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July 15, 2004

RECEIVED

The Honorable Greg Abbott
Attorney General of Texas
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JUL 21 2004
OPINION COMMITTEE

FILE # ML-43846-04
I.D. # 43846

Dear General Abbott:

As chair of the House Corrections Committee, I am requesting an Opinion from your office on the following question:

Does S.B. 319 (2003 TEX. GEN LAWS ch. 822) amend either the Controlled Substances Act, TEX. HEALTH & SAFETY COD ANN. § 481.001 *et seq.*, or the child abuse and neglect reporting requirements of the Family Code, TEX. FAM. CODE ANN. § 261.001 *et seq.*, so as to require physicians to report to local law enforcement agencies or the Department of Protective and Regulatory Services pregnant women patients who are using or have used controlled substances during pregnancy?

S.B. 319 was passed by the 78th Legislature (Regular Session) and signed by the Governor on June 20, 2003. It took effect on September 1, 2003. Three weeks after its effective date, Rebecca King, the District Attorney for Potter and Armstrong Counties, sent a letter to "All Physicians Practicing in Potter County." In that letter, a copy of which is enclosed, Ms. King stated that, as a result of the enactment of S.B. 319, physicians must not report to the local law enforcement agency or the Department of Protective Services women patients who are using or have used illegal narcotics during their pregnancy. Ms. King's letter has received considerable attention in the



community and has been mentioned in *Texas Medicine* magazine, a publication of Texas Medical Association (see enclosed article).

I believe Ms. King's interpretation is not legitimate under the canons of statutory construction and is contrary to the intention of the Legislature. S.B. 319 amended only the Civil Practice & Remedies Code (extending wrongful death actions to unborn children, subject to certain exceptions), the Penal Code (extending the scope of homicide statutes to unborn children, subject to certain exceptions), and the Code of Criminal Procedure (specifying evidentiary requirements in prosecutions for injury to or homicide against an unborn child). S.B. 319 did not amend or even mention either the Controlled Substances Act, which is contained in the Health & Safety Code, *see* TEX. HEALTH & SAFETY CODE ANN. § 481.001 *et seq.* (West 2003 & Supp. 2004), or the child abuse and neglect reporting requirements of the Family Code, *see* TEX. FAM. CODE ANN. § 261.001 *et seq.* (West 2002 and Supp. 2004).

The apparent basis for the mistaken supposition that S.B. 319 imposes new child abuse reporting requirements upon physicians with respect to their pregnant women patients is that it defines "individual" to include "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." S.B. 319, art. 2, § 2.01, amending, *inter alia*, TEX. PENAL CODE ANN. § 1.07 (a)(26)(West Supp. 2004). It is claimed that because the word "individual," as used in the Penal Code, now includes an unborn child, an unrelated provision of the Controlled Substances Act that makes it a crime to "deliver" a controlled substance (or marijuana) to a "child," *see* TEX. HEALTH & SAFETY CODE ANN. § 481.122 (a)(West 2003),¹ also includes the ingestion of illegal drugs by a pregnant women, which in turn triggers the child abuse reporting requirements of the Family Code, *see* TEX. FAM. CODE ANN. 261.101 (West 2002).

¹For purposes of this provision of the Controlled Substances Act, "child" is defined as "a person younger than 18 years of age." TEX. HEALTH & SAFETY CODE ANN. § 481.122 (D) (West 2003). There is no reported case in Texas law in which a pregnant women has been successfully prosecuted and convicted of "delivery" of a controlled substance for ingesting a controlled substance during pregnancy. In *Collins v. State*, 890 S.W.2d 893 (Tex. App.-El Paso 1994, no writ), appellant had been convicted of Injury to a Child under Texas Penal Code 22.04 for ingesting cocaine while pregnant. The court held that by definition that a crime could not be committed against a person who had not been born. While S.B. 319 changes definitions, it also exempts a mother's conduct. It would truly be a strange mode of interpretation that by implication creates a crime in the Family Code or Health and Safety Code that was explicitly rejected in the Penal Code. Additionally, state reviewing courts across the country have held, virtually without exception, that a pregnant woman's ingestion of a controlled substance does not constitute "delivery" of a substance to her unborn child.

This conclusion does not withstand scrutiny. By its express terms, S.B. 319 does not amend or purport to amend the definition of the word "individual," except with respect to its use in the Penal Code and in the Civil Practice & Remedies Code. Although the word "individual" appears in the Controlled Substances Act (as part of the definition of "person")², it is not defined in the Act and is not used as a term of art in the Act.

Express Amendment & Amendment by Implication

A statute may be amended expressly or, in rare circumstances, by implication. Neither express amendment nor amendment by implication applies here. With respect to express amendment, the Texas Constitution provides, "No law shall be revived or amended by reference to its title; but in such case the act revived, or the section or sections amended, shall be reenacted and published at length." TEX. CONST. art. III, § 36 (West 1997).³ The object of this section is to give notice to members of the Legislature of the subject to be affected by the proposed act. *Ex parte Erck*, 128 S.W.2d 1174, 1174 (Tex. Crim. App. 1939).⁴ S.B. 319 cannot be said to have amended any provisions of either the Controlled Substances Act (which appears in Health & Safety Code) or the child abuse and neglect reporting requirements of the Family Code because no such provisions are even referenced by their title, much less "reenacted and published at length," as required by § 36.

With respect to amendment by implication, the general rule is that a statute may *not* be amended by implication, but may be amended *only* by an enactment specifically setting forth its changed terms. *Small v. State*, 32 S.W.2d 860, 861 (Tex. Crim. App. 1930). Amendment by implication is not a favored doctrine in the law. *United States v. Federal Deposit Insurance Corp.*, 560 S.W.2d 119, 121 (Tex. Civ. App.-Houston [1st Dist.] 1977, writ ref'd n.r.e). For the reason, "[t]he legislature will not be held to have

²See TEX. HEALTH & SAFETY CODE ANN. § 481.002 (33).

³ Although revisions of the laws are excluded from the prohibition of § 36, see TEX. CONST. Ann. art. III, § 43(a) (West 1997), a "revision" is limited to a codification "without substantive change" of "statutes that individually relate to different subjects." TEX. CONST. Ann. art. III, § 43(b) (West 1997).

⁴ According to the Interpretive Commentary, "[t]he evil designed to be remedied by this mandate was the passage of amendments in terms so blind that legislators could be deceived in regard to their effects." TEX. CONST. art. III § 36, Interpretive Commentary, at 457 (West 1997). Needless to say, this is precisely the result Ms. King attributes to the Legislature in her interpretation of S.B. 319.

changed a law it did not have under consideration while enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together,' " *Id.* citing 1A Sutherland, STATUTES AND STATUTORY CONSTRUCTION 139-40, § 22.13 (4th ed 1972). The redefinition of the word "individual" in the Penal Code cannot be said to be "inconsistent with" the existing definitions of the words "child" and "person" in the Controlled Substances Act (which is contained within the Health & Safety Code) because the Penal Code and the Controlled Substances Act address entirely different subjects. There is no overlapping in the scope of the Penal Code and the Controlled Substances Act. Thus, an express amendment of one cannot amend by implication the other.

The type of amendment by implication that would be required to reach the suggested result would be particularly egregious. In interpreting statutes the courts seek the "intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d 574, 785 (Tex. Cr. App. 1991). The legislators who enacted the provisions of the Family Code and the Health and Safety Code at issue had intentions as to the meanings of "child" or "person" that were independent of S.B. 319. Not only would the proposed interpretation be a surprise to those who enacted those laws, it would also surprise the average citizen. A criminal law is unconstitutionally vague if the ordinary law-abiding citizen would not have received sufficient information that his conduct risked violating a criminal law. *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989). The average law-abiding citizen would not go through the mental gymnastics required to determine S.B. 319 changed definitions in codes that it does not reference.

It might be argued that the change in the definition of "person" in the Penal Code changes the definition of "person" in any crime, even a crime outside the Penal Code:

(b) The provisions of Titles 1,2, and 3 apply to offenses defined by other laws, unless the statute defining the offense provides otherwise; however, the punishment affixed to an offense defined outside this code shall be applicable unless the punishment is classified in accordance with this code.

Tex. Penal Code § 1.03(b). However, the language in the definition section itself shows that the definitions are limited to the Penal Code, "In this code..."Tex. Penal Code § 1.07(a). When the language of a part of the Penal

Code specifically refers to the Penal Code, that part of the Penal Code is not incorporated into other criminal law. For example:

§1.05. Construction of Code

(a) The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code.

(b) Unless a different construction is required by the context, Sections 311.011, 311.012, 311.014, 311.015, and 311.021 through 311.032 of Chapter 311, Government Code (Code Construction Act), apply to the construction of the code.

(c) In this Code:

(1) a reference to a title, chapter, or section without further identification is a reference to a title, chapter, or section of this code; and

(2) a reference to a subchapter, subsection, subdivision, paragraph, or other numbered or lettered unit without further identification is a reference to a unit of the next-larger unit of this code in which the reference appears.

Tex. Penal Code § 1.05. This section clearly applies only to the Penal Code; otherwise it would make the Code Construction Act apply to a crime that was in Vernon's Civil Statutes, which has its own rules of construction (Chapter 312, Government Code). For the most part, there are few direct references to the Penal Code in the Penal Code. The purpose of § 1.03(b), Penal Code, is to apply certain general standards to other crimes. The purpose is not to define terms in other statutes or to make the Code Construction Act apply to other statutes.

Perhaps more importantly, S.B. 309 should not be construed to change definitions in codes not explicitly amended because that was not the intention of the Legislature. As the intention is detailed in the letter, no further argument is needed as to this point.

It should be noted here that more than one-half of the States have enacted statutes extending the protection of the homicide laws to unborn children (subject to certain exceptions). Some of these laws have been on the books for decades. I have not found a single instance in other states where the

enactment of a similar law has been interpreted by the courts to apply to a woman ingesting illegal drugs during pregnancy. Indeed, the case law is precisely the opposite. See *In the Matter of the Unborn Child of Julie Starks v. State*, 18 P.3d 342 (Okla. 2001), *State ex rel Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997).

Implications for Prenatal Care

An article in *Texas Medicine* magazine (published by the Texas Medical Association) suggests that pregnant women using illegal drugs will refrain from obtaining prenatal care because they may fear that their physicians will report their drug use to the authorities. This is a misreading of the law on reporting, which (properly construed) is not affected by S.B. 319. If pregnant women using illegal drugs fear to obtain prenatal care, it is more likely because they are trying to avoid detection of their own drug use, regardless of the confidentiality of physician-patient communications, or because they fear adverse consequences if they give birth to a child who has been exposed to illegal drugs *in utero*. Physicians already have an obligation to report the birth of a child who is "born addicted to alcohol or a controlled substance." TEX. FAM. CODE ANN. § 261.001(8) (West 2002). Nothing in S.B. 319 changes that reporting obligation. Along with other evidence of parental unfitness, a woman who drinks alcohol or uses illegal drugs during pregnancy and gives birth to a child who is addicted to either may lose her parental rights. See *In re J.L.* 2002 WL 31059854 (Tex. App.-San Antonio 2002). Those consequences of illegal drug use during pregnancy already exist and are not affected by S.B. 319.

Conclusion and Request for Opinion

For the foregoing reasons, I respectfully request an Opinion from your office on whether S.B. 319 has any impact on either the Controlled Substances Act or the child abuse and neglect reporting requirements of the Family Code.

Thank you for your consideration in this matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'RAY ALLEN', written in a cursive style.

Representative Ray Allen
Chair, House Corrections Committee

District Attorney
47th Judicial District of Texas



REBECCA KING
DISTRICT ATTORNEY

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September 22, 2003

To: All Physicians Practicing in Potter County

Please excuse the informality of this letter, but statutes or amendments enacted by the Texas Legislature effective September 1, 2003, impact all of us and I would ask your help in compliance for ourselves and our agencies or offices.

NEWLY EFFECTIVE STATUTES

An individual is now defined as a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth. Tx. Penal Code Section 1.07

Delivery of a Controlled Substance or Marijuana to a Child is now a second degree felony, regardless of the amount delivered. Tx Controlled Substances Act Section 481.122

STATUTES CONTINUING EFFECTIVE

A person who has cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this sub-chapter.

If a professional has cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense . . . the professional shall make a report not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected or is a victim of an offense . . . A professional may not delegate to or rely on another person to make the report. (Professional includes one who is licensed or certified by the state, including doctors, nurses, employees of a health care facility.) Tx Family Code, Section 261.101

For the hospitals in Amarillo, reports are to be made to Amarillo Police Department or the Department of Protective and Regulatory Services.

BASED ON THESE LAWS, IT IS NOW A LEGAL REQUIREMENT FOR ANYONE TO REPORT A PREGNANT WOMAN WHO IS USING OR HAS USED ILLEGAL NARCOTICS. DURING HER PREGNANCY.

Most of these users will qualify for probation which will allow us to legally mandate medical services that may save the mother and the unborn child future years of medical, educational and rehabilitative services.

PLEASE REPORT ANY ABUSE OF CHILDREN BY VOLUNTARY INJECTION OF HARMFUL NARCOTICS BY EXPECTANT MOTHERS. TOGETHER, WE WILL TRY TO HELP BOTH GENERATIONS AND . . . IT IS THE LAW.

Rebecca King
Rebecca King
47th District Attorney