



Legal Rights of Unborn Children in North Carolina

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Abortion and Cloning Law in North Carolina

The first section summarizes the current legal rights of unborn children in North Carolina.

The second section is the history of the way that legal rights of unborn children have been approached alongside the law of abortion in North Carolina. A longer version appears as “The End of the State Abortion Fund” 22 Campbell Law Review 119 (1999).

The third section includes questions on human cloning. There is no North Carolina case or statutory authority on this subject except that cloning is subject to limits on abortion for clones that are intentionally destroyed.

Anyone with children knows that birth does not occur in a particularly private setting. Nor do the vast majority of abortions. These occur at clinics that use group counseling and employ a doctor who rarely knows the patient and certainly has not explored with her patient any existential questions on the meaning and mysteries of her existence.¹ Until October 1, 2013, the physician did not even have to be present in the same room with the woman.²

The consequences of an abortion are not limited to those making the decision. One thinks of the father whose opportunities for custody and whose obligations for monthly support obligation can either be zero or a substantial figure multiplied by 12 months times 18 years. His financial interest is in seeing the abortion go forward but he is allowed no say in the decision.³ On the other, hand the Social Security Trust Fund is heading toward insolvency because of the rapidly declining ratio of workers to retired people. Whatever the merits of these countervailing fiscal pressures the consequences of an abortion are anything but private.

Summary of the Law of Abortion in North Carolina as of October 1, 2013

With one exception, for any reason at all a mother can authorize a licensed doctor, of any specialty or of no specialty, to end the life of her unborn child up until the time she gives birth. Statutory limitations on the reasons or limits on the gestational age have been unenforceable for several decades, but the press persists in reporting that there are legally enforceable limits. There

¹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

² S.L. 2013-366 Sec. 4(a). N.C. Gen. Stat. § 90-21.82(a).

³ *Planned Parenthood v. Casey*, supra, Section VC.

have been none. But on October 1, 2013, there is now one limit: An abortion may not be performed when a significant factor is related to the sex of the unborn child.⁴

Paradoxically, while the unborn child's life is not protected at all, her rights to property are protected. The property of a parent dying without a will immediately vests in the unborn child as to real estate and as to personal property since 1809. Since 1839 an unborn child may take property by will. Since 1854 an unborn child can receive and hold title to real estate by a deed. Since 1853 the courts have recognized that an unborn child may take property under a passive trust and since 1860 an unborn child could be the beneficiary of an active trust. Unborn children today have their property rights protected by a guardian *ad litem*. But this guardian cannot take any action to preserve the unborn child's life.

Mr. and Mrs. Jones may be eagerly awaiting the birth of the daughter they named Sally after seeing her suck her thumb in real time on ultrasound. Her birth is expected next month. But, until December 1, 2011, when a gunman shoots Mrs. Jones, (knowing that Mrs. Jones is pregnant and even intending to kill Sally) so that Mrs. Jones is injured and Sally dies, the gunman was only guilty of aggravated assault,⁵ not of Sally's murder.⁶ But, if Sally survived the assault, the gunman (or a negligent motorist) is liable to Sally for perhaps millions of dollars in damages for her injuries. Session Law 2011-60, the Unborn Victims of Violence Act, changed this result by making the crime against the unborn child of equal gravity to the crime against her mother.⁷

The government safeguards us from toxic exposure. And state government spends hundreds of millions of dollars each year on perinatal care for the poor so that their children will grow up strong and healthy. But if there is an environmental danger specific only to unborn children an employer cannot keep women who could become pregnant away from that danger. (even knowing that a foreseeable percentage of the children will be born with serious birth defects).⁸

Until children are 18 years of age a parent's consent is needed for almost everything- a field trip to the zoo, piercing of the ears. But a 15 year old can procure an abortion by going to a judge in a distant county asking the judge not to notify her parents but instead to allow complete strangers to operate on her.⁹ And our Court of Appeals has ruled that the abortionist can rely on a handwritten "parental" consent, without requiring any identification or any authentication, and which is actually forged by the child.¹⁰ Effective October 26, 2011, the Woman's Right to Know Act requires that the parent or guardian receive the same information that their child or ward receives so that the *Jackson* case is now effectively overruled.¹¹

An Historical Approach to Unborn Children and Abortion

In 1859 its Committee on Criminal Abortion recommended to the American Medical Association a resolution, unanimously adopted, condemning the act of abortion at every period of gestation except as necessary for preserving the life of either mother or child. The stated

⁴ S.L. 2013-366 Sec. 3(a), N.C. Gen. Stat. § 90-21.120 et. seq.

⁵ N.C. Gen. Stat. § 14-18.2 (or an abortion, N.C. Gen. Stat. § 14-44).

⁶ *State v. Beale*, 324 N.C. 87 (1989).

⁷ N.C. Gen. Stat. § 14-23.

⁸ *International Union v. Johnson Controls*, 499 U.S. 187 (1991) (lead exposure - Title VII).

⁹ N.C. Gen. Stat. § 90-21.6 et. seq.

¹⁰ *Jackson v. A Woman's Choice*, 130 N.C.App. 590 (1998) pet. for disc. rev. den. 349 N.C. 360 (1998) Cf. *Manning v. Hunt*, 119 F.3d 254 (4th Cir 1997) (upholding the statute against constitutional challenges).

¹¹ N.C. Gen. Stat. § 90-21.87.

reason for the resolution was the increasing frequency "of such unwarrantable destruction of human life."¹²

North Carolina did not have an abortion statute at the time because the common law (imported from England as of 1776)¹³ made abortion a crime. In *State v. Slagle*,¹⁴ Judge Ashe held that abortion was a misdemeanor at common law: "It has been said that it is not an indictable offense . . . unless the mother is quick with child, though such a distinction, it is submitted, is neither in accordance with the results of medical experience or with the principles of the common law."¹⁵ In the second hearing of the case, Chief Justice Smith reiterated the prior holding that abortion was a common law misdemeanor: "The moment the womb is instinct with life and gestation has begun, the crime may be perpetrated."¹⁶

In immediate response to *Slagle*, N.C. Gen. Stat. § 14-44 and § 14-45, enacted in 1881, raised the punishment for the crime of abortion to a felony. This was part of a nationwide movement begun by the American Medical Association in 1859 to protect mothers and their children. These statutes are still on the books and still apply if someone other than a licensed doctor tries an abortion on a woman. The U.S. Supreme Court feels that a right founded on "privacy" exists in the presence of a phalanx of employees and other patients at a volume abortion clinic – but that right of privacy does not exist when a woman performs an abortion on herself in her own home.¹⁷

It is becoming well known that in 1973 the U.S. Supreme Court legalized all abortions performed by a doctor. The combination of *Roe v. Wade*,¹⁸ *Doe v. Bolton*,¹⁹ and *Planned Parenthood v. Casey*²⁰ mean that this right of a mother, if performed by a doctor, continues even until the child is in the birth canal. The United States Supreme Court has upheld the Federal Partial Birth Abortion Act which pushes this "right" to an abortion back inside the womb. But the abortionist can still use other means to terminate the pregnancy until immediately before birth.²¹ N.C. Gen. Stat. § 14-45.1, enacted in 1973 in response to *Roe v. Wade*, appears to limit the "right" to 20 weeks gestation. But that limit has not been enforceable for the last 34 years.²²

While the Supreme Court of the United States has decided that the unborn child has no right to live, if her mother and the mother's doctor decide otherwise, the unborn child in North Carolina retains extensive property rights. I elaborate on this to demonstrate that treating the unborn child as a juridical being is not a recent, nor a difficult, concept to understand and apply.

We have already noted, but now further explain, that the property of a parent dying intestate (without a will) immediately vests in the unborn child.²³ In *Deal v. Sexton*, a partition proceeding had been brought, and lands sold without making a party an unborn child of the

¹² American Medical Association, Minutes of the Annual Meeting, 1859, 10 The American Medical Gazette 409 (1859).

¹³ N.C. Gen. Stat. § 4-1.

¹⁴ *State v. Slagle*, 82 N.C. 653, 655 (1880).

¹⁵ *State v. Slagle*, at 655 (1880).

¹⁶ *State v. Slagle*, 83 N.C. 630, 632 (1880).

¹⁷ *Connecticut v. Menillo*, 423 U.S. 9 (1976).

¹⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹ *Doe v. Bolton*, 410 U.S. 179 (1973).

²⁰ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992),

²¹ *Cf. Planned Parenthood v. Danforth* 428 U.S. 52 (1976) (invalidating a ban on the use of saline amniocentesis).

²² *Colautti v. Franklin*, 439 U.S. 379 (1979). See also *Planned Parenthood v. Danforth*, supra.

²³ *Deal v. Sexton*, 144 N.C. 157, 56 S.E. 691 (1907) (realty); *Hill v. Moore*, 5 N.C. 233 (1809) (personalty).

deceased. The lands were sold to a bona fide purchaser for value without knowledge of the existence of the unborn child. In securing the child's inheritance the court said:

“If we hold, as we must, that the inheritance vested immediately in the plaintiff while *en ventre sa mere*, upon the death of the father, the conclusion must follow that such inheritance ought not to be divested and the child's estate destroyed by judicial proceedings to which it was in no form or manner a party; and for which not even a guardian ad litem was appointed. It may be that our civil procedure is defective in not providing for such contingencies, but that is no reason why the vested estate of the unborn child *in esse* should be taken from it. The general rule in this country and the acknowledged rule of the English law is that posthumous children inherit in all cases in like manner as if they were born in the lifetime of the intestate and had survived him, and for all the beneficial purposes of heirship a child *en ventre sa mere* is considered absolutely born. This has been the recognized law of this State since *Hill v. Moore*, 5 N.C. 233, decided in 1809.

*"From most remote times the common law of England regarded such child as capable of inheriting direct from the ancestor as much so as if born."*²⁴

In *Grant v. Bustin*,²⁵ it was made clear that only posthumous children conceived before death, (but not those conceived after death) can take by intestate succession. In that case a half-brother of the intestate, born ten and a half months after the death of his brother claimed a share along with his older brothers and sisters. The court was careful to point out that the half-brother did not claim that he was *en ventre sa mere* at the date of death. Therefore the court held:

“But the rule, nevertheless, is that the RIGHT to the distributive share vests at the death of the intestate. It is said the rule is liable to an exception in the case of a child in *ventre sa mere*. In truth, however, a child in *venare sa mere* [*sic*] is held capable of taking a distributive share, because for all beneficial purposes, it is in *rerum natura*, is regarded as actually *in esse*. The very reason on which these adjudications are founded shows that one not in being, and not considered as in being at the death of an intestate, can, under the statute of distributions, prefer no claim to a share of that intestate's estate. It is not stated in this case, nor can we infer from the facts set forth, that Benjamin Bustin was in *ventre sa mere* at the death of Patience Pitts, and we therefore hold that he was not entitled to the distributive share claimed for him in her personal estate.”²⁶

In 1823 the General Assembly enacted as Chapter 32 of the Laws of North Carolina from 1817 to 1825, the following:

“No inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten months after the death of the person last seized.”

That statute's descendant, N.C. Gen. Stat. § 29-9, now states:

“Lineal descendants and other relatives of an intestate born within ten lunar months after the death of the intestate, shall inherit as if they had been born in the lifetime of the intestate and had survived him.”

²⁴ Id. at 158-159.

²⁵ *Grant v. Bustin*, 21 N.C.77 (1835).

²⁶ Id. at 77-78.

The normal length of pregnancy is 266 days.²⁷ By choosing ten (lunar) months as the cutoff it is apparent that the legislature attempted to provide some certainty as to titles and yet allow the child who is a collateral relative to take from conception with some margin of error for the late pregnancy. The child of an intestate who is born more than 10 lunar months after death of the intestate is still able to take by inheritance if he is indeed the child of the intestate. The presumption that pregnancy lasts only ten lunar months is only a factual presumption which may be rebutted by evidence.²⁸

The common law held that a child, if conceived, could take a vested interest under a devise to "children" in a will.²⁹ In *Flora* the testator devised lands to his wife during widowhood and, upon her remarriage, to her heirs by consanguinity. No children were born to the testator during his lifetime, but after his death and after his widow remarried, she gave birth to a child with whom she was pregnant by the testator. It was held that, upon her remarriage, the land vested in the unborn child, and on the child's death descended to the child's heirs *ex parte paternal*.

By 1854 the unborn child was capable of taking a vested interest in property by deed as soon as she was conceived. The question arose because of the common law requirement that a deed must be delivered in order to be valid (similar to enfeoffment by livery of seisen). In *Dupree v. Dupree*,³⁰ a conveyance was executed on January 9, 1817 to "Washington and Lewis Dupree, sons of Robert and Rachel Dupree, and to the next of their heirs lawfully begotten of their bodies." On October 9, 1817 James Dupree was born to Robert and Rachel and claimed an interest. The court denied his claim stating that an actual delivery of the deed was necessary.³¹

The General Assembly apparently thought so little of the reasoning in *Dupree* (which would allow an unborn child to take property by will, by trust, or by use, but not directly by deed), that at the next opportunity (1854) it enacted a remedial statute, which is now N.C. Gen. Stat. § 41-5:

"An infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born."

While the ability of the unborn child to take as beneficiary of a passive trust is admitted in *Dupree*, such a child also could have a property right as beneficiary of an active trust.³² And the unborn child must be appointed a guardian ad litem when her rights to property are in litigation.³³

The bizarre conclusion is this: For all purposes beneficial to her the unborn child is protected by the law of North Carolina, unless the child's mother procures a doctor to terminate all of the child's rights, including her life, in which case the Federal courts tell us that this is such a private matter that generally the State may not intervene.

²⁷ Keith Moore, *The Developing Human* (2d ed. 1977) p 82.

²⁸ *Byerly v. Tolbert*, 250 N.C. 27 at 35, 108 S.E.2d 29 (1959).

²⁹ *Flora v. Wilson*, 35 N.C. 344 (1852).

³⁰ *Dupree v. Dupree*, 45 N.C. 165 (1853).

³¹ *Id.* at 167.

³² *Gay v. Baker*, 58 N.C. 344 (1860).

³³ Rule 17(b)(4) of the Rules of Civil Procedure.

Does the unborn child have a right to not have the government pay for her (or his) demise?

In 1977 Congress virtually ended the practice of using federal taxes to pay for medically unnecessary abortions through the Hyde Amendment. Governor Jim Hunt created a State Abortion Fund, effective February 1, 1978 to pay for “medically unnecessary” (the actual administrative rule) abortions up to 20 weeks of pregnancy. Lacking appropriated funds for the purpose the Governor took \$250,000 that had been appropriated for mental health services and used these funds to pay for abortions. Later he requested from the General Assembly \$1 million per year for taxpayer financed abortions. In 1979 he transferred \$303,000 that had been appropriated for rest homes and used that money to pay for medically unnecessary abortions beyond the \$1 million the General Assembly had appropriated. In 1980 the Governor again needed more money for abortion than the \$1,000,000 the General Assembly had provided. He transferred \$367,000 from Aid to Families with Dependent Children to the State Abortion Fund. In 1981 he again needed to find more money for abortion - again transferring \$235,000 to increase the abortion fund to \$1,235,000 – again taking the additional funds from Aid to Families with Dependent Children.³⁴

James Martin served two terms as governor from 1985 – 1993. During these years annual abortion funding was reduced from \$1,235,000 to \$924,000 in 1985-1989 and then to \$424,000/year from 1989-1993. In those days the Governor had no veto power.

When Governor Hunt again took office for a third term in 1993 abortion spending tripled, at his request, with yearly totals of \$1,212,000.00 until 1995. In 1995 the General Assembly ended the state abortion fund for all practical purposes and ended North Carolina's 17-year history as the only southern state to pay for elective abortions as part of its welfare program.

As a consequence of varying criteria and funding levels the number of abortions funded by the State Abortion Fund since its inception were:³⁵

Fiscal Year	# of Abortions	Fiscal Year	# of Abortions
1977-1978	1,123	1995-1996	0
1978-1979	6,125	1996-1997	1
1980-1981	5,730	1997-1998	0
1981-1982	4,295	1998-1999	0
1982-1983	6,149	1999-2000	0
1983-1984	6,645	2000-2001	0
1984-1985	6,564	2001-2002	0
1985-1986	2,662	2002-2003	0
1986-1987	4,181	2003-2004	0
1987-1988	3,600	2004-2005	0

³⁴ See *Stam v. State*, 302 N.C. 357, 362 (1981) (holding that there is no state constitutional prohibition against this state program but also holding that county funding of abortion must stop- “we find it inconceivable that the Legislature would have intended medically unnecessary abortions to be basic necessities of life.”).

³⁵ P.J. Cook et al. “The effects of short-term variation in abortion funding on pregnancy outcomes.” Volume 18, Issue 2, *Journal of Health Economics* 241 at 247 (April, 1999) and Division of Social Services.

1988-1989	4,137	2005-2006	0
1989-1990	1,921	2006-2007	0
1990-1991	2,330	2007-2008	0
1991-1992	2,156	2008-2009	0
1992-1993	2,132	2009-2010	0
1993-1994	4,448	2010-2011	0
1994-1995	4,587		

These numbers do not include abortions paid under the federal Medicaid program. In 1997 Medicaid funds paid for 59 abortions based on rape, 2 cases involving incest and 5 cases involving danger to the life of the mother. By SFY 2009 these had dropped to 18 abortions where rape, incest, or danger to the life of the mother was alleged, in SFY 2010 Medicaid funded 20 abortions and in SFY 2011 it funded 24. In SFY 2012 there were 12 and in SFY 2013 there were 10, of which 5 were on account of rape and 5 on account of danger to the life of the mother. That is still the criteria for the use of Medicaid funds.

In *Williams v. Zbaraz*,³⁶ the U.S. Supreme Court held that the federal constitution did not require taxpayer financed abortions. Typical was 112 Stat. 2681-385, Public Law 105-277, Section 508 and 509, Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations Act, October 21, 1998 which provides as follows:

“Sec. 508 (a) None of the funds appropriated under this Act and none of the funds in any trust fund to which funds are appropriated under this Act shall be expended for any abortion. (b) None of the funds appropriated under this Act shall be expended for health benefits coverage that includes coverage of abortion. (c) The term “health benefits coverage” means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.

“Sec. 509 (a) The limitations established in the preceding section shall not apply to an abortion—(1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed. (b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State’s or locality’s contribution of Medicaid matching funds). (c) Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a State’s or locality’s contribution of Medicaid matching funds).”

The Hyde Amendment does not appear in the United States Code. Instead it is a yearly part of the appropriations bills and continuing resolutions. For the last 20 years or so the text has remained relatively constant. During the early days of the Hyde Amendment an argument was advanced that restricting state abortion funding would increase the number of abortion related complications due to an increase in resort to illegal abortions. That projection did not materialize. The Center for Disease Control reviewed 600 consecutive hospital charts of women in Texas

³⁶ *Williams v. Zbaraz*, 448 U.S. 358 (1980).

with abortion related complications that caused them to seek emergency medical care. Texas was one of the 31 states that had ended the use of state funds for abortion. “The chart review revealed no increase after the restriction, compared to the time interval before the restriction, in either the number or proportion of Medicaid or Title XX – eligible women admitted for abortion complication.”³⁷

Denial of tax funds for abortion probably does not increase the actual number of children born for this reason: If a permanent prohibition on state abortion funding is in place investigators believe that it probably reduces fertility sufficiently to offset the number of births!

“To the extent that it is known in advance, the cost of obtaining an abortion may also influence the initial decisions regarding sex. The vast increase in abortions following legalization in the early 1970s was associated with a far-smaller reduction in births, indicating (together with direct evidence on sexual practice) that there was a considerable ‘moral hazard’ effect from legalization.

“...For women who did not want a baby but were willing to abort if pregnant, legalization reduced the expected cost of taking a chance of becoming pregnant. The result was a large increase in unwanted pregnancies.

“A number of authors have pointed out a possible paradoxical effect on birth rates. While reducing the cost of abortion reduces the probability of birth given pregnancy, the pregnancy rate may increase by enough to more than compensate. . . . Hence the effect of abortion costs on the birth rate is indeterminate.”³⁸

In *Rosie J. v. N.C. Department of Human Resources*,³⁹ the North Carolina Supreme Court held that there was no state constitutional right to state funded abortions.

Effective July 1, 1995 the North Carolina General Assembly had restricted eligibility for payment from the state abortion fund to cases where the pregnancy resulted from “cases of rape or incest or to terminate pregnancies that, in the written opinion of one doctor licensed to practice medicine in North Carolina, endanger the life of the mother.”⁴⁰ These limits did not appear in the general statutes (until 2011) but in the biannual appropriation bill. This limit was constant for 16 years.

But the new general statute, effective July 1, 2011, applies to *all state funding*, including the State Health Plan, and not just to welfare funding.

LIMIT STATE ABORTION FUNDING/HEALTH PLAN/INSURANCE

SECTION 29.23.(a) of HB 200 (The 2009-2011 Budget Bill amended) Part 1 of Article 6 of Chapter 143C of the General Statutes added a new permanent section:

"§ 143C-6-5.5. Limitation on use of State funds for abortions.

No State funds may be used for the performance of abortions or to support the administration of any governmental health plan or government-offered insurance policy offering abortion, except that this prohibition shall not apply where (i) the life of the mother would be endangered if the unborn child were carried to term or (ii) the pregnancy is the result of a rape or incest. Nothing in this section shall be construed to limit medical care provided after a spontaneous miscarriage."

³⁷ Morbidity and Mortality Weekly Report, Vol. 29, No. 22, June 6, 1980.

³⁸ P.J. Cook et al. “The effects of short-term variation in abortion funding on pregnancy outcomes” Volume 18, Issue 2, Journal of Health Economics 241 at 243 (April, 1999).

³⁹ *Rosie J. v. N.C. Department of Human Resources*, 347 N.C. 247, 491 S.E.2d 535 (1997).

⁴⁰ 1995 N.C. Session Laws Chapter 324 Section 23.27 (Budget for FY 1995-1997) as clarified by 1995 N.C. Session Laws Chapter 507 Section 23.8A.

SECTION 29.23.(b) Effective until January 1, 2012, the provisions of G.S. §135-45.8(21) and (22) do not apply to complications or related charges from an abortion not covered under G.S. §143C-6-5.5, as enacted by subsection (a) of this section.

SECTION 29.23.(c) Effective January 1, 2012, G.S. §135-48.50(1), as enacted by S.L. 2011-85, reads as rewritten:

"(1) Abortion coverage. – The Plan shall not provide coverage for abortions for which State funds could not be used under G.S. §143C-6-5.5. The Plan shall, however, provide coverage for subsequent complications or related charges arising from an abortion not covered under this subdivision."

After the 1995 legislation, "Rosie J.", as well as an abortion clinic, Raleigh Women's Health Organization and a doctor who performs abortions, John Marks, claimed that under the State Constitution tax paid abortion was guaranteed under Article I, Section 1 "life, liberty" clause, Article I, Section 19, "law of the land" and "equal protection" clause and Article XI, Section 4. ("Beneficent provision for the poor, the unfortunate and the orphan is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare.") The North Carolina Supreme Court did not think that these provisions of the state constitution guaranteed tax paid abortions.

While the preborn children of the poor and of state employees and teachers now have a legislative right not to have North Carolina pay for their elimination, other preborn children were not so fortunate. Until recently, counties and cities continue to spend hundreds of thousands of dollars in local funds for elective abortions, a practice ended by the Federal government for its employees with repeated passage of the DeWine Amendment as part of the yearly appropriations process. Eleven other states also prohibit this practice. North Carolina adopted the "DeWine Amendment" effective July 1, 2011, for state (but not local) employees. But effective October 1, 2013, cities and counties were prohibited from including abortion in health insurance coverage except for rape, incest, or where the life of the mother would be endangered.⁴¹

North Carolina has also exercised its right under the Affordable Care Act to opt out of covering abortion services under a qualified health plan offered through an Exchange pursuant to the Affordable Care Act. Coverage is allowed for abortions performed when "when the pregnancy is the result of an act of rape or incest or the life of the mother is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."⁴² Over twenty other states have already chosen this opt-out provision.

Informed Consent

A study conducted in 2003 at the School of Public Health and School of Medicine at the University of North Carolina at Chapel Hill underscored some additional concerns that impact the rights of unborn child and their parents.⁴³

Dr. John Thorp and Dr. Katherine Hartmann of UNC-Chapel Hill, and Dr. Elizabeth Shadigian of the University of Michigan concluded their study by recommending that women be told of the following long term physical and psychological health consequences of induced abortion:

⁴¹ N.C. Gen. Stat. § 153A-92(d), N.C. Gen. Stat. § 160A-162(b), S.L. 2013-366 Sec. 2(b)(c) and (d).

⁴² S.L. 2013-366 Sec. 2(a).

⁴³ "Long term physical and psychological health consequences of induced abortion: A review of the evidence." *Obstetrical and Gynecological Survey* 58(1):67-79 (2003); also available at www.obgynsurvey.com.

1. “mental health correlates of an increased risk of suicide or self harm attempts as well as depression and a possible increased risk of death from all causes.”⁴⁴
2. “a decision to abort her first pregnancy may almost double her life time risk of breast cancer through loss of protective effect of a completed first full term pregnancy earlier in life.” A subsequent study in *Lancet* did not support “the disputed independent risk of induced abortion on breast cancer risk.” But the *Lancet* study did not challenge the well-known increase in risk to a woman in the midst of a first pregnancy from loss of the protective effect of completing the pregnancy.
3. “risk of subsequent pre-term birth, particularly of a very low birth weight infant.”⁴⁵

Although this information will not prevent a mother from terminating her pregnancy it may well give her pause, knowing that in aborting her child she creates additional serious health risks for herself and her next child. And if these consequences occurred from any other risk factor, it is inconceivable that the regulatory agencies, such as the FDA or the CPS Commission would not immediately shut the provider down. But until the passage of the Woman’s Right to Know Act in 2011, this information was not readily available to women. Now under the Act every woman is entitled to truthful and relevant information needed for her to make an informed decision whether or not to abort her unborn child. Effective for school year 2013-2014 sex education classes in public schools will include instruction on the preventable risks for preterm birth, including induced abortion in prior pregnancies.⁴⁶

As suggested by Dr. Thorp and Dr. Hartmann, the informed consent provisions of the new law require that the potential adverse psychological effects and the risk of subsequent pre-term births be explained to the woman at least 24 hours prior to the abortion. But it requires that other vital information be given to the woman as well.

Twenty-four hours prior to the abortion the woman must be informed, either by telephone or in person, of the following: the name of her physician, the particular medical risks associated with the abortion method to be performed, the probable gestational age of the unborn child, and the risks of carrying the child to term. The woman must be given information on medical assistance benefits available, public assistance programs, that the father is liable to help support the child, and that adoption is an alternative.

The law requires that the Department of Health and Human Services provide printed materials that must be offered to the woman and be available on a website maintained by the Department (<http://wrk.ncdhhs.gov>). The printed materials must include a resource directory containing contact information of public and private agencies and services that could assist a woman through her pregnancy. There must also be materials that have detailed information on the unborn child at two week increments, methods of abortion procedures and the risks association with those methods, adverse psychological effects of abortion, and risks of carrying a child to term.

One of the most controversial sections of this law is the ultrasound requirement. At least four hours before a woman has an abortion, the physician or qualified technician on site must perform an ultrasound and give a simultaneous explanation of what is being displayed on the

⁴⁴ See also, Rue VM, et al., “Induced Abortion and Traumatic Stress: A Preliminary Comparison of American and Russian Women.” *Medical Science Monitor*, 2004, 10(10): SR5-16.

⁴⁵ See also, Swingle, HM, et al. "Abortion and the Risk of Subsequent Preterm Birth: a systematic review with Meta-Analyses." *Journal of Reproductive Medicine*, 2009, 54(2): 95-108.

⁴⁶ S.L. 2013-307, N.C. Gen. Stat. § 115C-81(e1)(4)(i).

screen, which is required under § 90-21.85. An opportunity to hear the fetal heart tone must also be presented to the woman. Currently, this one section of the law is preliminarily enjoined by Judge Catherine Eagles in *Stuart v. Huff*.⁴⁷ However, in *Texas Medical Providers v. Lakey*,⁴⁸ the Fifth Circuit Court of Appeals unanimously upheld a similar ultrasound provision.

Including Texas, several dozens of other states have adopted similar laws to the North Carolina's Woman's Right to Know Act. In Mississippi, the type of information offered by the Woman's Right to Know Act dropped the rate of abortions in the state by approximately ten percent. The new information provided by the law is changing the minds of women considering abortion. Ensuring that each woman is provided with the necessary information to make an informed decision is the ultimate goal of the new law; and if the information is changing minds, and subsequently action, the information is material to her decision and should not have been withheld from her in the first place.

In 2010 there were a total of 29,444 reported induced abortion on North Carolina residents. In 2012, there were 24,439. It is difficult to know which of the changes in law in 2011 caused or partially caused this 17% decrease in the number abortions over a two-year period. Nor is it easy to predict how the changes effective October 1, 2013, will impact the number of reported abortions.

Cloning Impacts Others

Let me raise questions that help me think about human cloning and whether it is a truly "private" act without implications for justice:

1. If only one parent is necessary for reproduction, what social structure will be required to see that two adults are normally responsible for the support of a child? If the second parent is only "on the hook" as a matter of contract, and not because of a shared life, what is to keep that parent sacrificing in the lean years.
2. Should the law impose on the professional cloner secondary duties of child support and rights of visitation? Why is there any less duty of support on the cloner than on a "father" who is liable for 18 years of support for contributing nothing more to a child's life than sperm. The cloner specifically intended that a child be conceived while the biological father may have intended something very different.
3. Should the amount of child support for which the professional cloner is liable be based on the mother's standard of living or on the cloner's standard of living.
4. We would all be rather put off if the eccentric rich decided to make 100 clones of themselves. But they really do control great wealth and some have little common sense. If the law allows cloning of individual human beings for some humanitarian purpose does anyone think that the law could then prevent Bart Simpson from plaguing the 21st century with another 100 yapping Simpsonistas if his vanity demanded it.
5. Surrogate motherhood, in vitro fertilization and artificial insemination already separate reproduction from sex. But genetic biodiversity is not adversely impacted because the male contribution to the DNA is still present. With cloning will biologic homogeneity provide avenues for epidemic diseases similar to what the potato did to Ireland.

⁴⁷ *Stuart v. Huff*, 2011 WL 6330668 (M.D.N.C.).

⁴⁸ *Texas Medical Providers v. Lakey*, 2012 WL 373132 (W.D.Tex.).

6. How will cloning change the use of DNA to convict (or exonerate) criminal defendants? Will the prosecutor have to prove alibis for all the other clones in order to prove guilt beyond a reasonable doubt? "What did which clone know and when did they each know it, respectively?"
7. People die prematurely. Some divorce or suffer accidents. Others are murdered. One of the wonderful things about the normal process of courtship, marriage, sex and children is that a child normally has not only two parents but two families – multiple grandparents, in-laws and cousins, as well as brothers and sisters. This support structure can often step up to its responsibility when one or both parents fail. But if a child is intentionally created with only half of that support structure, to whom will the child turn when the first half fails her.
8. May a cloned human being be held in slavery? I hope not. May a child be cloned for the purpose of a tissue match for the parent? Assuming that use of the child for that purpose entails some risk or pain, then who will give informed consent? If it is the parent have we not in effect sanctioned slavery, that is, using another human being as a means to someone else's ends– not empowering that human being as an end in herself.
9. If cloning requires a dozen unsuccessful tries for each successful birth is this not planned abortion in hyperdrive when the old justifications for abortion do not apply (ignorance, poverty)?
10. If there is no need for men in family formation what social consequences can we predict from an increase in the number of families without a resident father? Those studies are already in hand and the results are overwhelmingly bad for children.
11. The fertility rate is dropping in America. But is the rate now dropping so quickly that the usual, virtually free, method of producing children needs to be supplemented by hyper-expensive methods? Couldn't the need be handled by simply encouraging adoption. Is the problem lack of children? Or is the real problem vanity?
12. Is the vanity of a person who won't mix his genes with another – if not in bed at least in the test tube – an important interest that should be humored by a mature society. Or would character development be enhanced if those wishing to create children were required to develop social skills sufficient to create children in the context of a family.

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