

IN THE NINTH JUDICIAL CIRCUIT COURT OF  
THE STATE OF FLORIDA

In the matter of the Guardianship  
of

\_\_\_\_\_,  
An Incompetent Person

CASE NO:

**MEMORANDUM OF AMICI CURIAE AMERICAN CIVIL LIBERTIES  
UNION, AMERICAN CIVIL LIBERTIES UNION OF FLORIDA,  
FLORIDA NATIONAL ORGANIZATION FOR WOMEN, INC., AND  
CENTER FOR REPRODUCTIVE RIGHTS IN OPPOSITION TO  
PETITION FOR APPOINTMENT  
OF GUARDIAN FOR THE FETUS**

*Amici curiae* the American Civil Liberties Union (“ACLU”), the ACLU of Florida, Florida National Organization for Women, Inc. (“Florida NOW”), and Center for Reproductive Rights (“the Center”) submit this memorandum of law in opposition to the state or governor’s petition for the appointment of a guardian for the fetus of the pregnant woman involved in this matter. As the Supreme Court of Florida has held, the appointment of a guardian ad litem for a fetus in the context of an abortion decision is “clearly improper.” *In re T.W.*, 551 So. 2d 1186 (Fla.

1989). This is true under the federal and Florida Constitutions and under the relevant statutory schemes.

### **INTEREST OF AMICI CURIAE**

The ACLU is a nationwide nonpartisan organization of 400,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions. The ACLU of Florida is its state affiliate and has approximately 12,000 members in the state of Florida also dedicated to the principles of liberty and equality embodied in the United States and Florida Constitutions. The ACLU and its affiliates, including the ACLU of Florida, have long been committed to protecting the constitutional right to reproductive choice, including by participating as *amicus curiae* in *In re T.W.*, 551 So.2d 1186, in which the Florida Supreme Court held that the appointment of a guardian ad litem for a fetus is “clearly improper.” *Id.* at 1190.

Florida NOW is a subdivision of the national organization, NOW, a non-profit, tax-exempt civic organization under Sec. 501(c)(4) of the Internal Revenue Code. NOW is dedicated to advancing women's equality and self-determination by, *inter alia*, protecting women's reproductive rights through both litigation and advocacy.

The Center for Reproductive Rights (“the Center”) is a national public interest law firm dedicated to preserving and expanding reproductive rights in the

United States and throughout the world. The Center has long been active in working to protect the constitutional right of reproductive choice in Florida, including serving as lead counsel in challenges to Florida statutes banning abortion methods, limiting Medicaid coverage of medically necessary abortions, imposing a parental notification requirement on minors, and promoting an anti-choice message on license plates.

The proper resolution of this case is a matter of substantial concern to *amici*. In addition, it is respectfully submitted that *amici*'s analysis of the important constitutional question raised by this case may assist this Court in resolving the issue.

### **STATEMENT OF THE CASE**

*Amici* understand that the woman whose case is now before this Court was raped at a state-licensed group home, where she has lived for many years because of severe mental incapacitation. *Amici* further understand that she is at least five months pregnant as a result of the rape, and that the state or governor has petitioned or intends to petition this Court for the appointment of not only a guardian for her, but also a guardian for her fetus. *Amici* oppose the appointment of a guardian for the fetus as impermissible.

## ARGUMENT

### **I. The Appointment of a Guardian for the Fetus Is Impermissible Under Longstanding Florida Supreme Court and United States Supreme Court Precedent.**

The Supreme Court of Florida has clearly recognized the impermissibility of appointing a guardian for the fetus when an abortion decision is at issue. In *In re T.W.*, 551 So. 2d 1186, 1189 (Fla. 1989), the Florida Supreme Court reviewed *inter alia* a lower court's decision to appoint a guardian ad litem for the fetus of a pregnant minor who sought judicial permission to obtain an abortion without first receiving parental consent. The Florida Supreme Court unambiguously reversed the trial court's decision to appoint a guardian for the fetus. In one sentence, the Court held, "[W]e find that the appointment of a guardian ad litem for the fetus was clearly improper." *Id.* at 1190. The Florida Supreme Court has thus unequivocally decided the question presented here and, pursuant to its binding precedent, the state or governor's petition for the appointment of a guardian for the fetus must be rejected.

The Florida Constitution contains an explicit right to individual privacy that has no parallel in the United States Constitution. Article I, section 23 of the Florida Constitution provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life . . . ."

This “fundamental right to privacy” gives “more protection” to Florida Citizens than does the federal Constitution. *See, e.g., Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996); *In re T.W.*, 551 So. 2d 1186. “[T]he Florida constitution requires a ‘compelling’ state interest in all cases where the right to privacy is implicated.” *In re T.W.*, 551 So. 2d at 1195.

Even under the less protective federal Constitution, United States Supreme Court authority precludes the appointment of a guardian for the fetus. Since its decision in *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court has repeatedly protected a woman’s constitutional right to choose whether to continue a pregnancy. The basis for this constitutional protection is the recognition that the decision whether to continue a pregnancy involves personal considerations that are central to a woman’s dignity and autonomy. The Supreme Court has explained why the Constitution protects *for the woman involved* the right to decide whether to continue or terminate a pregnancy:

[T]he liberty of the woman [making that choice] is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.

*Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992). Similarly, the Florida Supreme Court has stated, with reference to the decision whether to continue a pregnancy, that “[w]e can conceive of few more personal or private decisions

concerning one's body that one can make in the course of a lifetime." *In re T.W.*, 551 So. 2d at 1192.

In light of those profound interests, the United States Supreme Court held that a state may not even require that a woman's husband be notified that she is considering an abortion, notwithstanding its recognition of a husband's "deep and profound concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus that she is carrying." *Id.* at 895 (internal quotations omitted). The Court emphasized that the right rests with the woman: "If the right to privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 896 (internal quotations omitted). Because requiring spousal notification would permit a third party to impose its preference on the woman's decision, "operat[ing] as a substantial obstacle to a woman's choice to undergo an abortion" before fetal viability,<sup>1</sup> *id.* at 895, the Court held the spousal notification requirement unconstitutional.

Appointing a guardian for the fetus would likewise permit a third party to substantially intrude on the woman's abortion decision and have the impermissible

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<sup>1</sup> "[V]iability is reached when, in the judgment of the attending physician . . . there is a reasonable likelihood of the fetus' sustained survival outside the woman." Colautti v. Franklin, 439 U.S. 379, 388-89 (1979).

“purpose or effect of placing a substantial obstacle in the path of a woman” considering an abortion, thus violating the federal Constitution. *Id.* at 877. The appointment of a guardian for the fetus creates an automatic adversary to a woman genuinely considering abortion as an option and ensures vigorous opposition to any potential decision to seek an abortion, which by definition would be detrimental to the fetus. The woman’s rights are paramount and the state may not constitutionally designate someone to promote opposing arguments and erect legal barriers in the path of a woman seeking to effectuate her right to choose an abortion. As a New Jersey court in a similar case has explained,

[I]t is the mother who controls the fetus, until viability occurs, not the reverse. That control is a constitutional right. If the mother is incompetent, control must be exercised through a guardian [for the woman]. The appointment of a guardian for the fetus, prior to its viability, is therefore improper. Such an appointment permits a third party to control the fetus, contrary to *Roe v. Wade*.

*Matter of D.K.*, 497 A.2d 1298, (N.J. Super. Ct. Ch. Div. 1985) (internal citations omitted). *Cf. In re Brown*, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997) (rejecting appointment of guardian for viable fetus in case involving woman’s right to refuse medical treatment); *Matter of Klein*, 145 A.D.2d 145 (N.Y. App. Div. 1989) (rejecting appointment of guardian ad litem for comatose woman’s fetus).

As the above decision recognizes, when a woman is incapacitated, her right of choice must be exercised by *her* guardian, upon a full evaluation of her

situation. These principles apply even more strongly in Florida, where state interference with the exercise of a person’s right to privacy – including the right exercise reproductive choice – must further a compelling state interest by the least intrusive means. *See, e.g., Beagle v. Beagle*, 678 So. 2d at 1276; *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995); *In re T.W.*, 551 So.2d at 1192. Accordingly, the Florida Constitution also proscribes the appointment of a guardian for the fetus.

*Amici* respectfully request that, in addition to denying the petition for a guardian for the fetus, this Court take measures to ensure that the guardian appointed for the woman is unbiased and able to assess, free from ideology, the appropriate decision for this woman in these circumstances. (*Amici* assume that a guardian will be appointed for her only upon a determination that she is incompetent to make this decision for herself.) Moreover, given how much time has elapsed since the rape occurred, and given that the window during which an abortion is available is rapidly closing, *amici* respectfully urge this Court to act as quickly as possible to ensure that the choice on behalf of the woman is a real one.

## **II. Governing Florida Statutes Do Not Authorize the Appointment of A Guardian for the Fetus.**

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Even if appointment of a guardian for the fetus in this case did not interfere with the woman’s constitutional rights of privacy and reproductive choice, the applicable statutes do not authorize the appointment of such a guardian. Those statutes discuss the appointment for guardians for “persons.” Thus, in order to

appoint a guardian to represent the fetus, the Court must first find that a fetus is a “person.” Yet Florida law clearly holds that a statute’s reference to a “person” does not encompass a fetus. Thus, appointment of a guardian for the fetus would contravene well established and longstanding precedent.

Each of the statutes authorizing the appointment of a guardian apply only to appointment of guardians for “persons.” For example, under Chapter 744, pertaining to guardianship generally, a guardian may be appointed for a minor, defined as a “person under 18 years of age whose disabilities have not been removed by marriage or otherwise,” Fla. Stat. Ann. §§ 744.102, 744.3021 (West 1997), or for an “incapacitated person.” Id. § 744.3031(1). Under the Public Health Statute, the Court may appoint a guardian to a “person with developmental disabilities.” Id. §393.12 (West 2002); see also id. § 393.063 (defining “high-risk child” as a “child from *birth* to 5 years of age” with certain identified characteristics) (emphasis added). Similarly, under Chapter 39, Proceedings Relating to Children, a guardian ad litem may be appointed to an abused, neglected or abandoned “child,” defined as an “unmarried person under the age of 18 years.” Id. §§ 39.01, 39.822.

Appointing a guardian pursuant to any of these statutes would thus require a ruling that a fetus is a “person” for purposes of the statute. Yet the Florida courts – including the Florida Supreme Court – have time and again refused to so extend

the meaning of “person.” For instance, the Florida Supreme Court has long held that a fetus is not a person within the meaning of the Wrongful Death Act. See Young v. St. Vincent’s Medical Ctr., Inc., 673 So. 2d 482 (Fla. 1996); Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980); Duncan v. Flynn, 358 So. 2d 178 (Fla. 1978). The Florida courts have also held that a fetus is not a “child” within the meaning of the Florida child abuse statutes. See State v. Gethers, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991) (rejecting argument that amendments to the child abuse and neglect laws were intended to extend the plain meaning of child to include an unborn fetus) (cited by the Supreme Court with approval in Johnson v. Florida, 602 So. 2d 1288 (Fla. 1992)). Nor is a fetus a “person” or “human being” within the meaning of Florida’s criminal manslaughter statute. State v. Gonzalez, 467 So. 2d 723 (Fla. Dist. Ct. App. 1985). Likewise, the Florida Supreme Court has held that a statute criminalizing the distribution of a controlled substance to minors was not intended to apply to transmission during birth. See Johnson v. Florida, 602 So. 2d 1288 (1992).

A fetus has been brought under the coverage of a Florida statute only when the Legislature has provided explicitly for its coverage. For instance, the Florida Legislature has criminalized fetal homicide, see Fla. Stat. Ann. §782.09 (West 2000), and has imposed regulations restricting when abortions may be performed on a fetus that may be viable, id. § 390.0111 (West 2002). Thus, as the Court of

Appeals for the Fourth District has explained, “[t]he Florida Legislature has indicated it is capable of distinguishing between an unborn child and a person born alive since it has enacted statutes which acknowledge this distinction.” Gonzalez, 467 So. 2d at 725-26. In contrast, each of the Florida statutes which establish the procedures for appointing a guardian apply only to “persons.” To appoint a guardian to a fetus would violate the clear language of these legislative enactments and improperly expand the intended coverage of the guardianship laws. Moreover, it would be inconsistent with the extensive case law, discussed *supra*, which has consistently held that a fetus is not a person or child, unless expressly defined as such, by Florida statute.

### **CONCLUSION**

For the foregoing reasons, *amici* respectfully request that this Court deny the state or governor’s petition for the appointment of a guardian for the fetus in this matter.

May 13, 2003

Respectfully Submitted,

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**Certificate of Service**

I certify that true and correct copies of the foregoing document have been sent by \_\_\_\_\_ on this 13th day of May, 2003, to the following counsel of record in this action:

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