



*Lynn Fitch*  
**ATTORNEY GENERAL**  
OPINIONS AND POLICY

August 25, 2025

The Honorable Margaret Alfonso  
Chancery Court Judge, Eighth District  
Post Office Box 1446  
Gulfport, Mississippi 39502

Re: Mississippi Code Annotated Section 43-21-303

Dear Chancellor Alfonso:

The Office of the Attorney General has received your request for an official opinion.

### Questions Presented

1. If a newborn is positive for methamphetamine, and the baby has suffered harm (for example, has gone through withdrawals as a result or suffered some other harm), and there is no reasonable alternative to custody, does Mississippi Code Annotated Section 43-21-303 prohibit Mississippi Child Protection Services (“CPS”) from taking the child into custody?
2. If a newborn is positive for cocaine, and the baby has suffered harm (for example, has gone through withdrawals as a result or suffered some other harm), and there is no reasonable alternative to custody, does Section 43-21-303 prohibit CPS from taking the child into custody?
3. If a child of tender years tests positive for methamphetamine or cocaine or a like substance other than marijuana, and there is no reasonable alternative to custody, does Section 43-21-303 prohibit CPS from taking the child into custody?
4. Does Section 43-21-303(b) mean that a newborn testing positive for a controlled substance other than marijuana, which was used unlawfully, must be sent home with the offending parent to suffer harm before CPS can take the newborn into custody?
5. Does Section 43-21-303 or any other statute prohibit a medical provider from also notifying law enforcement of a newborn or baby testing positive for a controlled substance of any nature, marijuana or otherwise, for investigation of criminal conduct of the child’s parent?

### Brief Response

1. Section 43-21-303 sets forth certain conditions that must be met for CPS —or a law enforcement officer or the Department of Human Services (“DHS”)— to take a child into immediate custody. Whether these conditions have been met is determined on a case-by-case basis based on the relevant facts. Under Section 7-5-25, our office may opine upon prospective questions of Mississippi law only; we may not opine upon questions of fact.
2. Please see response to question one.
3. Please see response to question one.
4. Please see response to question one.
5. Section 43-21-303 does not address whether a medical provider may or may not notify law enforcement of a newborn or baby testing positive for a controlled substance of any nature.

### Applicable Law and Discussion

Section 43-21-303 pertains to taking a child into custody without a custody order. It states in pertinent part:

(1) No child in a matter in which the youth court has original exclusive jurisdiction shall be taken into custody by any person without a custody order except that:

...

(b) A law enforcement officer or an agent of the Department of Child Protection Services or the Department of Human Services may take a child into immediate custody if:

**(i) There is probable cause to believe that the child is in immediate danger of personal harm;** however, probable cause shall not be based solely upon a positive drug test of a newborn or parent for marijuana or solely upon the status of a parent as a cardholder under the Mississippi Medical Cannabis Act, but a finding of probable cause may be based upon an evidence-based finding of harm to the child or a parent’s inability to provide for the care and supervision of the child due to the parent’s use of marijuana. Probable cause for unlawful use of any controlled substance, except as otherwise provided in this subparagraph (i) for marijuana, may be based: 1. upon a parent’s positive drug test for unlawful use of a controlled substance only if the child is in danger of a significant risk of harm or the parent is unable to provide proper care or supervision of the child because of the unlawful use and there is no reasonable alternative to custody; and 2. upon a newborn’s positive drug screen for a controlled substance that was

used unlawfully only if the child is in danger of a significant risk of harm or the parent is unable to provide proper care or supervision of the child because of the unlawful use and there is no reasonable alternative to custody.

...

**(ii) There is probable cause to believe that immediate custody is necessary as set forth in Section 43-21-301(3)<sup>1</sup>; and**

**(iii) There is no reasonable alternative to custody[.]**

Miss. Code Ann. § 43-21-303(1) (emphasis added).

You ask several questions regarding Section 43-21-303 and CPS's ability to take a child into custody when the child is born positive for a controlled substance other than marijuana or when a child of tender years tests positive for the same. We first note that Section 43-21-303 only applies to matters "in which the youth court has original exclusive jurisdiction" and there is no custody order in place. This said, under such circumstances, Section 43-21-303 sets forth certain conditions, emphasized in the quotation above, that must be met for CPS—or a law enforcement officer or DHS—to take a child into immediate custody. Whether these conditions have been met is determined on a case-by-case basis based on the relevant facts. *See* Miss. Code Ann. § 43-21-303(1)(b)(i) (regarding what probable cause may and may not be based upon); *see also Magyar v. Shiers*, No. 2023-CA-00682-COA, 2025 WL 1377559 at \*7 (Miss. Ct. App. May 13, 2025) (relating to malicious prosecution but generally stating that "[p]robable cause is determined from the facts apparent to the observer . . . ." When the facts are in dispute, the existence or absence of probable cause is a question for the fact-finder." (quoting *Benjamin v. Hooper Electronic Supply Co., Inc.*, 568 So. 2d 1182, 1190 (Miss. 1990))). Under Section 7-5-25, our office may opine upon prospective questions of Mississippi law only; we cannot opine upon questions of fact. Accordingly, because questions 1-4 require factual determinations, they are outside the scope of this opinion.

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<sup>1</sup> Section 43-21-301(3)(a) provides for issuance of a custody order when:

it appears that there is probable cause to believe that:

(i) The child is within the jurisdiction of the court;

(ii) Custody is necessary because of any of the following reasons: the child is in danger of a significant risk of harm, any person would be in danger of a significant risk of harm by the child, to ensure the child's attendance in court at such time as required, or a parent, guardian or custodian is not available to provide for the care and supervision of the child; and

(iii) There is no reasonable alternative to custody.

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Last, you ask if Section 43-21-303, or any other statute, prohibits a medical provider from also notifying law enforcement of a newborn or baby testing positive for a controlled substance of any nature, marijuana or otherwise, for investigation of criminal conduct of the child's parent. Section 43-21-303 does not address whether a medical provider may or may not notify law enforcement of a newborn or baby testing positive for a controlled substance of any nature and therefore does not prohibit such action. *But see* Miss. Code Ann. § 43-21-353 (addressing mandatory reporting to CPS by any person "having reasonable cause to suspect that a child is a neglected child [or] an abused child"). Finally, in accordance with Section 7-5-25, this office cannot opine on questions of federal law. Therefore, this opinion does not address any potentially relevant federal law considerations, such as, but not limited to, the Health Insurance Portability and Accountability Act.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Maggie Kate Bobo*

Maggie Kate Bobo  
Special Assistant Attorney General

OFFICIAL OPINION