The Ongoing Ramifications of *Dobbs v. Jackson Women's Health Organization* and Its Effect on Reproductive Rights

By Lee Rosenberg, Editor-in-Chief

In Volume 54, Number 2 of the 2022 issue of this publication, my article addressed the Supreme Court decision in *Dobbs v Jackson Women's Health Organization*.[1] That article entitled "The Evisceration Of Fundamental Rights by the United States Supreme Court Is Just Beginning," addressed in part the additional dangers proposed by the concurring opinion of Justice Clarence Thomas, characterized therein as "honest in its insidiousness." The primary focus in that regard was an anticipated attack on marriage equality given the breadth of his view on long-held constitutional protections on fundamental privacy rights, but the issue is far broader in terms of privacy rights and potential criminalization of conduct.

In New York, the New York State Bar Association took a position against the *Dobbs* decision, with the Women in Law Section providing additional warnings about what the future might hold.[2] The American Academy of Matrimonial Lawyers passed a resolution[3] concluding that,

> The AAML opposes an interpretation of the Constitution and Bill of Rights which rejects the fundamental right of privacy, rights protecting familial and individual autonomy, and the rights of individuals to order their own personal world. Accordingly, the AAML continues to support the right of reproductive liberty as a fundamental human right, along with all the other established rights of privacy recognized by the highest court in this land, based upon the recognition that the guarantee of liberty woven into the fabric of our nation's history secures the right to personal and familiar self-determination.[4]

In his concurring opinion in *Dobbs*, Justice Thomas opined,

> [I]n future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold [v. Connecticut], Lawrence [v. Texas], and Obergefell [v. Hodges]. Because any substantive due process decision is "demonstrably erroneous" . . . , we have a duty to "correct the error" established in those precedents . . . . After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.

His reference, inter alia, to the 1965 U.S. Supreme Court decision in *Griswold v Connecticut,*[5] which addressed contraceptive rights, is now also at play before the U.S. Supreme Court as it *sub judice* addresses the birth control pill mifespristone in *FDA v. Alliance for Hippocratic Medicine.*[6] The concurrence is also germane to various state court decisions—including the February 16, 2024 decision of the Alabama Supreme Court in *LePage v Center for Reproductive Medicine, P.C.,*[7] relating to IVF treatment and the declaration under Alabama law that frozen embryos are human beings as "extrauterine children" where "life begins at fertilization and ends at death"[8] Further attacks on what were long considered to be sacrosanct fundamental reproductive rights seek to further erode those rights post-*Dobbs*.[9]

Despite the Alabama legislature addressing IVF subsequent to the *LePage* decision, that legislation does not actually change the religious-based Alabama Supreme Court determination and will not stop attempts to continue to turn the clock backwards in time to theocratic views that contradict concepts of separation of church and state. The same is true even if the United States Supreme Court does not further limit access to mifepristone in *FDA v. Alliance for Hippocratic Medicine,* which was orally argued before the court on March 26, 2024.

As it relates to issues of IVF and the disposition of embryos, the New York Court of Appeals in 1998's *Kass v. Kass*,[10] considered a matter in which the ex-wife wanted frozen unfertilized "pre-zygotes" implanted in order to have the opportunity at biological motherhood. The ex-husband objected as the parties' IVF agreement provided that the pre-zygotes would be donated for approved research purposes. The IVF agreement contained provisions with regard to the disposition of the frozen pre-zygotes as well as their storage and several informed consent provisions. Three weeks after the signing of the IVF consent provisions regarding the disposition of the pre-zygotes, they signed a self-drafted divorce agreement, reiterating that the disposition of the pre-zygotes would be dis-

posed of as set forth in the IVF agreement. Shortly thereafter, the ex-wife objected to such disposition and commenced the divorce action, also seeking sole custody of the pre-zygotes. The trial level court granted the ex-wife custody of the pre-zygotes and gave her the right to implant them. A divided appellate division reversed. The Court of Appeals then undertook a detailed analysis relating to assisted reproductive technology as it then existed and looked to the laws of other states. The court concluded that the disposition of pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice, and that they are not recognized as "persons" for constitutional purposes.

The court ultimately found that the IVF contract was not ambiguous and clearly set forth the parties' dispositional intent which provided for the donation of the pre-zygotes to the IVF program for proven research purposes.

Over 20 years later, the Supreme Court, Suffolk County in 2021's *KG v. JG*,[11] where the father sought to set aside the IVF contract provisions, again addressed the interpretation and enforceability of such a contract—this time as it related to frozen embryos. The court adopted the analysis undertaken in *Kass*. The court in *K.G.* also addressed whether the IVF agreement would be challengeable and unenforceable as being non-compliant with the requirements of Domestic Relations Law section 236B(3), which requires a marital agreement to be in writing, subscribed by the parties, and acknowledged or proven in the manner required to enable a deed to be recorded. The IVF agreement, although signed by both parties, was neither notarized nor subscribed and acknowledged in the form which entitles a deed to be recorded.

The K.G. court noted that DRL § 236B(3) was in effect at the time that the Court of Appeals decided *Kass*, but that if equitable distribution would be applied to the frozen embryos, the court would have to distribute them "equitably" which could require an equal split – something that would never have been contemplated in the IVF contract. Further, the court noted that the contract in question was not only between the two parties, but also between them and the third-party IVF facility. The court also did not find that a change in circumstances existed to alter the analysis undertaken in *Kass,* based upon allegations that the mother was reportedly abusive to the parties' existing child and the father.

The court rejected the father's argument that releasing the frozen embryos to the mother could result in him paying child support as that was also not an unforeseen circumstance when they entered into the IVF agreement had the embryos been implanted and a child produced. Since the IVF agreement addressed contingencies dealing with joint custody–or disposition in the event of divorce, death of one party, or death of both parties–there again was no ambiguity; the intent of the parties was clear as to the embryos' disposition. In this case, because the IVF agreement provided specifically that if the parties are divorced, the mother was to have dispositional au-

thority over the embryos, the court found such a provision to be controlling. The matter was not appealed.

Under both *Kass* and *K.G. v. J.G.*, the law provided for the parties to self-determine their rights with regard to reproductive issues; and in particular reminded that pre-zygotes and embryos are *not* persons for constitutional purposes, or entitled to "special respect," with the Court of Appeals in *Kass*, specifically citing to *Roe v. Wade*[12] for authority.

Calls for national legislation to restrict or eliminate abortion and reproductive rights continue to permeate in the Congress of the United States and in the views of certain candidates for national high elective office. Whether such legislation is proposed remains most likely subject to determinations in the 2024 national elections and the composition of the United States Supreme Court. In New York, issues relating to abortion rights as well as other aspects of reproductive freedom continue to exist,[13] but can certainly be undermined by future federal legislation and U.S. Supreme Court rulings in both a civil and criminal context.

As my prior article stated, "As we have seen, and continue to see, our freedoms are fragile, and too many are willing to subvert them to suit their own purposes. This is just the beginning." State courts and legislatures, as well as certain federal officials seeking to consolidate authority and blur the lines between church and state have been emboldened by the *Dobbs* decision, and the open-ended invitation to reconsider all facets of privacy rights referenced by Justice Thomas' concurrence. This, despite many subsequent election results pushing back.

As it stands, the attack on privacy rights at the national level, including reproductive autonomy and marriage equality, remains a considerable threat even in New York. The ramifications of *Dobbs*, and the subsequent cases being brought in its wake (including the April 1, 2004, decision of the Florida Supreme Court in *Planned Parenthood of Southwest and Central Florida v. State of Florida*, permitting a six-week abortion ban), continue to pose a danger to rights and laws protecting privacy and reproductive autonomy in the State of New York and elsewhere. "The price of liberty is eternal vigilance."[14]

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Endnotes

1. 597 U.S 215 (2022).
2. *New York State Bar Association's Women in Law Section Issues Statement on the Supreme Court's Decision in Dobbs Overturning Roe v Wade*. June 28, 2022. https://nysba.org/new-york-state-bar-associations-women-in-law-section-issues-statement-on-the-supreme-courts-decision-in-dobbs-overturning-roe-v-wade/.
3. I was proud to be a co-author of that national organization's resolution as part of a task force of co-authors, chaired by Leigh Basehart Kahn of New York, and including Dana Prescott of Maine, Natalia C. Wilson of Washington DC, and Professor Mary Kay Kisthardt of the University of Missouri-Kansas City School of Law.
4. Resolution on *Dobbs v Jackson Women's Health Organization*, October 12, 2022. https://aaml.org/wp-content/uploads/Dobbs-Decision_102022.pdf.
5. 381 U.S. 479 (1965).
6. Docket No 23-235 (Argued March 26, 2024).
7. SC-2022-0579 (February 16, 2024).
8. *See also Idaho v. United States*, 1:22-cv-00329, scheduled for oral argument before the U.S. Supreme Court on April 24, 2024 and addressing enforcement of Idaho's Defense of Life Act, which prohibits abortions unless necessary to save the life of the mother, on the ground that the Emergency Medical Treatment and Labor Act preempts it.
9. *See* Tracking Abortion Bans Across the Country, NY Times (January 8, 2024); *Where State Abortion Laws Stand Without Roe*, U.S. News (March 6, 2024).
10. 91 N.Y.2d 554 (1998).
11. 72 Misc3d 593 (Sup Ct Suffolk County 2021).
12. 410 U.S. 113 (1973).
13. *See e.g.* New York's 2019 Reproductive Health Act.
14. Attributed to Thomas Jefferson and others.