

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gabrielle Smith,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 08AP-692
	:	(C.P.C. No. 08DV-07-843)
Kevin Martin,	:	
	:	
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on July 14, 2009

Capital University Family Advocacy Clinic, Lorie L. McCaughan, Elizabeth Laich and Anne E. Marsico, for appellant.

Kevin Martin, pro se.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

TYACK, J.

{¶1} Gabrielle Smith is appealing from the ruling of the Franklin County Court of Common Pleas, Division of Domestic Relations. She assigns two errors for our consideration:

1. The trial court erred when it denied Petitioner's request for a Civil Protection Order to include her unborn child as a designated protected person.
2. The trial court erred when it did not afford Gabrielle Smith's unborn child equal protection under the law.

{¶2} On July 16, 2008, a civil protection order ("CPO") was granted to protect Smith from her boyfriend who had abused her. Smith was pregnant by her boyfriend and asked that the CPO be modified to specifically protect the unborn child. The trial court refused the additional relief, but effectively addressed the problem by ordering the boyfriend to stay away from Smith and to avoid contact with Smith. The boyfriend obviously could not harm the child without having contact with the mother as long as the child was in utero.

{¶3} R.C. 3113.31 sets forth the procedure for obtaining a CPO because of domestic violence. The statute defines domestic violence as follows:

(A) As used in this section:

(1) "Domestic violence" means the occurrence of one or more of the following acts against a family or household member:

(a) Attempting to cause or recklessly causing bodily injury;

(b) Placing another person by the threat of force in fear of imminent serious physical harm or committing a violation of section 2903.211 or 2911.211 of the Revised Code;

(c) Committing any act with respect to a child that would result in the child being an abused child, as defined in section 2151.031 of the Revised Code;

(d) Committing a sexually oriented offense.

{¶4} R.C. 3113.31(A)(3) defines "family or household member" as follows:

(3) "Family or household member" means any of the following:

(a) Any of the following who is residing with or has resided with the respondent:

(i) A spouse, a person living as a spouse, or a former spouse of the respondent;

(ii) A parent or a child of the respondent, or another person related by consanguinity or affinity to the respondent;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the respondent, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the respondent.

(b) The natural parent of any child of whom the respondent is the other natural parent or is the putative other natural parent.

{¶5} The issue of when an unborn child becomes a person within the meaning of various laws is a complex issue, and not easily resolved. Ohio has taken different approaches when considering how the unborn are to be treated under the law. There are certain statutes in the revised code that are meant to protect the unborn and to punish an offender who harms an unborn child. For example, a person can be convicted of felonious assault if the offender knowingly caused serious physical harm to another or to another's unborn. R.C. 2903.11. In that instance, the term "unborn" is specifically used in the statute, and by implication, makes a distinction between a person and an unborn.

{¶6} Other cases have held that if a child is born alive, there may be a relation back in civil actions to prenatal injuries. For example, in *Jasinsky v. Potts* (1950), 153 Ohio St. 529, the Supreme Court of Ohio held that a cause of action may arise under the wrongful death statute as a result of injuries to the fetus if the child was born alive, but died shortly thereafter. See also *Werling v. Sandy* (1985), 17 Ohio St.3d 45, 48 (wrongful death action exists when a viable fetus is stillborn since a life capable of independent existence has expired).

{¶7} *In re Ruiz* (1986), 27 Ohio Misc.2d 31 involved the question of whether a child born addicted to heroin was an abused child under the existing child abuse statute. The Wood County Court of Common Pleas, Juvenile Division, held that a viable fetus is a child under the existing child abuse statute, and prenatal harm caused by the mother's use of heroin may be considered abuse under R.C. 2151.031.

{¶8} More recently, in *In re Baby Boy Blackshear*, 90 Ohio St.3d 197, 2000-Ohio-173, the Supreme Court of Ohio held that a newborn child who tests positive for illegal drugs due to prenatal maternal drug abuse is, for purposes of R.C. 2151.031(D), per se an abused child. That case turned primarily upon the language of the statute that provided that an "abused child" includes any child who, "[b]ecause of the acts of his parents, * * * suffers physical or mental injury that harms or threatens to harm the child's health or welfare." R.C. 2151.011(B)(6)(a) defined "child" as a person who is under 18 years of age. The statute did not define "person." The court found that the action causing injury was taken by one of his parents, and that the action taken caused injury both before and after birth.

{¶9} Obtaining a CPO is distinguishable from these cases by virtue of the fact that a CPO for a respondent to stay away from a pregnant petitioner protects the unborn child to the same extent that it protects the mother. In order to harm the unborn child, the boyfriend would of necessity have to violate the order with respect to the mother. Moreover, the controlling statute does not specifically include the unborn child within its protection. Amendments made by the General Assembly to specifically include the unborn with the purview of a statute lead us to infer that the legislature is fully aware of the situations in which it desires to protect the unborn or punish those who harm them.

Under the plain language of R.C. 3113.31, a viable fetus is outside the statutory definition of persons entitled to seek relief.

{¶10} Smith argues that a construction of R.C. 3113.31 that expands the definition of household or family member to include a viable fetus advances the safety and protection of family and household members. Smith has directed our attention to *Roe v. Wade* (1973), 410 U.S. 113, 154, 93 S.Ct. 705, in which the United States Supreme Court held, among other things, that the state has a legitimate interest in protecting potential life.

{¶11} Smith posits a situation in which a newborn infant would be unprotected if separated from the mother. She asserts that it would be a hardship for the mother to return to court to obtain a civil protection order for the child immediately after giving birth. Clearly a newborn infant could qualify as a family or household member within the meaning of the statute and entitled to a CPO under R.C. 3113.31. However, until such time as the legislature sees fit to grant such protection to an unborn, we conclude that the court made an order that protected the child in the only effective way available, absent a request for prospective protection on the child's birth. We cannot find reversible error in the trial court's refusal to grant additional relief by specifically including the unborn child in the CPO.

{¶12} The two assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations is affirmed.

Judgment affirmed.

FRENCH, P.J., and BRYANT, J., concur.
