

Will My Rights To Assisted Reproduction Be Affected by the Future Overturning of *Roe v. Wade*?

By: Midwest Fertility Law Group, PLC

In the wake of the leaked draft opinion from U.S. Supreme Court, in which it appears that *Roe v. Wade* is going to be overturned, we have received many questions from clients, concerned about their future rights regarding surrogacy, parentage, IVF, and embryo and egg donation.

The three most common questions we have been asked are:

- 1) **Will IVF become illegal?**
- 2) **Do I/we still get to decide what to do with my/our frozen embryos?**
- 3) **How do we plan for surrogacy in a state that is likely to pass a law restricting the right to a termination of pregnancy?**
- 4) **Is our same-sex marriage going to be invalidated (and what would that do to our parentage)?**

In our opinion, no, yes, there is a plan, and no.

Of course we can't predict the future, and these questions are based on legitimate concerns raised by the imminent overturn of *Roe v. Wade*, but let's dissect whether there is any straight line between the likely abortion decision and the right to create, use, store or donate embryos as part of fertility treatments, or the right to be married to the person of your choice.

- 1) **Will IVF become illegal?** This question has been given particular attention in Missouri, where a state statute (Section 1.205) declares that "[t]he life of each human being begins at conception." This statute was passed in 1988. IVF has been taking place in Missouri since the late 1980s, and there has never been a question of its legality, regardless of Section 1.205. In fact, in 2016, the Missouri Court of Appeals specifically held that Section 1.205 could not be interpreted to mean that an embryo formed by IVF (*in vitro fertilization*) is a person. The current abortion case involves the direct question of whether there is a constitutional right to have an abortion. That is a unique and completely separate question than the question of whether an embryo is a person. There are Missouri statutes which will immediately restrict abortion when *Roe v. Wade* is overturned. However, it would require a completely separate set of laws to restrict access to IVF, or to legislate what can happen to embryos. Any statutes seeking to make IVF illegal or to legislate what must happen with embryos would face an entirely different and more rigorous set of constitutional challenges. This is true in every state. We do not believe there is any immediate threat to your access to IVF.
- 2) **Do I/we still get to decide what to do with my/our embryos?** For the same reasons described above, there is no direct connection between the overturning of *Roe v. Wade* and your autonomy to decide what happens with your embryos. No final appellate court decision in the United States has held an embryo to be a person. If an embryo is not a person, then a state legislature would have to trample on numerous well-recognized constitutional rights (right to privacy, right to procreation, right to avoid procreation) in order to pass a law that attempted to direct what you can do with your embryos.
- 3) **How do we plan for surrogacy in a state that is likely to pass a law restricting the right to a termination of pregnancy?** First, let's point out that termination of pregnancy in surrogacy cases

is *extremely* rare. Second, even if *Roe v. Wade* is overturned, abortion will continue to be legal and available in various states which are relatively easy travel distances from the places where any of our gestational carriers may reside. Each surrogacy agreement will contain a provision addressing this circumstance, allowing for the gestational carrier to travel (and requiring Intended Parents to pay the cost of that travel) to a place where it is safe and legal to have the procedure performed.

- 4) **Is our same-sex marriage going to be invalidated?** As an initial matter, if your marriage was valid at the time you entered into it, it will continue to be valid, even if the law changes in the future. Courts in the U.S. have historically held that a marriage is valid if it was valid when it was entered, even if the law would later make it invalid. Further, the draft opinion makes expressly clear that the Supreme Court's current decision is only about whether there is a federal constitutional right to abortion. This is a quote from the draft opinion: "...abortion is a unique act because it terminates life or potential life...(abortion is 'inherently different from marital intimacy', 'marriage', or 'procreation'). *And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.*" (emphasis added). The constellation of rights surrounding intimate, private family decisions that do not involve an abortion, such as the right to marry, to procreate, or not to procreate, are far less controversial than the right to have an abortion. The furious political will that exists to overturn the abortion right simply does not exist—at least in the present—in the context of these other rights. Your marriage is safe, and the rights of same-sex couples to get married in the future is most likely safe for the foreseeable future.

We want to emphasize that this analysis represents our opinion. It is not fact. The purpose of this blog is to help our clients, and anyone else, understand the current events in the context of their family and fertility needs. You have a right to be concerned, and you should be. If you are worried about your rights, make your voice heard loudly. Contact your state legislators and your congressmen. Call, write, email, protest. Vote for people who won't try to infringe on your rights to make decisions about your family. These are your most powerful weapons.