



CARRERA DE ABOGACÍA

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Collateral Effects of Overturning Roe v. Wade: Expansion of Criminal Prosecutions and Penalizations Against Pregnant Women

JANUARY 13, 2023 by Isabelle Gilges

On June 24, 2022, the Supreme Court overturned Roe v. Wade in Dobbs v. Jackson Women's Health Organization, effectively ending any federal constitutional protection for the right to abortion. Proponents of overturning Roe emphasized theories of fetal pain and development. These theories provide the foundation for the recognition of fetal rights, whereby protection of the fetus is accorded precedence over a woman's bodily autonomy. The state law at issue in Dobbs, for instance, specifically made findings about an "unborn human being" in order to justify its restrictive time frame for abortion. The recognition of fetal rights is not far removed from the doctrine in Roe, Casey, and other precedent in this area of law, which balances a woman's right to bodily autonomy against the state's interest in protecting "potential life." While overturning Roe has already affected the ability of women to seek abortions in many states, it has also further legitimized the concept of fetal life and fetal protection at the cost of undermining a woman's right to bodily autonomy. Further legitimizing fetal rights could serve as justification for expanding the prosecution or penalization of pregnant women who use substances during their pregnancies.

Across the country, many states have laws that aim to protect fetuses from harm while in-utero. State policies regarding alcohol and drug use during pregnancy have become increasingly punitive towards pregnant women over time, ranging from requiring health professionals to report positive drug tests to child welfare authorities to criminal prosecution. Although prenatal drug use maybe a legitimate public health concern, research has found that these policies have not only failed to achieve their goals of preventing substance abuse by pregnant women, but have been disproportionately applied to low income women of color.

For example, one study found that despite similar rates of drug use between Black and white women while pregnant, Black women were 10 times more likely to be reported to child welfare agencies for prenatal drug use. These reports can result in "social holds," whereby newborns are separated from their mothers or removed from their parents' custody and placed in congregate or foster care settings. The intense disparities between

Black and white families and their involvement in the child welfare system is well documented, with Black children being more likely to be reported for abuse and in foster care on average for months longer than other children. Some have referred to this process of pushing newborns born to poor women of color into the foster care system as the “womb-to-foster-care pipeline.” Reporting to child welfare is one of the most common state policies regarding prenatal drug use, despite studies demonstrating that drug-exposed newborns do better when allowed to remain with their parents as opposed to foster care or

physical separation, and that children in foster care tend to have worse outcomes than other children.

Other states have responded to prenatal drug use with criminal prosecution. While federal and state laws explicitly protecting fetuses from harm sometimes exempt pregnant women from prosecution, many states do not explicitly do so and have prosecuted women for harm to their fetuses caused by drug use. South Carolina is one prominent example. In *Whitner v. State*, the South Carolina Supreme Court denied postconviction relief for a mother convicted of criminal child neglect after her newborn tested positive for cocaine. The court reasoned that the children endangerment statute included a viable fetus. A few years later in *State v. McKnight*, the South Carolina Supreme Court applied this reasoning to affirm a 20-year prison sentence for a woman who was convicted of homicide after suffering a stillbirth which was believed to be linked to her cocaine use during pregnancy. This conviction was eventually overturned years later after McKnight sought postconviction relief, on grounds that her counsel had failed to introduce evidence tending to weaken the link between her drug use and her stillbirth. At least one other state has used South Carolina’s reasoning to justify criminal prosecution against women who use drugs while pregnant.

The issue with punitive policies like those identified above is that they fail to adequately address drug use by pregnant women. Many states have limited substance use treatment programs that will accept pregnant women. As of 2010, only 19 states offered drug treatment programs for pregnant women. Women on Medicaid may also be denied access to drug treatment programs during their pregnancies.

Additionally, these policies deter women from seeking prenatal care and sharing important information with their physicians. Many low-income women of color fear that if they share their drug use with their physicians, they will be subject to a child welfare investigation and possibly lose custody of their child upon birth. Failing to seek prenatal care altogether can be detrimental for the woman’s and the newborn’s health.

The justification for these punitive policies often follows the same line of reasoning that states attempting to challenge *Roe* rely on: the need to protect fetal life. In fact, one study found that while punitive state policies for alcohol use during pregnancy were not

associated with policy effectiveness, states with more punitive policies were more likely to have more restrictive reproductive rights policies. The researchers of this study posited that this data suggested that the primary goal of pursuing these punitive policies was to restrict women's reproductive autonomy, rather than to actually reduce alcohol use or alcohol-related harm to the fetus.

Fetal protectionism was a prominent theme throughout many of the amicus briefs and the oral argument for the state in *Dobbs v. Jackson Women's Health*. Many briefs advanced arguments justifying restricting the right to abortion or doing away with the viability line on theories of "fetal pain" and development. At oral argument, the attorney for the state repeatedly spoke of fetuses as "unborn children" and "unborn girls and boys." This rhetorical move seeks to justify the restriction of a pregnant woman's autonomy. As Julie Ehrlich declared in her piece "Break the Law by Giving Birth: The War on Drugs, The War on Reproductive Rights, and The War on Women," "the more rights accorded to a fetus, the fewer remain for the woman who carries the fetus."

The connection between a woman's reproductive autonomy and the penalization of prenatal drug use was not absent from the arguments in *Dobbs*. Justice Thomas emphasized the relationship between bodily autonomy and prenatal drug use on two separate occasions during arguments, asking counsel for Jackson Women's Health Organization at one point "whether or not [a woman] has a right also to bodily autonomy in the case of ingesting an illegal substance and causing harm to a pre-viability fetus."

Dobbs allows states to justify the restriction of abortion on their theories of fetal pain and development, thereby allowing notions of fetal life to take precedence over a woman's right to bodily autonomy. The arguments and rhetoric advanced by the state and amicus that emphasize fetal protection can be used to further expand fetal protection laws that penalize and prosecute women for their actions while they are pregnant. For example, Texas passed one of the most restrictive abortion laws in the country in May 2021, banning abortions after six weeks and deputizing private citizens to report anyone who obtain an abortion. Subsequently, a woman was charged with murder and taken into custody for a self-induced abortion, despite there being no law in Texas that explicitly criminalized self-induced abortions. This case demonstrates that when fetal protection takes precedence over reproductive autonomy, the state becomes more willing to punish and criminalize actions taken by pregnant women.

Policies that seek to address prenatal drug use should be focused on helping pregnant women or new mothers seek treatment or care, rather than on criminalization and family separation. Relationships between pregnant women and their physicians should be premised on trust, so that pregnant women can feel safe to share pertinent medical

information and seek prenatal care without fear that doing so will result in their child being removed from their custody upon birth.

Overturing Roe fundamentally shifts how we understand pregnant women's autonomy and further normalizes the criminalization of women who use substances while pregnant. Because current policies regarding prenatal drug use already disproportionately target and are applied against low-income women of color, the normalization and expansion of these policies will likely be felt most strongly by these women, who already face higher rates of family separation and maybe least able to access drug treatment programs.

A partir del análisis de la macro y micro-estructura del texto y su contenido, responder las preguntas enumeradas a continuación con CLARIDAD, CONCISIÓN Y PRECISIÓN

- 1) ¿Cuáles son las repercusiones jurídicas del fallo Dobbs?

MODELO

- 2) ¿Cuál es la conclusión y recomendaciones de la autora sobre las repercusiones que acarrió el fallo de la *USSC*?

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3) ¿Cuáles son las diferencias entre los enfoques de los estados en cuanto a las políticas relacionadas con el uso de sustancias durante el embarazo?

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4) ¿De qué manera el fallo criticado por la autora se relaciona con el principio de "stare decisis"?

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5) En *Whitner v. State* ¿qué se decidió y en base a qué fundamento? ¿De qué manera incidió este fallo en *State v. McKnight*?

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Aclaración: _____ D.N.I.: _____



CARRERA DE ABOGACÍA

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Fecha: MARZO 2024

Apellido y Nombre del Alumno:

D.N.I. N°: _____

Supreme Court of Nebraska.

Jonathan B. SIMONS, appellant, v. Heather L. SIMONS, appellee.

No. S-21-599.

Decided: August 05, 2022

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

John A. Kinney, Omaha, Jill M. Mason, Omaha, and Samantha M. Robb, of Kinney Mason, P.C., L.L.O., for appellant.

Benjamin M. Belmont and Wm. Oliver Jenkins, Omaha, of Brodkey, Cuddigan, Peebles, Belmont & Line, L.L.P., for appellee.

I. INTRODUCTION

In a dissolution action governed by a premarital agreement, the court imposed a constructive trust over certain limited liability companies titled solely in the respondent's name, such that they were considered additions to the marital estate under the agreement. The petitioner appeals the court's judgment, arguing that the court abused its discretion in allowing the respondent to amend her pleadings to conform to the evidence at trial to include the issue of the constructive trust, that the trust was in conflict with the premarital agreement, that the evidence did not support a constructive trust, and that the amount of the trust was in error. The petitioner also challenges the court's award of a \$150,000 lump-sum payment under the terms of the premarital agreement, an order to maintain life insurance to fund a support order, the inclusion of a truck in the marital estate, and the amount of the alimony award.

II. BACKGROUND

Jonathan B. Simons brought a complaint for dissolution of his marriage to Heather L. Simons. Jonathan and Heather were married in 2005. Two children, still minors at the time of filing, were born to the marriage. The complaint alleged that a premarital agreement controlled the division of their assets and debts. In her operative answer, Heather asked, among other things, for an equitable division of the marital estate and for alimony. She denied the validity of the premarital agreement. However, the court ultimately found the agreement was valid, and that finding is not challenged on appeal.

1. Issues in Controversy

The court issued a pretrial order directing the parties to submit a letter stating the issues in controversy, the issues not in controversy, and a concrete statement of the relief sought. As relevant to this appeal, the letter submitted by Heather's counsel set forth as issues in controversy the following:

- a. Whether Jonathan holds one half of the membership interest in JBS Kids Play & Fitness, LLC; JBS Properties, LLC and Dogwatch, LLC in a constructive trust for the benefit of Heather.
- b. Does Jonathan have an equitable duty to convey one half of the membership interest in JBS Kids Play & Fitness, LLC; JBS Properties, LLC and Dogwatch, LLC to Heather on the ground that his acquisition or retention of the membership interests would constitute unjust enrichment.
- c. If the Premarital Agreement is valid and enforceable, whether three limited liability companies [Jonathan] organized to operate the parties' businesses which were started during the marriage and in which Heather was an owner and held out to the public as being an owner are part of the marital estate;
- d. Whether the provision of the Premarital Agreement stating, "Anything in this section 3.2 to the contrary notwithstanding, in no event shall [Jonathan's] Property or Heather's Property be made a part of or be considered in determining any alimony award as herein contemplated" is valid, or contrary to law and if contrary to law, is it able to be severed from the Premarital Agreement.
- e. Whether Jonathan has comingled any purported separate funds with marital funds to subject those funds to an equitable division;
- f. The determination of what assets are part of the marital estate and the equitable division of the marital estate.

A copy of the letter was sent to opposing counsel, who raised no objections.

Before trial commenced, Jonathan's counsel argued to the court that the premarital agreement was enforceable and that, under the agreement, title controls—assets jointly titled are marital while assets not jointly titled are not marital.

Heather's counsel responded that even with the premarital agreement, the court had equitable powers, there were issues as to what exactly the agreement means, and "[i]t's not just a matter of title." Heather's counsel elaborated that at issue in the case was a business Heather and Jonathan started together, which they both worked for, and which Jonathan represented to Heather and to others that he and Heather jointly owned. Heather's counsel argued that the fact the business was titled solely in Jonathan's name should not be controlling of the distribution even under the premarital agreement.

At the conclusion of the evidence presented at trial, Heather moved to amend her pleadings to conform to the evidence so as to allege constructive trust and unjust enrichment. A discussion ensued with Jonathan's counsel arguing that Heather's position relating to a constructive trust was simply a type of equitable distribution that would not be applicable if the premarital agreement, which distributed assets by title, was valid. Heather's counsel responded that the claimed constructive trust was not mooted by a possible finding that the premarital agreement is enforceable; rather, a constructive trust created under equitable principles would simply make that asset marital under the terms of the premarital agreement. The record does not reflect that Jonathan's counsel raised the waiver provision of the agreement found in section 6.

The court granted the motion to amend the pleadings over Jonathan's objection, stating from the bench, "I don't see how the amendment to the pleadings would change the evidence, nor would the Court's equitable resolution of the issues presented." The court reasoned further in its written order that the issues were set forth in the pretrial letter and that Jonathan raised no objection to the litigation of those issues either before or during the trial in which those issues were actually litigated. The court noted that a constructive trust and unjust enrichment are equitable concepts and that Heather raised in her pleadings the

issue of the equitable division of the marital estate and the court's equitable jurisdiction. Finally, the court found that Jonathan was not prejudiced by the amendment.

[...]

The premarital agreement was entered into evidence at trial. Section 1.5 of the agreement describes the “Marital Estate”:

Anything in this Agreement to the contrary notwithstanding, to the extent that [Jonathan] or Heather have acquired or in the future acquire and affirmatively transfer or convey any assets the title to which, as evidenced by some written instrument, is held by them after such acquisition, transfer or conveyance in any form of co-ownership, including but not limited to tenancy in common, joint tenancy, tenancy by the entirety or community property, such property shall be deemed to constitute and be part of the “Marital Estate.” The Marital Estate shall include any appreciation or depreciation on the assets forming a part of the Marital Estate but shall not include any earnings thereon, proceeds therefrom or replacements thereof unless such earnings, proceeds or replacements, as the case may be, are also titled in some form of co-ownership. The Marital Estate shall be subject to division, distribution and disposition as hereinafter provided in this Agreement.

[...]

This Nebraska Supreme Court does hereby affirm the decree in all respects with the exception of the court's itemization of the truck as part of the marital estate, which we vacate. The truck is part of the constructive trust.

Affirmed in part, and in part vacated.

Lest the bar and trial bench misunderstand the court's decision—believing that it sanctions the remedy of a constructive trust in run-of-the-mill marital dissolution actions—I write separately. I address two aspects.

First, the application here was driven by the enforcement of a premarital agreement. The parties utilized a premarital agreement to circumvent (at least partially) the principles of equitable division of property dictated by the dissolution statutes. Had they not done so, I suggest that a constructive trust would have had no application. In other words, where parties bring individual property to a marriage and do not attempt to use a premarital agreement regarding division of property, the division of property would be controlled solely by §§ 42-365 and 42-366 and our decisions construing those statutes.

Second, I have considerable doubt that the remedy of a constructive trust would apply to parties' actions prior to marriage. In the absence of a premarital agreement, the status of property brought to a marriage is governed by the first step of a three-step process. The first step is to classify the parties' property as either marital or nonmarital, setting aside the nonmarital property to the party who brought the property to the marriage. Any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property. The burden of proof rests with the party claiming that property is nonmarital. Here, the disputed property was not “property brought to a marriage.” Today's decision should not be misunderstood as precedent for applying a constructive trust in the first step of the three-step process. It is not necessary to consider the issue here, and I do not understand the court's opinion as doing so. With this understanding, I join the court's opinion.

Responder con claridad expositiva y precisión terminológica el siguiente cuestionario:

1) i) ¿Cuál es el núcleo del conflicto jurídico expuesto en el texto?

ii) Sin dejar de mencionar:

- a. Tipo de texto jurídico
- b. Instancia procesal
- c. Sede judicial (fuero natural) de radicación y tramitación
- d. Partes del proceso (en las distintas etapas procesales, si las hubiere)
- e. Acto jurídico que subyace al fondo del litigio

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2) ¿Sobre qué puntos giró la traba de la litis?

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3) ¿En qué argumentos jurídicos basaron sus respectivas defensas las partes litigantes?

MOQUELO

4) Mencionar 3 frases donde aparezca el concepto “equitable”. Describir qué aspectos jurídicos según el sistema jurídico angloamericano tienen en común dichas expresiones, y detallar cuál es su verdadero alcance jurídico y su relación con la figura del “constructive trust”.

MOQUELO

5) ¿En qué sentido resuelve el tribunal interviniente y qué disidencia se le hace al fallo en cuestión? Sintetizar sus principales considerandos.

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