

IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE
ATTORNEY GENERAL RE: LIMITING
GOVERNMENT INTERFERENCE WITH
ABORTION

Case No.: SC2023-1392

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Fla. R. App. P. 9.225, Opponents Florida Voters Against Extremism, PC (“FVAE”) and Liberty Counsel, Inc. submits as supplemental authority the following constitutional provisions, statutes, and precedent directly related to questions raised during the February 7, 2024, oral argument by Chief Justice Carlos G. Muñoz regarding whether the Ballot Summary should apprise voters that the Proposed Amendment may impact Art. I, § 2 of the Florida Constitution respecting an unborn child, including legal rights of an unborn child in law.

I. FLORIDA CONSTITUTION.

A. Article I, §2. Basic Rights:

All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived

of any right because of race, religion, national origin, or physical disability.

Art. I, §2, Fla. Const.

B. Article I, §9. Due Process:

“No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.” Art. I, §9, Fla. Const.

II. FLORIDA STATUTES AND PRECEDENTS.

The following is a non-exhaustive list of statutes that recognize legal protection afforded to an “unborn child” or “unborn person”:

A. Criminal Statutes

1. Fla. Stat. §775.021(5) (“Whoever commits an act that violates a provision of this code or commits a criminal offense defined by another statute and thereby causes the death of, or bodily injury to, an unborn child commits a separate offense if the provision or statute does not otherwise specifically provide a separate offense for such death or injury to an unborn child.”).

2. Fla. Stat. §782.071 (defining “vehicular homicide” as “the killing of a human being, or the killing of an unborn child by any

injury to the mother, caused by the operation of a motor vehicle by another in a reckless manner”).

3. Fla. Stat. §782.09(1) (“The unlawful killing of an unborn child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed murder in the same degree as that which would have been committed against the mother.”).

4. Fla. Stat. §782.09(2) (“The unlawful killing of an unborn child by any injury to the mother of such child which would be manslaughter if it resulted in the death of such mother shall be deemed manslaughter. A person who unlawfully kills an unborn child by any injury to the mother which would be manslaughter if it resulted in the mother's death commits manslaughter, a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.”).

5. Fla. Stat. §782.09(3) (“The death of the mother resulting from the same act or criminal episode that caused the death of the unborn child does not bar prosecution under this section.”).

6. *Wyche v. State*, 232 So.3d 1117, 1120 (Fla. 1st DCA 2017) (“The clear and unambiguous language of the feticide statute

provides that the killing of an unborn quick child may constitute murder, which is in direct conflict with the common law rule requiring the fetus to be born alive. As such, the Legislature has expressed a clear intent to recognize an unborn quick child as a human being entitled to the protection of Florida's homicide statute. Therefore, we hold that the Legislature has abrogated the common law born alive rule by enacting the 2013 version of the feticide statute as the two cannot coexist.”).

7. *In re Standard Jury Instructions in Criminal Cases—Report No. 2016-08*, 211 So.3d 995, 998 (Fla. 2017) (“Driving Under the Influence Manslaughter does not require the State to prove that the defendant knew or should have known that (victim) was pregnant or that the defendant intended to cause the death of the unborn child.”).

B. Florida Trust And Estate Law

1. Fla. Stat. §736.0304 (“Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another person having a substantially identical interest with respect to the particular question

or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.”).

2. Fla. Stat. §731.303(4) (“If the court determines that representation of the interest would otherwise be inadequate, the court may, at any time, appoint a guardian ad litem to represent the interests of an incapacitated person, an unborn or unascertained person, a minor or any other person otherwise under a legal disability, or a person whose identity or address is unknown. If not precluded by conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.”)

C. Florida Guardianship Law

1. Fla. Stat. §744.3725 (“Before the court may grant authority to a guardian to exercise any of the rights specified in §744.3215(4), the court must: (1) Appoint an independent attorney to act on the incapacitated person's behalf, and the attorney must have the opportunity to meet with the person and to present evidence and cross-examine witnesses at any hearing on the petition for authority to act; (2) Receive as evidence independent medical, psychological, and social evaluations with respect to the incapacitated person by competent professionals or appoint its own

experts to assist in the evaluations; (3) Personally meet with the incapacitated person to obtain its own impression of the person's capacity, so as to afford the incapacitated person the full opportunity to express his or her personal views or desires with respect to the judicial proceeding and issue before the court; (4) Find by clear and convincing evidence that the person lacks the capacity to make a decision about the issue before the court and that the incapacitated person's capacity is not likely to change in the foreseeable future; and (5) Be persuaded by clear and convincing evidence that the authority being requested is in the best interests of the incapacitated person.”).

2. *In re Guardianship of J.D.S. v. Dep't of Children & Families*, 864 So.2d 534 (Fla. 5th DCA 2004) (Pleus, J., dissenting) (“By enacting [Fla. Stat. §744.3725], it is abundantly clear that the Legislature intended to protect the rights of the unborn child in situations where the mother is determined to be incapacitated. . . . Inherent in these requirements is the necessity of an adversarial hearing in which not only interests of the mother are represented, but also the interests of the unborn child. This is best achieved by requiring that upon petition of the guardian of the mother for authority to abort the mother's child, a guardian for the unborn child

be appointed to represent the unborn child's interest at the hearing. . . . Thus, a guardian can and should be appointed for the unborn baby to ensure compliance with Florida law should abortion be considered.”).

D. Florida Habeus Corpus And Incarceration Law

1. Fla. Stat. Ann. § 951.175(4) (“An inmate who is pregnant shall be provided with prenatal care and medical treatment for the duration of her pregnancy. The county shall ensure that a pregnant inmate receives supplemental food and clothing and is excused from inappropriate work assignments. An inmate shall be transferred to a hospital outside the detention facility grounds if a condition develops which is beyond the scope and capabilities of the county detention center's medical facilities.”).

2. *Unborn Child v. Reyes*, 356 So.3d 326, 329 (Fla. 3rd DCA 2023) (Gordo, J., concurring) (“Importantly, however, Florida law also recognizes that a mother's lawful incarceration may result in an unborn child—in utero—being in a correctional facility. . . . The Legislature has provided for prenatal care and medical treatment for pregnant incarcerated inmates, a sure sign it clearly understood that an unborn child may find itself within a correctional facility as a

function of its mother, a pregnant inmate, being properly incarcerated.”).

E. Florida Tort Law

1. *McNamara v. Seibert*, 537 So. 2d 1009, 1010 (Fla. 5th DCA 1988), *rev'd on other grounds* 566 So. 2d 767 (Fla. 1990) (“[The unborn child] was an insured within the meaning of the policy, and has uninsured/underinsured motorist coverage as a ‘survivor’ for the wrongful death of her father caused by the wrongful acts of the underinsured motorist.”); *id.* (noting that an unborn child may recover damages under Florida’s Wrongful Death Act for a parent killed shortly before the unborn child’s birth).

Respectfully submitted,

Dated: February 9, 2024

/s/ Mathew D. Staver
Mathew D. Staver (FBN0701092)
Anita L. Staver (FBN 0611131)
Horatio G. Mihet (FBN026581)
Hugh C. Phillips (FBN1038781)
LIBERTY COUNSEL
PO Box 540774
Orlando, FL 32854
(407) 875-1776
court@lc.org

*Counsel for Florida Voters
Against Extremism, PC and
Liberty Counsel, Inc.*