

WISCONSIN FETAL ALCOHOL SPECTRUM DISORDERS (FASD)
TREATMENT OUTREACH PROJECT (WTOP)

Interpreting and Applying the Wisconsin Children's Code

Addressing Alcohol/Drug Use During Pregnancy



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CONTENTS

Introduction Statement.....	3
Interpreting and Applying the Wisconsin Children’s Code: Addressing Alcohol/Drug Use during Pregnancy.....	4
History	
Clarification and Explanation	
Mandatory Reporting	
Resources.....	10
References.....	11

DISCLAIMER

This information is not intended to constitute legal advice and should not be relied upon in lieu of consultation with appropriate legal advisors in your own jurisdiction. **Please be aware that informed consent laws and regulations can change and it is important to first contact your local legal counsel.**

This document is not meant to refute or request a repeal of the current Wisconsin State Statutes pertaining to pregnant women and unborn children. It is meant to be used as a resource to clarify Wisconsin State Statutes, informed consent laws and provide up-to-date information on services for clients. This is an interpretation of an Assistant District Attorney who is assigned to review these types of legal issues, and as such, is her reading of and interpretation of the legal aspects of UCHIPS law. It does not represent the policies at the Milwaukee District Attorney's Office.

Introduction Statement

The adverse effects of alcohol consumption during pregnancy have been widely reported, and represent a leading preventable cause of physical and cognitive birth defects in the United States (Bertrand, 2009; Hoyme et al., 2005; Wilton and Plane, 2006). In 2005, former U.S. Surgeon General Carmona issued a public health advisory highlighting the risks of alcohol use during pregnancy. Despite the awareness and education that occurred since the first Surgeon General's advisory on fetal alcohol syndrome (FAS) (C. Everett Koop, 1981), a significant number of women continue to drink alcohol during pregnancy, placing their children at risk for physical, cognitive, behavioral, and emotional disorders. According to the Wisconsin Epidemiological Profile on Alcohol and Other Drugs, 2010:

- Wisconsin's rates of alcohol use and misuse are among the highest – if not the highest – in the nation. As of 2008, Wisconsin adults continue to have the highest rates of alcohol consumption, binge drinking and heavy drinking among all U.S. states.
- The Centers for Disease Control and Prevention (CDC) has reported that Wisconsin is among the states that report the highest rates of drinking among pregnant women and high-risk drinking among women of childbearing age, (2004).
- Data for the years 2001-2008 consistently show that Wisconsin women of childbearing age are more likely to drink – and to binge drink – than their national counterparts. This has important implications for unplanned pregnancy and infant health.
 - In 2008, 68% of Wisconsin women ages 18-44 said they had at least one alcoholic drink in the past 30 days; this compares with 50% of women in the United States.
 - In 2008, among women ages 18-44, 24 % in Wisconsin and 15% nationally said they had consumed four or more drinks on one occasion in the past 30 days.

Wisconsin Statutes Chapter 48 (The Children's Code) addresses the protection of children and unborn children—including those children at risk due to maternal alcohol and/or other drug abuse. This paper will clarify The Children's Code as it relates alcohol use during pregnancy.

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Interpreting and Applying the Wisconsin Children’s Code: Addressing Alcohol/Drug Use During Pregnancy

The following section is written by Assistant District Attorney, Katherine Kucharski, of Milwaukee County, Wisconsin.

To begin, it is necessary to understand the difference between a “CHIPS” case and a “UCHIPS” case. “CHIPS” stands for Child in Need of Protection or Services and is defined under Wis. Stats. §48.13. There are many different subsections (abandonment, abuse, neglect, etc.) with many different definitions of children over whom the court has jurisdiction (authority to act) based upon some sort of unsafe activity or environment in their lives. All CHIPS sections under Wis. Stats. §48.13 apply to children who have already been born. The definitions in the statutes make this clear.

An “UCHIPS” case refers to a very specific and separate law from the “CHIPS” law. “UCHIPS” stands for an Unborn Child in Need of Protection or Services and is defined under Wis. Stats. §48.133. There is only one definition, which must be proven by the government, for a court to have jurisdiction over an unborn child. Wisconsin Statutes, section 48.133, defines “UCHIPS” as:

“an unborn child... whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control.”

The statute clarifies that, “[t]he court also has exclusive original jurisdiction over the expectant mother of an unborn child described in [Wis. Stats. §48.133].”

The UCHIPS law focuses on the impact on the unborn child. The focus is not the impact on the pregnant woman. However, there are Constitutional issues that get considered and weighed in, because the mother’s rights are not overtaken by the rights of the unborn child. So, the legal standard is truly a balancing of interests.

Before the UCHIPS law was created in 1998 via Act 292, the only laws in existence that were closely related were the CHIPS laws. There was no real legal method for intervention

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unless or until the child was born. People began to get very concerned, following the research and publication of the (as then-understood) link between crack cocaine use and newborn health issues that came to light in the mid-eighties. Dr. Ira J. Chasnoff and other researchers published a good deal of information appearing to link a pregnant woman's use of crack cocaine (a "newer" and quite broadly used drug in the 1980's) with major long-term medical and health effects to the unborn baby. With no legal method for intervention, these then-termed "crack babies" became a large and quite concerning perceived "epidemic" in America. It was a social issue at the forefront of child welfare issues of the time.

In the mid-1990's, the issues came to Wisconsin's legal "door." A Waukesha County case (Ex. Rel. Angela M.W. v. Kruzicki, 209 Wis.2d 112, 561 N.W.2d 729 (1997)) addressed the questions and led to the current law. The Angela M.W. case discussed what the rights of the unborn child are, along with what the rights of the mothers were and what if any limits there are on these rights. It questioned whether a mother's right to bodily integrity (a Constitutional implication) is diminished at all when weighed against an unborn child's right(s) to be born reasonably healthy. How these concerns were weighed and when one tipped the scales was contemplated throughout the Angela M.W. case. Several organizations representing governmental, child welfare, children's rights and reproductive rights groups submitted briefs to the Wisconsin Supreme Court.

In the end, the Wisconsin Supreme Court decided the following in Angela M.W. Based totally upon the statutes (CHIPS/48.13 because the UCHIPS law had not yet been passed), that the State could not intervene in the life of an unborn child.

Before Angela M.W., the only law allowing the government to intervene for child welfare cases was the CHIPS law, which defined a "child," as a living, born child, NOT an

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unborn child. The Wisconsin Supreme Court hinted that any different outcome would have to be based upon a different law/statute. Very soon thereafter, in 1998, the Wisconsin Legislature passed Act 292, amending the statutes and creating a UCHIPS law (48.133) allowing for government intervention in the lives of pregnant women and their unborn children.

Having discussed how the UCHIPS law came to be, let's now discuss what it means and how it is implemented. For many people, it's not what the public thinks it is. In the end, it's really created to be a vehicle to provide for and to expect pregnant women to get services, so they can deliver healthy babies.

The current UCHIPS law (as defined above) has several key aspects. It's not the simplest, most minimal legal standard to prove. An "unborn child" is defined as a "human being from the time of fertilization to the time of birth." The pregnant woman must be proven to "habitually" lack self-control in her use of "alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree" so as to create a "substantial risk" that the unborn child will be "seriously affected or endangered UNLESS" the pregnant mother receives "prompt and adequate treatment" for her lack of self-control.

As with all child welfare matters, the investigation and assessment of the child's (or unborn child's) safety with a parent begins with the receipt of a referral by the Child Protective Services (CPS) agency. The statutes and CPS agency regulations contemplate that there should be a lot of intervention before the UCHIPS law might even be considered. Given the high threshold of proof needed to file a UCHIPS case, it's highly likely that lots of informal intervention may be required to be attempted, before we even think the UCHIPS law can be proven.

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In assessing for safety and what, if any, intervention is necessary, it's important to understand and clarify some of the myths that exist about the UCHIPS law. It is a civil and not a criminal law. It is meant to be remedial and to make children safe, not as a means to punish women using alcohol or drugs. As a subset of Chapter 48, the pregnant woman and unborn child have confidentiality rights to have the facts and information of the case stay within the realm of the court assigned to make decisions in the child welfare case. Unless specifically allowed by laws governing child welfare confidentiality, the information and investigation are not admissible in other matters. A woman cannot be charged with a crime for harm she does to her unborn child from alcohol or substance abuse (Wis. Stats. §939.75).

For many people working with pregnant women who have substance abuse issues, there is concern about the concept of taking “custody” of an unborn child and its mother in these cases. It is important to understand exactly what is meant by the legal term “custody.” The Wisconsin Statutes differentiate between secure custody (locked) vs. non-secure custody (court-ordered conditions of placement and care, but not locked).

The statutes also differentiate between an adult expectant mother and a child expectant mother with substance abuse issues. In summary, an adult expectant mother cannot be held in secure custody (“locked up”) unless through some other legal method (discussed below). A child expectant mother can be held in secure custody (locked); however only once they meet the same criteria as any other child would meet, in order to be held in secure custody (or via the same “other legal means” as adult expectant mothers).

What may be perceived as the use of the UCHIPS law to keep an expectant mother locked in secure custody may in fact be a misunderstanding as to how they came to be in locked custody. At times, for all sorts of reasons, a woman may be pregnant, enmeshed in substance

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abuse issues, and find herself locked up and in custody for various alternative legal reasons. The most common include a Chapter 51 (mental health commitment) hold. In certain circumstances under Chapter 51 of the statutes, a person's out-of-control alcohol or drug usage can lead to them being involuntarily committed into secure custody. Another example is a criminal hold for different reasons. To illustrate, if the expectant mother has a criminal case pending, they may find themselves in secure (locked) custody like other criminal defendants. There may be a tie-in between the woman's drug usage issues and her criminal matters (e.g., crimes like "drug possession," "drug dealing" and "fraudulently obtaining prescriptions," etc.). Even if there is not an open or pending criminal case, a prior criminal record could result in the expectant mother being on probation or parole. Continued drug or alcohol usage may be a violation of probation or parole, leading to a warrant for and subsequent arrest of an expectant mother. An unrelated violation of a probation or parole condition can have the same result. There may be warrants (orders to arrest and take a person into secure custody) outstanding for a person.

This paper did not go into depth about mandatory reporting and its application to UCHIPS cases. While concerned individuals must get this advice from legal counsel, be aware of the following Wis. Stats. §§48.981, §48.981(2)(d) and 48.981(3)(a) ("required to report...suspicion of child abuse or neglect or of unborn child abuse..."). All medical providers must understand the laws about release of medical records. While patient health care records of the expectant mother are routinely confidential (Wis. Stats. §146.82), when the allegations involve suspected abuse or neglect of a child or unborn child, the records are no longer confidential (Wis. Stats. §146.82(2)(11)). With recognition that changes in policies and regulatory requirements for the treatment of substance use disorders are continuous, all providers must be knowledgeable about federal, state, and local legislation, regulations, and policies.

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Resources

Legal

1. Wisconsin Chapter 48 – Children’s Code
<http://legis.wisconsin.gov/statutes/stat0048.pdf>
 (Electronic reproduction of 2009–10 Wis. Stats. database, current through 2011 Wis. Act 15 and April 30, 2011.)
2. Wisconsin Chapter 51 – State Alcohol, Drug Abuse, Developmental Disabilities and Mental Health Act
<http://legis.wisconsin.gov/statutes/Stat0051.pdf>
3. Wisconsin Department of Health Services’ Administrative Rules, State Statutes and Grievance/Complaints Information:
<http://www.dhs.wisconsin.gov/substabase/statref.htm>
4. State Bar of Wisconsin – Directory of Federal, State and Tribal Courts
http://www.wisbar.org/AM/Template.cfm?Section=Court_and_State_Offices_Directory&Template=%2FCustomSource%2FCourtDirectory.cfm&view=0&Court=Wisconsin+Circuit+Courts&Tribes=*%&Positiontitle=Corporation+Counsel&Finish=OK
 (In the position/title drop down box select “Corporation Counsel” for information about your county or tribe’s contact information)

Services for Individuals

1. Wisconsin Women’s AODA Treatment Coordinator, Bernestine Jeffers
Bernestine.Jeffers@dhs.wisconsin.gov
2. Wisconsin’s Human Services Department County Directory:
<http://www.dhs.wisconsin.gov/areaadmin/HSDPgms.asp>
3. Wisconsin FASD Treatment Outreach Project (WTOP)
 1-800-462-5254 or WTOP@fammed.wisc.edu
4. National Substance Abuse and Mental Health Treatment Locator, Substance Abuse and Mental Health Services Administration (SAMHSA)
<http://www.samhsa.gov/treatment/index.aspx>
5. Alcoholics Anonymous (AA) Meetings Locator
http://www.aa.org/lang/en/meeting_finder.cfm?origpage=29
6. Narcotics Anonymous (NA) Meetings Locator
<http://portaltools.na.org/portaltools/MeetingLoc/>
7. SMART Recovery Meetings Locator
http://www.smartrecovery.org/meetings_db/view/

References

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- Hoyme, H. E., May, P. A., Kalberg, W. O., Kodituwakku, P., Gossage, J. P., Trujillo, P. M., Buckley, D. G., Miller, J. H., Aragon, A. S., Khaole, N., Viljoen, D. L., Jones, K. L., & Robinson, L. K. (2005). A practical clinical approach to diagnosis of fetal alcohol spectrum disorders: Clarification of the 1996 Institute of Medicine criteria. *Pediatrics, 115*, 39-47.
- Centers for Disease Control and Prevention (2004). Alcohol consumption among women who are pregnant or might become pregnant – United States, 2002. *Morbidity and Mortality Weekly Report, 53* (50), 1178-1181.
- Wilton, G., & Plane, M. B. (2006). The Family Empowerment Network: A service model to address the needs of children and families affected by fetal alcohol spectrum disorders. *Pediatric Nursing, 32*, 299-306.
- Wisconsin Department of Health Services, Division of Public Health and Division of Mental Health and Substance Abuse Services. Wisconsin epidemiological profile on alcohol and other drug use, 2010(P-45718-10). Prepared by the Population Health Information Section, Division of Public Health, in consultation with DMHSAS and the University of Wisconsin Population Health Institute. November 2010.
Note: This report is available online at <http://dhs.wisconsin.gov/stats/aoda.htm>
- Wisconsin Statutes Chapter 48.
<https://docs.legis.wisconsin.gov/statutes/statutes/48.pdf>
- Wisconsin Statutes Chapter 51.
<https://docs.legis.wisconsin.gov/statutes/statutes/51.pdf>
- Wisconsin Statutes Chapter 146.
<https://docs.legis.wisconsin.gov/statutes/statutes/146.pdf>
- Wisconsin Statutes Chapter 939.
<https://docs.legis.wisconsin.gov/statutes/statutes/939.pdf>