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Recent Developments

***Casey v. Planned Parenthood:* SUPREME COURTHOLDS THAT STATES MAY ENACT MEASURES WHICH PERSUADE WOMEN TO CHOOSE CHILD- BIRTH OVER ABORTION.**

In *Casey v. Planned Parenthood*, 112 S. Ct. 2791 (1992), the Supreme Court rejected the trimester framework established by *Roe v. Wade*, 410 U.S. 113 (1973), and held that the constitutionality of abortion regulations before fetal viability must be judged by an "undue burden" standard. In so holding, the Court affirmed the essential holding of *Roe*, which recognized a woman's right to terminate her pregnancy before viability without undue interference from the state. However, it significantly deviated from *Roe* by holding that a state is permitted to enact measures designed to persuade women to choose childbirth over abortion so long as those measures do not constitute an undue burden on the exercise of that right.

Five provisions of the Pennsylvania Abortion Control Act of 1982 as amended in 1988 and 1989 (the "Act") were challenged by Petitioners, five abortion clinics and one physician on behalf of a class of physicians performing abortions ("Petitioners"). The provisions of the Act required that: (1) a woman seeking an abortion give her informed consent prior to the abortion procedure, (2) a woman be provided with certain information prior to the procedure, (3) minors obtain parental consent, (4) married women notify their husbands prior to the abortion procedure, and (5) facilities performing abortion procedures comply with certain reporting requirements. In anticipation of the provisions taking effect, the

Petitioners brought suit in the United States District Court for the Eastern District of Pennsylvania seeking declaratory and injunctive relief. The district court ruled all of the provisions unconstitutional and issued a permanent injunction prohibiting their enforcement. The Court of Appeals for the Third Circuit upheld all of the regulations except for the spousal notification requirement. The United States Supreme Court granted certiorari to clarify the central holding in *Roe*.

The Court used a three part analysis in its examination of the holding in *Roe v. Wade*. *Casey*, 112 S. Ct. at 2804. The Court noted that the central holding of *Roe*, recognized the following: (1) the woman's right to choose to have an abortion before viability without state interference, (2) the state's power to restrict abortion after viability with exceptions for danger to the life or health of the mother, and (3) the state's legitimate interest from the outset of pregnancy in protecting both the life of the mother and health of the fetus.

In its analysis, the Court first reaffirmed that a woman's constitutional interest in the right to an abortion before fetal viability was a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Id.* Citing prior settled decisions, the Court next affirmed the fundamental principle that the Constitution limits the state's power to interfere with parenthood and family decisions. *Id.* at 2806. The Court also acknowledged the strong moral and political feelings that the abortion decision engendered. *Id.* at 2806. Declining to become entangled in those "feelings," the Court strove to determine only "whether the state can re-

solve these . . . questions in such a definitive way that a woman lacks all choice in the matter." *Id.*

The Court noted that the constitution protects the right of a person to be "free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 2807 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). The Court recognized that abortion is a unique act, but acknowledged that a state may not proscribe it in all instances because the liberty of a woman "is at stake in a sense unique to the human condition and so unique to the law." *Id.* The Court concluded that any reservations it may have had about affirming *Roe* were outweighed by the concept of personal liberty under the Due Process Clause and the principles of stare decisis. *Id.*

To further justify its refusal to overrule *Roe*, the Court reviewed the principles of institutional integrity and concluded that the cost of overruling *Roe* in the face of pressure to do so by certain societal interests would cause profound damage to the Court's integrity as an institution dedicated to the rule of law. *Id.* at 2814-15. Thus, the Court recognized that the fundamental decision of *Roe* was based on a constitutional analysis which it could not now repudiate. *Id.* at 2817.

The Court next turned to the important question of defining the limits of a woman's protected liberty interest. *Id.* The Court reasoned that it was required to draw a line where the state may not interfere with a woman's right to control her own body in order to give meaning to the protected liberty. *Id.* The Court reaffirmed that viability was

where it drew this line. *Id.* Most importantly, the Court noted that, because viability was the point at which a fetus could survive outside the womb, viability also marked the time when a fetus became deserving of state protection. *Id.* at 2818. While recognizing that a woman's right to terminate her pregnancy before viability was the central holding of *Roe*, the Court pointed out that *Roe* also recognized the importance of the state's interest in "potential life." *Id.*

The Court then examined the trimester framework established by *Roe* in light of the state's interest in "potential life." *Id.* at 2819. The Court found that the trimester framework had the effect of contradicting some of the state's permissible powers in the early stages of a woman's pregnancy. *Id.* Because the Court believed the trimester framework undervalued the state's interest in "potential life," the Court rejected the trimester framework adopted in *Roe*. *Id.*

The Court next addressed whether limitations on a woman's right to abort pre-viability fetuses were permissible. *Id.* at 2819. The Court held that if the law was not designed to strike at the abortion right itself and had the incidental effect of making the right more difficult to exercise, then such a law would not be invalidated. *Id.* Only where a law imposed an undue burden on the exercise of the right would the state be held to have interfered with the liberty interest of the woman protected by the Due Process Clause. *Id.* Under the Court's analysis, laws which "do no more than create a structural mechanism by which the state . . . may express a profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.* at 2821.

The Court then applied the "undue burden" standard to the provisions of the Act. *Id.* at 2822. The Court first addressed the Act's definition of "medical emergency" and found that it was central to the operation of the other provisions of the Act. *Id.* The Court concluded that limiting abortions in certain situations to medical emergencies, as defined under the Act and as construed by the court of appeals imposed no "undue burden" on a

woman's right to an abortion. *Id.* at 2822.

The Court next addressed the informed consent requirement of the Act. *Id.* The Court concluded that requiring specific information be given to the woman regarding the gestational age of the unborn child, the availability of alternatives to abortion and including a mandatory 24 hour waiting period, did not constitute an "undue burden." *Id.* at 2823-24. The Court reasoned that even if the information given expressed a preference for childbirth over abortion, the giving of truthful, non-misleading information ensured that a woman understood the full impact of her decision. *Id.* at 2823. In so holding, the Court overruled certain portions of *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) ("*Akron I*"), and *Thornbird v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). *Casey*, 112 S. Ct. at 2823.

Turning to the 24 hour waiting period, the Court overruled its decision in *Akron I* which held that a 24 hour waiting period served no legitimate state concern. *Id.* at 2824. The Court held that an informed decision would be promoted by some period of reflection, particularly where information concerning the abortion decision was given to the woman. *Id.* The Court acknowledged that the waiting period was a substantial obstacle for women who lacked financial resources or were burdened by other considerations such as explaining their whereabouts to employers or family. *Id.* at 2825. Nevertheless, the court concluded that the effect of "increasing the cost and risk of delay of abortions" did not constitute an "undue burden." *Id.*

Addressing the husband notification requirement of the Act, the Court concluded that based on expert testimony and evidence presented to the lower court regarding domestic violence, the husband notification requirement was likely to prevent a significant number of women from obtaining abortions. *Id.* at 2829. The Court concluded that the father's interest in the potential life did not justify permitting a state to empower him with veto power over his wife's decision. *Id.* at 2833.

The Court treated the parental notification requirements of the Act sum-

marily, holding that a state may require consent of the parent or guardian prior to a minor obtaining an abortion so long as there is an adequate judicial bypass. *Id.* at 2832. Finally, the Court found the record keeping requirements of the Act permissible. *Id.* The Court held that the requirements were reasonably related to the "preservation of maternal health and . . . that they properly respected a patient's confidentiality and privacy." *Id.* (quoting *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 80 (1976)).

Thus, the Court upheld all of the provisions of the Act with the exception of the husband notification requirement enunciating an "undue burden" standard by which to assess the constitutionality of laws which restrict a woman's right to choose abortion prior to fetal viability. The opinion was joined by concurring and dissenting opinions from all sides. While accepting its responsibility to "define the freedom guaranteed by the Constitution's . . . promise of liberty," the Court has charted a course which will continue to engender confusion among courts and legislatures and endanger the liberty of women to control their reproductive lives. Thus, it is clear that the Court's decision in *Casey* has not secured for women the constitutional protection of their liberty guaranteed by the Due Process Clause of the Fourteenth Amendment.

- Sue Lawless

***Cipollone v. Liggett Group, Inc.:*
FEDERAL CIGARETTE LABELING LAWS DO NOT PREEMPT CERTAIN STATE AND COMMON LAW ACTIONS.**

In a controversial case of first impression, the United States Supreme Court held in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) that the Public Health Cigarette Smoking Act of 1969 ("1969 Act") did not preclude a smoker who developed lung cancer from suing cigarette manufacturers under certain state and common law theories. The smoker's claims for breach of express warranty, intentional fraud and misrepresentation, and conspiracy were upheld despite the 1969 Act's warning