

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

Now that *Roe v. Wade* has been overturned, we return to the concerns expressed by our clients about the future of access to surrogacy, parentage, IVF, and embryo and egg donation.

The four most common questions we have been asked are:

- 1) **Is IVF going to become illegal?**
- 2) **Do we still get to decide what to do with our frozen embryos?**
- 3) **How do we plan for surrogacy in a state in which abortion is (or is going to become) illegal?**
- 4) **Is our marriage going to be invalidated (and what would that do to our parentage)?**

We now have the final opinion in *Dobbs v. Jackson Women's Health Org.*, which overturned *Roe v. Wade* and *Planned Parenthood v. Casey*. The concurring opinions and the dissenting opinion give us a little more insight into what the entire court is thinking about issues beyond just whether or not there is a constitutional right to an abortion. Is there a straight line between the ruling that there is no constitutional right to an abortion, and the right to create, use, store, or donate *in vitro* embryos as part of fertility treatments, or the right to be married to the person of your choice? I think there is not.

- 1) **Is IVF going to 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 practiced 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*) is a person. The overturn of *Roe v. Wade* only involved the direct question of whether or not there is a constitutional right to have an abortion. As of June 24, 2022, Missouri’s trigger law effectively bans abortion in Missouri. However, there is no law in Missouri restricting a person’s access to IVF, or legislating what can happen to *in vitro* embryos. Because a frozen embryo has never been held to be a person, or to have rights, any statute seeking to make IVF illegal or attempting to legislate what must happen with *in vitro* embryos would face an entirely different and more rigorous set of constitutional challenges. This is true in every state, even after the ruling in *Dobbs*. We do not believe there is any immediate threat to your access to IVF.
- 2) **Do we still get to decide what to do with our frozen 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 frozen embryos. No final appellate court decision in the United States has held an *in vitro* embryo to be a person. If an *in vitro* 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 *in vitro* embryos. Based on the various opinions issued in *Dobbs* on June 24th, there is reason to believe the Supreme Court would not be in favor of repudiating those rights. Could these laws change in the future? Anything is possible, but certain groups have been trying to pass such laws for twenty years and they have been entirely unsuccessful. Your ability to determine what happens to your frozen embryos has not been directly impacted by the overturn of *Roe v. Wade*.

3) **How do we plan for surrogacy in a state in which abortion is (or is going to become) illegal?**

First, the rate of terminations of pregnancy in surrogacy cases is *extremely low*. Second, abortion will continue to be legal, safe, and available in various states which are relatively easy travel distances from the places where any of our gestational carrier may reside. Each surrogacy agreement already does, and will continue to, contain a provision addressing this issue, allowing for the gestational carrier to travel (and requiring Intended Parents to pay the costs 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?** First, 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 United States 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 opinion makes expressly clear that the Supreme Court's decision in *Dobbs* is only about whether or not there is a federal constitutional right to abortion. In the opinion, the Court specifically stated that "...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.*" The constellation of rights surrounding intimate, private family decisions that do not involve an abortion, such as the right to marry, and the 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 right to an abortion simply does not exist—at least in the present—in the context of these other rights. Your marriage is safe, and the right of same-sex couples to continue to get married is most likely safe for the foreseeable future.

We again 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 overturn of *Roe v. Wade* in the context of their family and fertility needs. Should you be concerned? Yes, but there is no need to overreact. If you are worried about your rights or the rights of anyone else to access fertility treatment, then make your voice heard loudly. Pay attention to calls for action. Contact your state legislators and your congressmen/congresswomen. Call, write, email, protest. Vote for people who will not attempt to infringe on your rights to make decisions about your family. These are your most powerful weapons.