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The Right of a Husband or a Minor's Parent to Participate in the Abortion Decision

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Whether the alleged defect was of such a nature, that, as a matter of common experience, it was more likely than not to have originated before the product left the bottler's possession is a question of fact. Ultimately the court's decision is one of public policy—who should bear the burden of defective secondary containers, the manufacturer or the consumer.[28] Public policy, the right, justice and welfare of the general purchasing and consuming public, demands that the manufacturer be liable for breach of implied warranty of a secondary container when the injury proximately follows from such defect. The functional distinctions between primary and secondary containers, in this age which has witnessed an enormous revolution in the containerization process, should not be determinative of liability. Whether it is a defect in the beverage bottle or the beverage carton that causes injury is an artificial distinction which speaks of glass and cardboard and not of reason. Perhaps only after consideration of the manufacturer's purpose in creating the secondary container and its functions to both the manufacturer and consumer, should liability be affixed.

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THE RIGHT OF A HUSBAND OR A MINOR'S PARENT TO PARTICIPATE IN THE ABORTION DECISION

Plaintiffs, a married woman, an unmarried minor female, and three Florida-licensed physicians specializing in family medicine[1] brought a class action for declaratory and injunctive relief in the United States District Court for the Southern District of Florida against officials of the State of Florida, attacking the constitutionality of Florida Statutes section 458.22(3),[2] which required the written consent of husbands or

28. It should be noted, however, that in *Schuessler*, since a deep-pocket retailer was held liable, the court was not faced with a policy decision which would place the burden of the loss on the consumer.

1. The Supreme Court in Doe v. Bolton, 93 S. Ct. 739 (1973) (the companion case to Roe), held that a physician consulted by pregnant women had standing to sue as one against whom an abortion statute "directly operate[s] in the event he procures an abortion that does not meet the statutory exceptions and conditions." *Id.* at 745. The Court found a sufficiently direct threat of personal detriment to a doctor in this situation, and held that he should not be required to undergo criminal prosecution as a sole means of seeking relief. Coe v. Gerstein, No. 72-1842 (S.D. Fla. Aug. 14, 1973) follows *Doe* in this respect.

2. FLA. STAT. § 458.22(3) (Supp. 1972) [hereinafter the spousal or parental consent requirement]. The pertinent part of the statute is as follows:

> (3) WRITINGS REQUIRED.—One of the following shall be obtained by the physician prior to terminating a pregnancy:
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> (a) The written request of the pregnant woman and, if she is married, the written consent of her husband, unless the husband is voluntarily living apart from the wife, or
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> (b) If the pregnant woman is under eighteen years of age and unmarried, in

the parents of minor females as a precondition to abortion. Upon application of the plaintiffs, a three-judge court was convened to hear this constitutional question. The court granted declaratory judgment for the plaintiffs[3] and *held*: Florida Statutes section 458.22(3) is unconstitutional. A state may not grant husbands or parents the power to regulate abortions in areas in which the state itself has been prohibited from regulating by the United States Supreme Court's decision in *Roe v. Wade*.[4] *Coe v. Gerstein,* No. 72-1842 (S.D. Fla. Aug. 14, 1973).

Roe v. Wade[5] was the culmination of several years of abortion litigation dealing with the rights of a potential mother as against the state. In *Roe,* the Supreme Court weighed a pregnant woman's right to an abortion against a state's interest in protecting maternal health and potential life. The court found that in the first trimester of pregnancy, a woman's right of privacy encompasses her decision to terminate that pregnancy, and outweighs the interests of the state. In the second trimester the state can only interfere to the extent of protecting maternal health by regulating the medical surroundings in which the abortion is performed. However, after the fetus becomes viable (twenty-fourth to twenty-eighth week), the state can intervene even to the extent of proscribing abortion to protect the potential life of the fetus.

One of the questions still unanswered by *Roe* concerned the right of a pregnant woman's husband or parents to participate in her abortion decision. *Coe v. Gerstein*[6] was the first case to focus on this issue. Although *Coe* raised the question of who (wife or husband, minor daughter or her parents) has the superior right to determine whether an abortion will occur, the case disposed of Florida's statutory spousal or parental consent requirement without resolving that issue. Instead, the requirement was attacked indirectly.

First, the court recognized the existence of a husband's interest in seeing his procreation carried full term, or the interest of the parents of a pregnant minor child in governing and controlling the family unit. It was conceded that these interests might be compelling enough to merit state protection and that they might even attach at conception and, therefore, be present during the first trimester. The court pointed out that if the state could have proven that these interests, which fall outside any interest husbands or parents have in protecting maternal health and in protecting the fetus' own interest in its life, were the *only* interests the spousal or parental consent requirement sought to protect, then the requirement could not have been held unconstitutional on the basis of *Roe*.

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addition to her written request, the written consent of a parent, custodian, or legal guardian must be obtained . . . .

3. Injunctive relief was denied as unnecessary in the light of the declaratory judgment of unconstitutionality. Coe v. Gerstein, No. 72-1842 at 7 (S.D. Fla. Aug. 14, 1973).

4. 93 S. Ct. 705 (1973) [hereinafter referred to as *Roe*].

5. *Id.*

6. No. 72-1842.

The crucial fault of the spousal or parental consent requirement was that it did not distinquish between those interests of husbands and parents which the state has been prohibited from enforcing, and those against which no prohibition has been levied:

> We cannot avoid the conclusion that at least a portion of the interests which husbands and parents have in their pregnant wives or minor daughters may be reasonably related to the protection of maternal health and the protection of potential life.[7]

The spousal or parental consent requirement, by its unrestrictive wording, improperly permitted husbands and parents to withhold consent for unconstitutional reasons as well as for considerations which might be sufficiently compelling so as to allow state protection even in the first trimester of pregnancy.[8]

In theory, *Coe* does not foreclose state protection of husbands' and parents' interests in vetoing abortion decisions. However, whether it is possible or practical in light of *Coe* for Florida to draw a valid statutory spousal or parental consent requirement which removes the defects of the now invalid requirement is questionable. The *Roe* criterion for any statute affecting the abortion area is that it be narrowly drawn to express only legitimate and compelling state interests.[9] The purpose of state legislation in drawing such a requirement must be to protect, through legal sanction, unprotected interests of all parties necessarily involved in the abortion decision.[10] The court in *Coe,* while emphasizing that these interests might merit state protection if they could be isolated, states its belief that the "practical problems involved in drafting or enforcing a statute which would exclude interests related to maternal health [or fetal life] in the first trimester,"[11] may possibly make the existence of any statutory spousal or parental consent requirements impossible.

If, however, there are any substantial rights of husbands or parents in the abortion area which closely compete with, or possibly outweigh those of pregnant wives or minor daughters, it seems certain that the courts will find ways to overcome the technical obstacles imposed by *Coe.* For example, an affidavit by a husband that his veto was not made for the reasons of protecting maternal health or the fetus' right to life—reasons proscribed by *Roe*—might be adjudged sufficient proof of its propriety. If no such substantial rights are found to exist, the technical

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7. No. 72-1842 at 5.

8. If the state could demonstrate that the third-party interests sought to be protected by this provision attach at the moment of conception and are interests which fall completely outside the categories of protection of maternal health and potential life, *Roe v. Wade* . . . would not be controlling and the provisions would withstand constitutional attack.
No. 72-1842 at 4.

9. Roe v. Wade, 93 S. Ct. 705, 728 (1973).

10. [1971-1972] FLA. ATT'Y GEN. BIENNIAL REP. 205.

11. No. 72-1842 at 6 n.6.

solution to the consent requirement question imposed in *Coe* will stand.

Do these rights exist, and are they substantial enough to outweigh the pregnant wives' or minor daughters' rights, allowing husbands or parents to veto an abortion with state sanction?[12] The present law is sketchy since this issue had been obscured, until recently, by statutes imposing an almost complete prohibition on abortions.[13] Now that these statutes have been overturned by the Supreme Court in *Roe,* the issues of husband versus wife and of parent versus minor daughter have begun to be considered in the courts.

Coe points to some of the parameters that any court attempting to resolve that question will have to consider. It characterizes the husband's interest as that of "seeing his procreation carried full term,"[14] and the parents' interest as that of "maintaining their traditional control of the family unit."[15] It indicates arguments which could be made for the prevalence of these interests over those of a pregnant female. First, biological differences between male and female should not necessarily foreclose active participation of the male in decisions relating to whether mutual procreation should be aborted or allowed to prosper. Second, the family unit is, in law, a self-governing entity and the primary obligation for the care and control of minor children rests with the parents.

The recent Florida case of *Jones v. Smith,*[16] arising from an unusual fact situation, indirectly illuminates this conflict of a husband's right to his procreation with his wife's right to seek an abortion. In *Jones,* an unmarried potential putative father appealed the denial of his claim seeking to enjoin the nineteen-year-old potential mother from obtaining an abortion. He based his claim on the grounds that he, as the potential father, had the right to participate in the decision to terminate the pregnancy. The court, in affirming the denial of the injunction, held that an unmarried potential mother's right to obtain an abortion was superior to the potential father's right to veto it. Though this outcome is obvious, the reasoning in *Jones* can be analogized to a husband-wife situation. The *Jones* court found that the underlying basis of an unmarried mother's superior interest, vis-a-vis the father, was her fundamental right of privacy which the Supreme Court, in *Roe* had extended to encompass her decision whether to terminate her pregnancy. Most importantly, the *Jones* court found that this right of privacy is purely

12. The question of parental consent to a minor's abortion has been viewed until now as one involving a minor's capacity to consent to the abortion rather than one of possible conflicting rights of a minor and her parents. *See* Comment, *The New York Abortion Reform Law: Considerations, Application and Legal Consequences—More Than We Bargained For?* 35 ALBANY L. REV. 644, 657-61 (1971). There was no judicial discussion of a husband's right to his offspring while the restrictive abortion statutes now overturned by *Roe* were in force. *Id.* at 661-62.

13. For a complete list of these statutes see Roe v. Wade, 93 S. Ct. 705, 709 n.2 (1973).

14. No. 72-1842 at 5.

15. *Id.* at 5.

16. 278 So.2d 339 (Fla. 4th Dist. 1973), *aff'd* — U.S.L.W. — (U.S. Mar. 4, 1974).

personal to the person asserting it,[17] and so, by implication, excludes the father. The court viewed *Roe* as standing for the proposition that since the state cannot interfere in the abortion decision during the first trimester, neither can anyone else for any reason.[18]

This view overstates the Supreme Court's position since the court specifically left open the question of a husband's legal right to participate in the abortion decision.[19] It is still a useful observation, however, because it intuitively captures the thrust of the language of the Court in *Roe*. That language, taken as a whole, gives the impression that, its own disclaimers to the contrary, nothing should restrain a woman's first trimester abortion decision except the medical judgment of her physician.[20]

In Re P.J.,[21] a trial court case decided in Washington, D.C. in February, 1973, speaks directly to the issue of who has the superior right to make or veto an abortion decision as between a minor daughter and her parents. In allowing the abortion, the court held that a woman's fundamental right of privacy, extended by the Supreme Court in *Roe* to cover her abortion decision, could not be denied a minor merely because of chronological age. Not extending that right to minors would be a denial of due process. This decision is of less moment than it might have been, since in that case the minor was living apart from her parents at their insistence, and thus, the necessity of considering any family integrity arguments was almost completely excluded.

Perhaps the language in *Roe* points most clearly to the outcome of the conflict of interests between a pregnant woman and her husband or parents. The Court detailed the direct physical and psychological risks for the mother which exist in every pregnancy.[22] It noted that mortality rates for early abortion are as low or lower than those for normal childbirth.[23] Concurring opinions note the physical and emotional demands made on a woman during her pregnancy,[24] as well as the pain and aftereffects of childbirth and the continued taxing of physical and mental health in providing child care after childbirth.[25] From these facts, it is not difficult to argue persuasively that the interests of a pregnant woman outweigh those of her husband or parents, and that her abortion, if she desires it, should not be prevented by their state-sanctioned vetos.

17. *Id.* at 342.

18. *Id.* at 341-42, 342 n.3.

19. We do not "discuss the father's rights, if any exist, in the constitutional context, in the abortion decision. . . . We need not now decide whether provisions of this kind are constitutional." Roe v. Wade, 93 S. Ct. 705, 733 n.67 (1973).

20. If a woman is willing to change doctors, the medical judgment of her initial physician is, in fact, no restraint at all. She merely inquires as to which doctors have a "liberal" reputation for advising abortions.

21. *In re* P.J., No. J-7150-72 (D.C. Super. Ct., Feb. 6, 1973).

22. Roe v. Wade, 93 S. Ct. 705, 727 (1973).

23. *Id.* at 725.

24. *Id.* at 735 (Stewart concurring).

25. *Id.* at 759 (Douglas concurring).

The loss to a husband of his right to the enjoyment of his offspring and the possible weakening of the integrity of the family are intangible and speculative concepts compared to the direct and immediately measurable emotional and economic consequences to the mother of bearing a child which she does not want. It seems probable that no interests of husbands or parents exist which outweigh those of pregnant wives or minor daughters, and that *Coe* has reached the most desirable result in the most economical manner.

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