

2004-2005

**NATIONAL HEALTH LAW
MOOT COURT COMPETITION**

Transcript of Record
Docket No. 04-1566

SUPREME COURT OF THE UNITED STATES

October Term, 2004

AMANDA DORIGHT,

Appellant,

v.

**CHARLES CARING, DIRECTOR,
GOODLAW CHILD WELFARE DEPARTMENT, AND
THE STATE OF GOODLAW,**

Appellee.

SPONSORS:

Southern Illinois University School of Law

*Southern Illinois University School of Medicine,
Department of Medical Humanities*

The American College of Legal Medicine

The American College of Legal Medicine Foundation

IN THE SUPERIOR COURT OF GOODCHILD COUNTY

STATE OF GOODLAW

AMANDA DORIGHT,)	
)	
Appellant,)	
)	
v.)	Civil No. 01-CV-2004
)	
)	
CHARLES CARING, DIRECTOR,)	
GOODLAW CHILD WELFARE)	
DEPARTMENT, AND THE STATE OF)	
GOODLAW,)	
)	
)	
Appellee.)	

MEMORANDUM OPINION AND ORDER

Wesley Wise, Superior Court Judge

Appellant, Amanda DoRight, filed this appeal from the Goodchild County Juvenile Court’s order placing her in involuntary protective custody for the duration of her pregnancy to protect her unborn child from her illegal use of the drug phenobarbital. She seeks immediate release from custody. This appeal involves two issues: 1) Does Goodlaw’s CHIPS statute (“Child in Need of Protective Services”), which permits involuntary protective custody of drug-abusing pregnant women, unduly burden Appellant’s procreative liberty rights and, 2) Does Goodlaw’s CHIPS statute meet the minimal due process standards required before a state can deprive a person of her liberty through involuntary civil confinement.

Pursuant to 18 Goodlaw Stat. § 1707.63 (1998), the Juvenile Court order is appealable as of right, but we do not review the Juvenile Court’s factual findings, except under the “clearly erroneous” standard. Based on the record before us, including the expert testimony of the attending physician, we find that the Appellant’s actions bring her within the purview of the statute. As a result, should we find the statute in question constitutional, its application to Ms. DoRight is appropriate and legal. If the statute is not constitutional, the case must be remanded to the Juvenile Court for additional proceedings.

I. FACTS

Appellant Amanda DoRight is a 26-year old never-married woman. She is approximately 15 weeks pregnant at the time of this court's decision. She has an eight-year-old daughter from a previous relationship, and has had one previous abortion.

In April 2004 a high level of phenobarbital, a controlled substance, was detected in Appellant's urine through routine tests given during a prenatal visit at GoodHealth Hospital, a private, non-profit hospital participating in the Medicaid program. As required by law, the hospital reported these findings to the local police department, which in turn reported them to the Goodlaw Child Welfare Department (CWD). Based on Appellant's long history with them, the Department immediately filed a CHIPS petition with the Juvenile Court seeking to exercise jurisdiction over the unborn child and take it, and consequently the Appellant, into protective custody. The CHIPS statute, as explained below, was amended in 2002 to allow the Juvenile Court to exercise jurisdiction over an unborn child in need of protective services and take a drug-abusing pregnant woman into custody for the duration of her pregnancy.

The Juvenile Court heard the CHIPS petition on April 23, 2004, within a week of its filing. At the hearing, Appellant's attending physician stated that Appellant was approximately 11 weeks pregnant and abusing phenobarbital, an addictive controlled substance. CWD also presented evidence regarding Appellant's lengthy history showing that her daughter, now eight years old, had been taken away twice (for two months and 15 months, respectively) due to Appellant's prior drug abuse. Both times, the daughter was temporarily placed with Appellant's mother (the child's grandmother) while Appellant underwent drug treatment through the community alcohol and drug treatment center. Both treatments, by Appellant's own admission, were unsuccessful. She claims that she started using the drug a number of years ago, initially due to problems sleeping, and has been unable to kick the habit. At the Juvenile Court hearing, her attending physician noted the specific risks of barbiturate use to the fetus during the first trimester included digital and facial birth defects, lower IQs, and potential reproductive problems in later life.¹ However, he stressed the risks throughout pregnancy from any injectable drug including: disease transmission from unclean needles (HIV, Hepatitis); overdose and coma or death (a risk for the mother and a corollary risk of causing hypoxia² to the fetus); and fetal drug withdrawal or subsequent post-birth withdrawal for the child.

When Appellant appeared before the Juvenile Court she admitted her drug use and addiction, and agreed to enter into the community drug and alcohol abuse center for treatment under an outpatient commitment order.³ Appellant failed to attend a meeting

¹ Pregnancy is divided roughly into three trimesters. The first ends at approximately 12-14 weeks, the second at approximately 24-28 weeks, and a full term delivery is anytime after 36 weeks (and can be up to 42 weeks).

² Hypoxia is the lack of oxygen in the blood and can cause organ (e.g., brain) damage or even death.

³ The community drug and alcohol abuse center has an intensive treatment program that involves twice-weekly group meetings along with weekly individual meetings focused on providing the substance abuser with a variety of tools to combat the addiction. Although most individuals entering the program come

during the second week of the drug program, claiming she lacked transportation. CWD notified the court, which issued an order for inpatient commitment due to her lack of compliance with the outpatient order. The local police picked up Appellant the next day (May 4, 2004) and she was held in the county jail for approximately one week because the state's only inpatient drug treatment facilities for pregnant women, 100 miles away in Faraway City,⁴ had a waiting period of over two months. Appellant was released from the county jail on May 11, 2004 because her mother, with whom her eight-year old daughter had been temporarily placed, asked that the child be placed elsewhere because of her advancing age and poor health. No other relatives or suitable friends were willing to take custody and CWD felt that it was not in that child's best interests to be placed in temporary foster care.

Appellant was then placed under house arrest and ordered back into drug treatment at the community drug and alcohol center until the Faraway City Inpatient Drug Treatment Center had an opening for her. She remained free from custody for a couple of days before being ordered into Faraway City (which had an unexpected opening) on May 17, 2004, approximately three weeks after the initial Juvenile Court proceeding, and she remains there today. The initial drug test given upon her entrance into the facility was negative. Appellant's eight-year-old daughter was placed in temporary foster care for the up to 26 remaining weeks of her mother's pregnancy.

Appellant challenges the Juvenile Court's order directing that she be placed in physical custody of the State, on the grounds that she is being held in custody in violation of both her procreative liberty and due process rights.⁵ She seeks immediate release from state custody. For the reasons set forth below, the Court finds that Appellant's procreative liberty and due process rights were not violated, and that Appellant was properly held in protective custody under the amended CHIPS statute. Her request to be released is hereby DENIED.

II. ANALYSIS

We start our analysis with a brief history of the State of Goodlaw's attempts to combat prenatal drug abuse. With increasing frequency over the last few decades, the state has faced the problem of protecting an unborn child from its mother's drug use, which has devastating and often permanently debilitating effects on the child. It was the State's efforts to combat this horrific problem that led the legislature to amend the CHIPS statute at issue here to include protective custody.

voluntarily, a few enter because of either pressure from employers (in order to keep their job) or due to court-ordered outpatient treatment.

⁴ The inpatient drug treatment program is located on the grounds of a high-risk 24 hour lock-down psychiatric facility. Access in and out of the facility is closely restricted and involuntary residents are not permitted off the grounds except in unusual circumstances and then only with strict supervision. Some of the individuals at the facility are involuntary committed under the state's civil power. Others are placed in the facility because they are either incompetent to stand trial, or found not guilty by reason of insanity.

⁵ The Juvenile Court has jurisdiction only to determine whether there is a child in need of protection or, in cases such as this, a pregnant woman poses a "substantial risk" to the health of an unborn child. Original jurisdiction to hear constitutional challenges rests with this Court.

Goodlaw's efforts to battle this overwhelming social problem of prenatal drug use reflect the frustration and failure of many other states. Goodlaw's first attempt to combat prenatal drug abuse was through its criminal child abuse laws. Prosecutors in Goodlaw considered filing criminal charges against mothers who used drugs during their pregnancy. This effort was abandoned. Other state courts have not been amenable to these prosecutions. *See Johnson v. State*, 602 So.2d 1288 (Fla. 1992). The few states that have had successful convictions have been met with hostility and scorn by the media and commentators. *See Whitner v. State*, 492 S.E.2d 777 (S.C. 1997). Goodlaw's attempts to combat the problem through criminal avenues were abandoned.

Next, Goodlaw tried to treat the problem as a community health issue, by treating drug abuse as a mental health problem. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) includes a number of substance abuse disorders. Goodlaw set up community drug and alcohol abuse centers throughout the state. Appellant has availed herself several times of her community's center. Unfortunately, like many other states' attempts, Goodlaw's experiment with community outpatient drug treatment met with very limited success.

With this extensive experience, Goodlaw sought to use the state's civil commitment powers to address the problem. The legislature amended the existing CHIPS statute to include an unborn child within its definition of child abuse, and specifically to authorize taking the "child" into protective custody, along with its mother. Goodlaw is one of only a handful of states with the courage to take this approach--the only option which has any chance of preventing harm to these unborn children. *See also* Wis. Stat. Ann. § 48.01(1)(2); Minn. Stat. Ann. § 626.5562; S.D. Codified Laws § 34-20A-63.

According to Goodlaw's amended CHIPS statute, child abuse, for which the state can intervene, includes:

Serious physical harm inflicted on an unborn child, or a substantial risk of serious physical harm to the child when born, caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcoholic beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.

186 Goodlaw Stat. § 18.02 (2004) [See Appendix].

If there is substantial risk that the mother would inflict serious physical harm on the unborn child by her drug use, the amended CHIPS statute authorizes the CWD to file a CHIPS petition to take the unborn child in need of protection into custody, thereby also taking the expectant mother into custody, for the duration of the pregnancy. 186 Goodlaw Stat. § 18.05. The statute also added a number of procedural safeguards to protect the expectant mother's constitutional rights. It is this statute that Appellant now claims violates both her procreative liberty rights and her due process rights.

A. Procreative Liberty

Appellant argues that the involuntary protective custody violates her procreative liberty rights, and requests that she be immediately released. She is represented by the Goodlaw Alliance for Reproductive Freedom (GARF), which contends that the amended CHIPS statute is an unconstitutional burden on a woman's reproductive choices. This is a case of first impression for the court.

It has been longstanding Fourteenth Amendment law that a woman has certain privacy rights regarding choices about marriage, contraception, procreation, family relationships, child rearing, and education. *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In 1973, the United States Supreme Court specifically recognized the right to make choices about abortion. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Drawing from that line of cases, Appellant claims that her choices during pregnancy are protected from state interference, particularly prior to viability when the state's interests in protecting unborn children is not yet compelling. There is no dispute that the Juvenile Court ordered Appellant into protective custody before the fetus was considered viable under either medical standards or state law.⁶

The Court does not agree with Appellant's arguments regarding the scope of the state's interest and when it accrues. *Roe* and *Casey* deal with a woman's choice to terminate her pregnancy. Goodlaw does nothing to prevent Appellant from choosing to terminate her pregnancy—this is a case about illegal drug use. When a woman decides to carry the child to term, then the state has an interest in that child coming into the world as healthy as possible. The greatest risks to the fetus from prenatal drug abuse exist during the first trimester. It is during this time period that the state must act. Compared to the lifelong suffering a drug-abused child will face, and the potential enormous costs to society, the short-term deprivation of liberty the mother experiences is a small price to pay and surely does not unduly burden her right to choose. Moreover, protective custody is beneficial to all parties: the state, the unborn child, and the expectant mother. *Casey*.

Accordingly, the Court holds that being involuntarily confined for the benefit of her unborn child has not violated Appellant's procreative liberty rights.

B. Due Process

Apart from the procreative liberty arguments, Appellant also claims that her due process rights were violated because Goodlaw's amended CHIPS statute does not comport with the requirements necessary to place her in involuntary protective custody. Her first claim is substantive--she argues that her addiction is not a sufficient basis for the state's actions. *Cf. Robinson v. California*, 370 U.S. 660 (1962) (holding that a person cannot be imprisoned simply because of his status as an addict); *O'Connor v. Donaldson*,

⁶ Goodlaw sets the legal date of viability at 22 weeks. After this time the fetus is presumed viable, unless two medical doctors certify otherwise. General medical standards set viability at approximately 24 weeks, although survival rates even at this point are still low, and, even with survival, disability is likely.

422 U.S. 563 (1975) (“a State cannot constitutionally confine without more a nondangerous individual”). To the contrary, Appellant was confined because her actions were endangering a minor—here her unborn child. *Powell v. Texas*, 392 U.S. 514 (1968). To this, Appellant responds that the danger to others cannot include a danger to an unborn child. This point seems to fold back into the procreative liberty argument above. We have already noted that the state’s interest in protecting potential life is sufficient to authorize action.

In addition to the substantive due process challenges, Appellant claims there are two flaws in the procedures used to confine her. First, Appellant argues that the state failed to meet the evidentiary standard required for involuntary commitment under the amended CHIPS statute. *See Addington v. Texas*, 441 U.S. 418 (1979) (holding that a state must prove by “clear and convincing” evidence that the person poses a danger to self or others before indefinite civil commitment is allowed). Second, Appellant argues that confinement is not the least restrictive means to achieve the state’s goals. We will address each issue in turn.

1) The Standard of Evidence

The Juvenile Court found, as required by the statute, that the Appellant posed a substantial risk to the health of the unborn child in this case. Rather than engage in an evaluation of the evidence, the Juvenile Court deferred to the expertise of the attending physician in determining whether Appellant met the standard for commitment. This is common practice in civil commitment hearings. Without questioning the veracity of the physician’s testimony (a factual inquiry in which we will not engage), we note that the determination by a qualified medical professional that an expectant mother poses a “substantial risk” of serious harm to the unborn child is a sufficient constitutional safeguard. *See Parham v. J.R.*, 442 U.S. 584, 609 (1979) (finding that a medical professional’s determination that civil commitment is warranted satisfies constitutional due process requirements). In other words, the Juvenile Court accepted the medical professional’s finding that there was a substantial risk of harm, and this was sufficiently clear and convincing evidence of harm. *Parham* establishes that a full evidentiary hearing on this issue is not necessary. *See Parham*, 442 U.S. at 609 (“due process is not violated by use of informal traditional medical investigative techniques.”).

The “substantial risk” standard requires a finding that the expectant mother’s actions pose a significant probability that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered. *See* 186 Goodlaw § 18.05. Although the statute might have required that a physician find the expectant mother’s actions pose a clear and convincing risk of harm, duplicating the evidentiary standard in the statute, it chose instead to simply use the more appropriate medical terms. *See, e.g.*, Georgia Code §. 31-14-2 (1997). Some commitment statutes specifically use the “clear and convincing evidence” phrase and some do not. *Compare* Colo. Rev. Stat. § 25-1-311 with Alaska Stat. § 47.37.190. The Court finds that the Appellant’s constitutional interests have been sufficiently safeguarded in the Juvenile Court proceeding and reject her Fourteenth Amendment challenge.

2) The Requirement of Least Restrictive Means

Appellant also argues that involuntary confinement is not the least restrictive means to achieve the state's goal of protecting unborn children. She claims that as a constitutional matter the state may do no more than order her into outpatient drug treatment since no other mechanism has any chance of success. Moreover, she states that even if the inpatient commitment for prenatal substance abuse is constitutional, in this case a less restrictive alternative should have been used.

As we noted above, states have tried a number of mechanisms to combat prenatal substance abuse. Having seen most of these fail, we will not second-guess the Goodlaw Legislature's decision to use its civil commitment power to achieve its goals. Moreover, the amended CHIPS statute makes a number of options available, short of inpatient commitment. The range of available options provided in the CHIPS statute is one reason why it is an ideal means to combat prenatal drug abuse. C. Antionette Clark, *Fins, Pins, Chips, & Chins: A Reasoned Approach to the Problem of Drug Use During Pregnancy*, 29 Seton Hall L. Rev. 634 (1998). In fact, the court in this case initially ordered outpatient treatment, despite Appellant's prior record of failures. The Court believes that the amended CHIPS statute operated exactly as it was intended to. Thus, we find that protective custody is the least restrictive means to further the state's interest in protecting the unborn child in this case.

III. CONCLUSION

For the foregoing reasons, the Court finds that neither Appellant's procreative rights nor due process rights are being violated. The Court hereby DENIES Appellant's request to be released from custody.

IT IS SO ORDERED,

Wesley Wise, Superior Court Judge

Dated: May 20, 2004

**IN THE SUPREME COURT
FOR THE STATE OF GOODLAW**

No. 01-2004

AMANDA DORIGHT,)	
)	
Petitioner,)	
)	
v.)	Civil No. 02-CV-2004
)	
)	
)	
CHARLES CARING, DIRECTOR, GOODLAW CHILD WELFARE DEPARTMENT, AND THE STATE OF GOODLAW,)	
)	
Respondent)	

Appeal from the Superior Court of Goodchild County

This is an appeal from the Superior Court of Goodchild County, upholding the Juvenile Court order placing the Appellant, Amanda DoRight, into involuntary protective custody in Faraway City Inpatient Drug Treatment Center for the remainder of her pregnancy for the health and safety of her fetus.

This Court hears this direct appeal from the Superior Court under 28 Goodlaw Stat. § 2004(A)(1998). This section allows Goodlaw’s Supreme Court to hear directly any case of first impression that involves novel issues of state or federal constitutional law for which the lower courts need direction to ensure uniform application of the law.

For the reasons that follow, we hereby AFFIRM the Order of the Superior Court of Goodchild County. We find that the amended CHIPS statute is not an undue burden on the Petitioner’s procreative liberty, and that the procedural protections contained in the statute far exceed the due process required whenever a state confines a person under its civil authority.

ORDER AND MEMORANDUM

I. FACTS

The facts of this case have been set forth in detail in Goodchild Superior Court's opinion and we need only a brief recitation here. Petitioner is a 26-year old woman who is currently 18 weeks pregnant. At the initial CHIPS hearing, Petitioner was approximately 11 weeks pregnant. In Goodlaw, viability is presumed at 22 weeks; therefore, the actions taken here occurred pre-viability. At the hearing, the Juvenile Court found that Petitioner was addicted to phenobarbital, a controlled substance, and ordered her into outpatient drug treatment in the local community drug treatment center as required by the amended CHIPS statute. The Juvenile Court also ordered Petitioner into involuntary protective custody if she failed to meet any of the requirements for outpatient drug treatment. Petitioner failed to attend a meeting during the second week of drug treatment and was placed in the county jail for approximately a week because the inpatient drug treatment center in Faraway City lacked a spot for her. Prior to placing her in the county jail, the Juvenile Court tried to find her a bed in the local psychiatric hospital, but the hospital refused to accept pregnant patients as they are considered high risk. Petitioner was released from the county jail due to family problems, but was placed shortly thereafter in the Faraway City Drug Treatment Center for the remainder of her pregnancy.

While in the county jail, Petitioner filed an appeal with GoodChild Superior Court requesting to be released from custody. The Superior Court held an immediate hearing. It found that neither Petitioner's rights to procreative liberty nor her due process rights were violated by her placement in protective custody, and refused to release her.

Petitioner thereafter filed an appeal with Goodlaw's Supreme Court pursuant to 28 Goodlaw Stat. § 2004(A)(1998).¹ For the foregoing reasons, we hereby find that the statute is constitutional and AFFIRM the Superior Court of Goodchild County's decision not to release Petitioner from custody.

II. ANALYSIS

Petitioner claims that both her procreative liberties and due process rights were violated by her confinement. We address each issue briefly below.

A. Procreative Liberty

The Superior Court noted in great detail the lengths Goodlaw has gone to protect its unborn children from drug-abusing mothers. It has explored every avenue available to combat the social problem of drug-abusing pregnant woman. The amended CHIPS

¹ For purposes of this appeal only, Ms. DoRight does not challenge the factual determination made by the Juvenile Court that her actions posed a substantial risk to the physical health of her unborn child. Her argument is solely that the amended Goodlaw CHIPS statute unconstitutionally permits the State to exercise custody over her.

statute was the result of four years of legislative work, and was carefully crafted in light of the rights recognized by *Roe* and its progeny. In this case, we are hard pressed to see how Petitioner's procreative rights have been burdened. She has always retained the right to abort her fetus. Petitioner urges this Court find that any action the state takes to protect her unborn child is an unlawful burden on her procreative liberties. This we cannot do. The state has always had the power to commit drug abusers. *See Robinson v. California*, 370, U.S. 660 (1962) ("a state might establish a compulsory program for those addicted to [drugs]"). The pregnancy of the drug abuser does not change this.

B. Due Process

We believe the Superior Court properly analyzed the due process issues in this case. The decision to commit was made by a qualified professional who found that Petitioner's behavior posed a substantial risk of harm to her unborn child. Moreover, the state acted only after less restrictive means to combat abuse were tried. We are confident that all the procedural safeguards that are necessary to commit a person have been applied in this case. We find that the amended CHIPs statute does not violate Petitioner's due process rights.

For the foregoing reasons, we hereby AFFIRM the Superior Court of Goodchild County's decision not to release Petitioner from custody.

IT IS SO ORDERED

Supreme Court of Goodlaw,
Charles Real-Smart, Chief Judge
Amanda Black, Associate Judge
Michael Crane, Associate Judge

Dated: June 10, 2004

DISSENTING OPINION

Judges Libe and Ral

We must dissent on the ground that the state does not have a compelling interest in the potential life of Petitioner's fetus. Further, the amended CHIPS statute does not comply with the minimum due process required to deprive the Petitioner of her liberty right to be free from involuntary confinement.

II. ANALYSIS

A. Procreative Liberty

As the Superior Court correctly noted, Goodlaw has made valiant attempts to address the problem of drug-abusing pregnant women. However commendable these efforts, it is this court's sworn duty to scrutinize every liberty deprivation against the safeguards of the Constitution. We cannot allow personal values to cloud our judgment with regard to the standards required to justify infringing upon Petitioner's procreative freedom. In this case, we find, unlike the majority, that the state has not shown a sufficient interest to justify intrusions upon this right. *See In Re Tanya P.*, N.Y.L.J. Feb. 28, 1995, at 26 (N.Y. Sup. Ct.).

Petitioner's procreative liberty rights have been violated by Goodlaw's amended CHIPS statute. In *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court held that abortion was included within the privacy rights protected under the Fourteenth Amendment. These procreative rights have been subsequently reaffirmed by the Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and *Webster v. Reproductive Health*, 492 U.S. 490 (1991). Under both these cases, the Supreme Court held that the state does not have a compelling interest in the fetus until viability.

The Superior Court, however, relied on *Casey* in finding a compelling state interest before viability. *Casey* permitted the states to regulate abortion prior to viability if the regulation does not unduly burden the woman's procreative liberty. Permissible regulations include parental notification, waiting periods, informed consent requirements, and the like. In no case has a regulation been upheld that authorizes the confinement of a pregnant woman for any period of time. The reliance on *Casey* is misplaced.

The state also argues that its interest is compelling because of the enormous social costs incurred by allowing a drug-abusing pregnant woman to harm her fetus. The social and medical costs associated are undoubtedly high. However, there was no evidence presented by the state regarding the severity of Petitioner's drug use or in what quantities phenobarbital might be harmful to the fetus.

Nor does the statute, or the confinement it authorizes, further the state's interest in protecting the woman's health. It is questionable whether Goodlaw is even focused on the effect of phenobarbital on the pregnant woman's health. The statute gives authority to the Child Welfare Department, not to adult mental health services, to bring a petition. The petition is brought in Juvenile Court, not a civil commitment court. The woman may be placed in jail, as happened to Ms. DoRight, rather than a treatment facility. Finally, the statute authorizes confinement for the duration of the pregnancy, not until the addiction is under control.

Moreover, we find that as a practical matter the amended CHIPS statute permitting involuntary protective custody does not advance the state's interest in protecting either the potential life of the fetus, or the health of the mother. Under this statute pregnant women may be forced to choose between abortion and confinement. It makes no difference in this case which route Ms. DoRight may have chosen—the constitutional concern is that the

choice itself was unduly burdened. If confined, the women's other children may be taken away from them and placed in the foster care system. Moreover, some pregnant addicts, fearing their doctors will report them, may avoid prenatal care. Finally, placing women in jail is the least healthy option for both the woman and her fetus. See, Helene M. Cole, *Legal Interventions During Pregnancy*, 264 J.A.M.A. 2663, 2667 (1990) ("Pregnant women in jail are routinely subject to conditions that are hazardous to fetal health, such as gross overcrowding, 24-hour lock up with no access to exercise or fresh air, exposure to tuberculosis, measles, and hepatitis, and a generally filthy and unsanitary environment."). Unfortunately, jail time is likely to be common under this statute since there is only one drug treatment facility for pregnant woman and it has a considerable waiting list.

B. Due Process

Even if we had no concerns regarding impositions on procreative liberty, we still disagree with the majority regarding the due process violations. Goodlaw fails to meet any of the requirements for involuntary commitment. As we noted above, the State does not have an important and legitimate interest in confining Petitioner, either under its police powers or under its *parens patrie* power. The mere use of a drug cannot be criminalized. *Robinson v. California*, 370 U.S. 660 (1962). Regardless of the apparent civil nature of the statute, the result of its application was to incarcerate Ms. DoRight in a county jail for a week. We in no way condone the behavior of Petitioner. However, "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's liberty." *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

1. The Standard of Evidence

In addition to our concerns regarding whether the state interests are sufficient to confine Ms. DoRight, we also note that Petitioner was committed merely upon the testimony of one physician that her actions posed a "substantial risk" to the fetus. The statute does not specify what evidence is required to meet the "substantial risk" standard. No evidence regarding how damaging the substance in question might be to the fetus is specifically required. Moreover, the Juvenile Court provides us with no specific understanding regarding how it concludes that the clear and convincing evidence standard was met in this case. *Parham* was a completely different situation and involved a much more robust procedure of medical fact-finding. See *Parham v. J.R.*, 442 U.S. 584 (1979).

2. The Requirement of Least Restrictive Means

Petitioner's last claim is that the amended CHIPS statute is not the least restrictive means to achieve the state's goals. *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966). Based on the historically proven limitations of involuntary drug treatment programs, we believe that the state, as a matter of long-standing public policy, cannot order a pregnant woman into protective custody. The overall failure of involuntary drug treatment programs to cure drug addicts is well known. Goodlaw has experienced this failure. To deprive a person of the most protected liberty interest in an attempt to cure her of drug

abuse, in a manner which has a high likelihood of failing, is unconstitutional. The Supreme Court has stated that “due process requires that the nature and duration of a commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jackson v. Indiana*, 406 U.S. 715 (1972). In this context, commitment does not serve the state’s interests, or the interests of the person being held against her will. The state’s interest would be served at least as well by ordering outpatient drug counseling. This is least restrictive means of helping a drug addict. *See generally* Kenneth A. De Ville and Loretta M. Kopelman, *Fetal Protection in Wisconsin’s Revised Child Abuse Laws: Right Goal, Wrong Remedy*, 27 J.L. Med. & Ethics 332 (1999).

III. CONCLUSION

For the foregoing reasons, we hereby DISSENT

Judge Albert Libe
Judge Bettina Ral

No. 04-1566

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2004**

**AMANDA DORIGHT
PETITIONER**

v.

**CHARLES CARING, DIRECTOR
CHILD WELFARE DEPARTMENT, AND
THE STATE OF GOODLAW
RESPONDENTS**

ORDER GRANTING CERTIORARI

Upon the Petition for Certiorari the Court hereby GRANTS the petition as to the following issues:

1. Whether the state of Goodlaw's amended CHIPS statute, which permits involuntary protective custody of drug-abusing pregnant women, unduly burdens procreative liberty.
2. Whether the statute meets the minimal due process requirements for restrictions of individual liberty.

IT IS SO ORDERED

Date: July 12, 2004

Appendix

GOODLAW STATUTE

CHARITABLE, CURATIVE, REFORMATORY INSTITUTIONS AND AGENCIES

CHAPTER 186 PROTECTION OF CHILDREN CODE

SUBCHAPTER 1 GENERAL PROVISIONS

18.01. Title and legislative purpose.

- (1) This chapter may be cited as "The Protection of Children Code". In construing this chapter, the best interests of the child or unborn child shall always be of paramount consideration. This chapter shall be liberally construed to effectuate the following express legislative purposes:
- a. To provide judicial and other procedures through which children and all other interested parties are assured fair hearings and their constitutional and other legal rights are recognized and enforced, while protecting the public safety.
 - b. To recognize the compelling need to reduce the harmful financial, societal and emotional impacts that arise and the tremendous burdens that are placed on families and the community and on the health care, social services, educational and criminal justice systems as a result of the habitual lack of self-control of expectant mothers in the use of alcoholic beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, during all stages of pregnancy.
 - c. To encourage innovative and effective prevention, intervention and treatment approaches, including collaborative community efforts and the use of community-based programs, as significant strategies in planning and implementing legislative, executive and local government policies and programs relating to children and their families, and to unborn children and their expectant mothers.
 - d. To recognize that unborn children have certain basic needs which must be provided for, including the need to develop physically to their potential and the need to be free from physical harm due to the habitual lack of self-control of their expectant mothers in the use of alcoholic beverages, controlled substances or controlled substance analogs, exhibited to a severe degree. It is further recognized that, when an expectant mother of an unborn child suffers from a habitual lack of self-control in the use of alcoholic beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, in order to ensure that the needs of the unborn child are provided for, the court may determine that it is in the best interests of the unborn child for the expectant mother to be ordered to receive treatment, including inpatient treatment, for that habitual lack of self-control, consistent with any applicable law relating to the rights of the expectant mother.

- (2) The paramount goal of this chapter is to protect children and unborn children, to preserve the unity of the family, whenever appropriate, by strengthening family life through assisting parents and the expectant mothers of unborn children, whenever appropriate, in fulfilling their responsibilities as parents or expectant mothers. The courts and agencies responsible for child welfare, while assuring that a child's health and safety are the paramount concerns, should assist parents and the expectant mothers of unborn children in changing any circumstances in the home which might harm the child or unborn child, which may require the child to be placed outside the home, or which may require the expectant mother to be taken into custody. The courts should recognize that they have the authority, in appropriate cases, not to reunite a child with his or her family. The courts and agencies responsible for child welfare should also recognize that instability and impermanence in family relationships are contrary to the welfare of children and should therefore recognize the importance of eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family.

18.02 Definitions:

In this chapter, unless otherwise defined:

“Abuse,” means any of the following:

- a. Physical injury inflicted on a child by other than accidental means.
- b. Sexual intercourse or sexual contact.
- c. When used in referring to an unborn child, serious physical harm inflicted on the unborn child, or a substantial risk of serious physical harm to the child when born, caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcoholic beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.

18.03 Jurisdiction over unborn children in need of protection or services

The court has exclusive original jurisdiction over an unborn child, from the moment of conception, alleged to be in need of protection or services.

18.04 Juvenile Court Powers

Juvenile Courts are empowered to assist parents in changing any circumstances in the home that might harm, or put at risk, a child. The court may, upon petition of the Child Welfare Department, order a parent, guardian, or custodian into any of the following programs consistent with preventing harm to the child. The powers of the Juvenile Court include the following:

- (1) Supervise and assist a child and the child's family or the expectant mother of an unborn child pursuant to informal dispositions, a consent decree or order of the court;

- (2) Offer individual and family counseling;
- (3) Make an affirmative effort to obtain necessary or desired services for the child and the child's family or for the expectant mother of an unborn child and investigate and develop resources toward that end;
- (4) Order shelter care for the mother or expectant mother;
- (5) Order the parent, guardian or custodian into diversion programs;
- (6) Order the parent, guardian or custodian into crisis intervention programs;
- (7) Order the parent, guardian or custodian into vocational training programs;
- (8) Order the parent, guardian or custodian into outpatient drug treatment programs;
- (9) Recommend a plan of rehabilitation, treatment and care;
- (10) The court may exercise its authority to control or limit the contact of third parties, where such control is consistent with the best interests of the child;
- (11) The court may place reasonable restrictions on the parent, guardian or custodian where such restrictions are consistent with the best interests of the child;
- (12) The court may require an expectant mother to obtain adequate prenatal care;
- (13) In cases where the mother of an unborn child suffers from a habitual lack of self-control in the use of alcoholic beverages, controlled substances or controlled substance analogs, exhibited to a severe degree; and the expectant mother refuses to participate in outpatient treatment, or is not making a good faith effort to participate in the court-ordered program, the court may determine that it is in the best interests of the unborn child to order take the mother into custody. If such a finding is made, the court may order the expectant mother be placed in any of the facilities listed in section 18.06. Such involuntary commitment orders may be carried out by the sheriff's office, and are valid for the duration of the pregnancy, up to nine (9) months.

18.05 Taking an adult expectant mother into custody.

An adult expectant mother of an unborn child may be taken into custody upon an order of the judge. The judge must find that due to the adult expectant mothers habitual lack of self-control in the use of alcoholic beverages, controlled substances or controlled substance analogs exhibited to a severe degree, there is a substantial risk that the physical health of the unborn child, or the health of the child when born, will be seriously affected or endangered unless the adult expectant mother is taken into custody; and that the adult expectant mother is refusing or has refused to accept any alcohol or other drug abuse

services offered to her, or is not making or has not made a good faith effort to participate in any alcohol or other drug abuse services offered to her.

18.06 Places where a child or expectant mother may be held in custody.

An adult expectant mother of an unborn child held in physical custody may be held in any of the following places:

- (a) The home of an adult relative or friend of the adult expectant mother.
- (b) A licensed community-based residential facility
- (c) A hospital or a physicians office
- (d) An approved public treatment facility
- (e) Any other appropriate secure facility