

1988

Michael Jon Reynolds v. Jennifer Franks Reynolds : Supplement

Utah Court of Appeals

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Utah Court of Appeals
Attention: Clerk
230 South 500 East #400
Salt Lake City, Utah 84102

APPEALS

Re: Reynolds v. Reynolds,
Docket No. 880420-CA

NOTICE OF SUPPLEMENTAL AUTHORITY

To the Clerk of the Court of Appeals:

Introduction. Pursuant to Rule 24(j), R. Utah Ct. App., this letter is to notify the Court of the case of Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989). This case was decided months after the briefing in this appeal was completed.

Relevance. Appellant believes this case constitutes "pertinent and significant" authority which came to appellant's attention after the the reply brief was filed. R. Utah Ct. App. 24(j). Five copies of this letter are enclosed with this original.

Summary of Holding. Webster is not squarely on point, as it does not involve the rights of fathers in relation to abortion. It is, however, a watershed case, signaling a narrowing of abortion rights and an expansion of the states' ability to regulate.

While Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) was not expressly overturned, state regulation was permitted beyond the bounds Roe and its progeny previously allowed. This included prohibition of abortion in public facilities or performance of abortion by public employees, and a presumption of viability at 20 weeks. The upheld statute requires that physicians perform tests to overcome the presumption.

The majority also refused to overturn the preamble, which stated that life begins at conception, that unborn children have protectable interests in life, and that natural parents have protectable interests in the life, health, and well-being of their unborn children. Webster, 109 S.Ct. at 3049, n. 4. The Supreme Court did not discuss the parental rights provision.

The preamble was upheld because Roe implies no limitation on states' authority to make value judgments favoring birth over abortion. Webster found the preamble was more a policy statement than an abortion regulation. 109 S.Ct. at 3050.

The prohibition of public facilities and employees becoming involved in abortions was upheld, because it places no government obstacle in the path of a woman who chooses to terminate her pregnancy. 109 S.Ct at 3052.

Roe narrowed by plurality. To uphold the 20 week viability presumption and viability testing requirements, a Webster plurality found it necessary to reject the "rigid trimester analysis" of Roe. 109 S.Ct at 3056. Roe's system was found to be "unsound in principle and unworkable in practice." Id. In this part of the holding, Justice O'Connor concurred but did not join.

The plurality of Rehnquist, White and Kennedy found a compelling state interest in potential life not only after viability, but throughout the pregnancy. Id. at 3057. See also p. 3069 (Blackmun, J., dissenting) "To the extent indicated in our opinion, we would modify and narrow Roe and succeeding cases." Id. at 3058.

Justice Blackmun's dissent points out that the plurality's standard would balance the state's newly labeled compelling interest in potential human life against the "liberty interest" of the pregnant woman in procuring an abortion. Id. at 3077, n. 11.

O'Connor's concurrence. Justice O'Connor differed with the majority only on the rationale which should be used to uphold the viability testing requirements. Id. at 3060. She wished to reserve any express limitation on Roe to a future day. Id. at 3061. She did observe that she continues to find Roe's trimester system problematic. Id. at 3063. She state that she would uphold the testing, since it does not provide an "undue burden" on the woman's abortion decision. Id.

Scalia's concurrence. Justice Scalia would have gone further than the other four justices constituting the majority. He would have re-examined and overturned Roe. Id. at 3066-67.

Effect on this case. Rule 24 requires reference be made in this letter to the portions of appellant's brief affected by the new authority. R. Utah Ct. App. 24(j). Since it appears that states now have a compelling interest in fetal life from conception, and the trimester system was abandoned, appellant believes all the abortion cases relied upon by respondent become

dead letters--overruled sub silentio. This would affect appellant's opening and reply briefs throughout.

Unlike respondent, Appellant still believes no state action is involved. But Webster would favor appellant even if the Court finds judicial action is state action. While it is difficult to draw a clear line around the Webster holding, it appears the lowest common denominator among the majority is that there is now an "absolute obstacle", "rational basis" or "undue burden" test for state abortion regulation. This test is easily met, and balancing fathers rights and the state's interest in fetal development would not appear to violate it.

Some sections of appellant's briefs will be particularly affected, including the following sections, beginning on the pages indicated:

- Brief III, p. 15 {abortion right not absolute}
- Brief VII, p. 23 {Utah public policy restricts abortion}
- Brief IX, p. 25 {No state action is involved}
- Brief VIII, p. 30 {Roe v. Wade is eroding}
- Reply III, p. 4 {Danforth does not control this case}
- Reply V, p. 9 {No state action is involved}
- Reply X, p. 21 {Roe v. Wade should be narrowed}

Thank you for your attention, and for bringing this case to the attention of the Court. If there are questions, please contact me.

Sincerely,



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