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Legislative Update

In Vitro Fertilization After *Dobbs v. Jackson Women's Health Organization* – The Best Interest of the “Embryo”

*Caitlyn Schaffer*¹

I. INTRODUCTION

When women undergoing In Vitro Fertilization (“IVF”) are left with extra embryos, they can opt to freeze, donate, or destroy them. Post *Dobbs v. Jackson Women's Health Organization*, if a state declares that life begins at fertilization, what happens to these embryos or to the individuals who opt to destroy them? Furthermore, will destroying these embryos mean running afoul of the law? Many states have not been specific about how their prohibitions on abortion will impact people using assisted reproductive technology, however it is a very real question yet to be reconciled.

This article will analyze practical ramifications of classifying embryos in the same category as children following *Dobbs*. First, this commentary will take a brief look at IVF, the *Roe v. Wade* decision, and the best interest of the child standard. Next, it will address lingering questions regarding the impact this decision will have on marital dissolution legislation, parents, children, and courts. Finally, this article will look at how *Dobbs*' supporters and opponents may amend legislation under dissolution of marriage statutes to reflect their views on embryos.

II. IN VITRO FERTILIZATION, OVERTURNING OF *ROE V. WADE*, AND THE BEST INTEREST OF THE CHILD STANDARD.

A. In Vitro Fertilization (IVF)

IVF is an assisted reproductive technology. IVF began in the 1960s and 1970s due to advances in human anatomy through human reproduction research. This knowledge led to the birth of the first “test tube baby” in England in 1978. Since that time, the practice of IVF has grown at a rapid pace, accounting for millions of births around the world.

IVF works by combining medications and surgical techniques to aid in fertilization, embryo growth, and implantation, allowing conception of a child over the course of several months. In the blastocyst stage, the egg is fertilized, and an embryo is formed using both the parent’s DNA. After the implantation operation, the choice is given to the prospective mother to freeze the embryos to preserve fertility, donate the embryos, or destroy any unused embryos that may develop into persons.

B. Overturning *Roe v. Wade*

The majority opinion in *Dobbs* states that abortion destroys "potential life." In *Dobbs*, the Supreme Court overturned *Roe v. Wade* which held that the right to privacy guaranteed in the Fourteenth Amendment protected abortion as a fundamental right. The debate over what restrictions the government may impose on abortion is perpetual, however under *Roe v. Wade*, abortion was lawful in all 50 states.

Abortion rights are defined at the state level. In anticipation of *Roe v. Wade*'s reversal, many states enacted "trigger laws." Trigger laws are laws passed by the legislative body that go into effect following a particular occurrence, such as a court ruling. In this instance, once the court ruled that *Roe v. Wade* was erroneously decided, the constitutional right to an abortion would be automatically revoked. That is, abortion is illegal, making it a felony to administer an abortion. The Supreme Court's decision to overrule *Roe v. Wade* prompted a global discussion about where the Court will draw the line in future cases, such as whether access to contraception should be considered a fundamental constitutional right.

C. The Best Interest of the Child Standard and Domestic Relations Court

The primary issue in every custody case is the child's best interests. On a case-by-case basis, the best interests criterion evaluates elements that genuinely impact the child's physical, intellectual, moral, and spiritual well-being throughout life. A variety of factors are taken into account when making this determination. The children's physical safety and welfare, including food, shelter, health, and clothes, the bonding and emotional ties that exist between the child and the parent, and the child's need for stability are just a few examples of the numerous factors recognized across states.

In Illinois, the child's best interest criteria are one of several interlinked objectives of the Illinois Marriage and Dissolution Act. Other objectives include marriage, divorce, parenting time, child support, and maintenance. These interconnected components support the idea that one of the most important duties of the legal system is to determine what is in the child's best interest. These overlapping goals of the Illinois Marriage and Dissolution Act are created to protect the child's physical, mental, moral, and emotional wellbeing to the greatest extent possible both during and after the legal proceedings.

III. THE POTENTIAL IMPACT OF *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION* ON DISSOLUTION OF MARRIAGE STATUTES ACROSS THE COUNTRY

Davis v. Davis heard in the Supreme Court of Tennessee in 1992, helps illustrate the future impact *Dobbs* could have on courts, children, and parents across the country. In *Davis*, the Tennessee Supreme Court reviewed a divorce judgment which held that embryos which had been frozen for future use were children who could be awarded into the wife's sole custody. The couple was married and sought to conceive a child through IVF by using two of the nine embryos, which were ultimately unsuccessful. There were seven embryos left over, but the couple split and fought for custody of the embryos in a

divorce suit before they could be utilized. The husband wanted the embryos destroyed, but the wife did not.

The wife was given custody of the embryos by the trial court, underlining that the embryo is a person. The trial judge concluded that the eight-cell entities at issue were not embryos but “children in vitro.” Given this classification, the judge invoked the doctrine of *parens patriae* and held that it was in the best interest of the children to be born rather than destroyed. Since the petitioner was willing to provide the “child in vitro” the opportunity to born, the judge awarded the petitioner sole custody. This view of the embryo as a human after fertilization requires that it be accorded the rights of a person.

The Court of Appeals decided in the husband's favor, finding that he would be compelled to become a father against his will, and that the pre-embryo is ultimately property. This view is consistent with the idea that an embryo’s status is no different from any other human tissue. No limits should be imposed on the decision makers when it comes to destroying embryos. The Supreme Court of Tennessee held that the Court of Appeals correctly made the decision that embryos cannot be considered “persons.”

The Tennessee Supreme Court maintained the Court of Appeals' judgment but classified the pre-embryo as having a "special respect because of their potential for human life." The Tennessee Supreme Court concluded that embryos are neither “persons” nor “property,” but instead belong in an interim category due to their potential for human life. When looking under the law in *Roe v. Wade*, the United States Supreme Court refused to hold that fetuses possess independent rights. Furthermore, the United States Supreme Court stated that embryos do not enjoy protection as “persons” under federal law. The reasoning behind this is that embryos have not developed the features of personhood, is not developed individually, and may never realize its biologic potential. The Tennessee Supreme Court concluded that embryos are not “persons” or “property,” but occupy an interim category that entitles them to special respect because of their potential for human life.

After *Dobbs*, which declared that abortion destroys "potential life," would it be a felony to provide the father procreational autonomy and terminate the pre-embryo in *Davis*? Is the *Dobbs* judgement practical in the context of IVF? Furthermore, what would be the ramifications of the trial court’s decision regarding the “child’s best interest?”

IV. *DOBBS v. JACKSON* SUPPORTERS, OPPONENTS, AND FUTURE LEGISLATION

Since the early 1990s, states have controlled the fertility sector. The fertility sector represents medical facilities primarily engaged in providing services aimed at aiding patients in conceiving children. There is, however, no clear "side" to the debate. Republicans and Democrats both appear to have attempted to control the industry, but in different ways.

Republican-led states have used language that echoes pro-life and personhood language to justify regulating the IVF industry. Republican leaders such as Georgia Governor Brian Kemp and New Hampshire Senate nominee Don Bolduc are fighting to act regarding the practice of destroying unused embryos. Republican legislators have begun by claiming "potential life" for the embryos, much like anti-abortion legislation to ban embryo destruction. Republican-controlled states may limit donor compensation or restrict advertisement capabilities of IVF clinics.

NARAL Pro-Choice America declared in a campaign for Stacey Abrams, a Democrat in Georgia, "this is a downright dystopian vision of the future..." Democrat-led states echo pro-choice policy justifications, such as NARAL Pro-choice America to justify leaving IVF largely unregulated in states where Democrats control the legislatures. However, they regulate the same technologies, such as the use of embryos left over from IVF. If Democrats take action, they may strengthen parental rights by limiting or prohibiting egg and sperm donors from bringing legal claims on behalf of donor-conceived children.

V. CONCLUSION

If embryos are considered persons, then, according to personhood laws, disposing of them constitutes a crime. Looking back to *Davis*, is application of *Dobbs* practical considering what is in the best interest for children today? Chambers, an IVF patient stated that post-*Dobbs*, she felt scared about her options because "I don't want to transfer embryos that I know I have to miscarry, I want to save myself that heartache... and I don't want to have 20 children." Senator Tammy Duckworth, Illinois Democrat, stated "that now could potentially be manslaughter at best and murder at worst for a physician." Where will we draw the line?

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