- PATIENTS/CLIENTS, DISGRUNTLED EMPLOYEES, YOUR LICENSING BOARD

WHAT

- The "small c" complaint

WHEN

- 20-days from date of complaint letter to you
- Usually extended 30-days

HOW

- Strongly encouraged to get legal counsel involved
- Very high number of complaints dismissed at the "small c" stage
- Make sure your address is always up to date with the IN PLA

Attorney General Investigations/Complaints

Formal Complaint (if AG decides to pursue sanctions after investigation)

Administrative trial before the applicable licensing board

Sanctions

- Permanent revocation of license
- Suspension
- Letter of Reprimand

Settlement strongly encouraged

- Usually can negotiate minimal sanctions for first time licensees

Questions?

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