

THE DELAWARE SUPREME COURT: HOW WILL A BUSINESS COURT RESPOND TO THE CHALLENGES OF A POST-*ROE* WORLD?

Rick Esenberg¹

In the legal world, Delaware is best known for business law; though, as true in most states, the great bulk of the Delaware Supreme Court's work involves deciding criminal cases and other garden-variety matters that comprise much of the law's daily business. But the Court's most significant decisions tend to involve business issues and so, to a greater extent than may be the case elsewhere, its justices are chosen with business law expertise in mind.

Should *Roe v. Wade*² be overturned, Delaware may be an important battleground state because its pre-*Roe* statute—banning all but therapeutic abortions—remains on the books. The definition of a therapeutic abortion is narrower than *Roe* requires; it is broad enough that it is unclear how many abortions permitted under *Roe* would be banned by Delaware's statutes. As to the constitutionality of Delaware's statute under the State Constitution, there is little to permit an informed judgment as to how the Delaware Supreme Court (“Court”) will respond to this and other life issues.

I. LIFE ISSUES

Abortion

Current Delaware Law is actually more protective of the unborn than *Roe* allows. Delaware law currently makes it a crime to commit "upon a pregnant female an abortion which causes the miscarriage of the fetus, unless the abortion is a therapeutic abortion."³ Although the statutes do not directly define a "therapeutic abortion," the scope of such an abortion may presumably be consistent with the limitations set forth in another section of the code regulating

¹ Visiting Professor of Law, Marquette University Law School.

² 410 U.S. 113 (1973).

³ A woman is guilty of a self-abortion when she commits or submits to a non-therapeutic abortion upon herself, 11 DEL. CODE ANN. tit. 11, § 652 (2007), but that is only a Class A misdemeanor. (DEL. CODE ANN. tit. 11, § 651 (2007))

medical practice.⁴ That permits an abortion to be performed by a licensed physician in an accredited hospital if it is authorized by a hospital abortion review authority under one of the following circumstances:

- (1) Continuation of the pregnancy is likely to result in the death of the mother;
- (2) There is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;
- (3) The pregnancy resulted from: (a) Incest, or (b) A rape or unlawful sexual intercourse in the first or second degree committed as a result of force or bodily harm or threat of force or bodily harm, and the Attorney General of this State has certified to the hospital abortion review authority in writing over the Attorney General's signature that there is probable cause to believe that the alleged rape or unlawful sexual intercourse in the first or second degree did occur, except that during the first 48 hours after the alleged rape or unlawful sexual intercourse in the first or second degree no certification by the Attorney General shall be required;
- (4) Continuation of the pregnancy would involve substantial risk of permanent injury to the physical or mental health of the mother.⁵

However, an abortion is not permitted after twenty weeks of gestation, unless continuation of the pregnancy is likely to result in the death of the mother or where the fetus is dead.⁶

Although one might argue that this definition permits more than therapeutic abortions, it seems likely that a court would construe the two statutory provisions to be consistent. Even so, this definition of therapeutic abortions is certainly more restrictive than *Roe* and its progeny.

There is no pending injunction against enforcement of §§ 651 and 1790 of the Delaware Code. A post-*Roe* attempt seeking an injunction was dismissed for lack of case or controversy.⁷ In such cases, a common question is whether there might be an "implied repeal" of pre-*Roe* statutes, i.e., whether the legislature enacted statutes that implicitly repeal the more restrictive laws.

⁴ DEL. CODE ANN. tit. 24, § 1790 (2007).

⁵ tit. 24, § 1790(a)(1)-(4) (2007).

⁶ tit. 24, § 1790(b)(1).

⁷ Delaware Women's Health Organization, Inc. v. Wier, 441 F.Supp. 497 (D. Del. 1977)

Regarding parental notification, the doctrine of implied repeal has fared with mixed results in Delaware courts. A Delaware court has specifically ruled that a later-enacted statute regarding a minor's access to abortion repealed an earlier parental consent requirement.⁸ Both statutes, however, were enacted prior to *Roe* and applied only to "therapeutic abortions." Although the implied repeal argument has been successful in other contexts,⁹ Delaware courts have also refused to recognize an implied repeal and, as in most other states, have made clear that it is disfavored.¹⁰

There is, in any event, no strong argument for implied repeal of these statutes in that no post-*Roe* statute has passed that can be clearly read as repealing or modifying the pre-*Roe* prohibition. For example, in 1979, the Delaware Legislature enacted a statute requiring certain pre-abortion disclosures and providing that no abortion may be performed except 24 hours after the woman's written consent unless, in the opinion of her treating physicians, "an emergency situation presenting substantial danger to the life of the woman exists."¹¹ This requirement, although currently unenforceable,¹² would be fully applicable to those therapeutic abortions permitted by the pre-*Roe* statute.

In 1995, the General Assembly passed a law requiring a 24-hour notice to the parent(s) of a minor seeking an abortion, but there is a broad provision for judicial waiver and for substituted notice to grandparents or mental health professionals. Notification may be waived upon a finding that the minor is "mature and well-informed enough to make the abortion decision on her own" or "that it is in the best interest of the minor."¹³ Again, nothing in the newer law alters the

⁸ *In re Diane*, 318 A.2d 629, 631 (Del. Ch. 1974) (statute providing that a pregnant female over age 12 can give her consent to an abortion repealed by implication by a previously enacted statute requiring consent of parents or guardian before pregnant females under 18 could seek abortion).

⁹ *See Wilson v. State*, 500 A.2d 605, 609 (Del. Super. Ct. 1985) (stating that repeal can be implied where continued existence of both statutes would lead to absurd, unjust or mischievous results); *Fraternal Order of Police v. McLaughlin*, 428 A.2d 1158, 1160 (Del. 1981) .

¹⁰ *See, e.g., Bd. of Assessment Review v. Silverbrook Cemetery Co.*, 378 A.2d 619, 622 (Del. 1977) (stating that repeal by implication is not favored, and denying claim for implied repeal).

¹¹ DEL. CODE ANN. tit. 24, § 1794.

¹² The 24-hour waiting period was found unconstitutional because there was no exception in the event of a threat to health—as opposed to the life—of the mother. *Planned Parenthood of Delaware v. Brady*, 250 F.Supp. 2d 405 (D. Del. 2003).

¹³ DEL. CODE ANN. tit. 24, § 1780.

meaning of "non-therapeutic" abortions prohibited by pre-*Roe* law.¹⁴ No case has passed on the constitutionality of § 1780.

Similarly, 24 Del. C. § 1795, passed in 1982 and which provides that an abortionist must render medical assistance to a child born alive, does not imply the legality of non-therapeutic abortion.

It seems likely, then, that if *Roe* is overturned, only abortions meeting the requirements of § 1790 will be permitted in Delaware. In other words, the only exceptions to a general ban will be hospital-authorized abortions to save the life of the mother and before twenty weeks of gestation on cases with substantial risk of grave and permanent physical deformity or mental retardation or substantial risk of permanent injury to the physical or mental health of the mother.

If *Roe* is overturned, there is obviously some chance that hospitals—or some of them—would use the exception for a "substantial risk of permanent injury . . . to the mental health of the mother" to approve most requests for abortion. Whether the Court might find a state constitutional right to abortion precluding enforcement of the pre-*Roe* statute remains an open question. The Court has, from time to time, said that it need not interpret provisions in the Delaware Constitution in the same way that the United States Supreme Court ("USSC") interprets parallel or similar provisions in the United States Constitution¹⁵

Although the Court has not considered the question of whether the Delaware Constitution confers a right to abortion, it has recognized a state constitutional right of "self-determination" in the context of a person's right to refuse life-sustaining nutrition and hydration. It has said:

More than a century ago, the United States Supreme Court recognized that no 'right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his [or her] own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.' *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891). The foregoing principle is one of the unalienable rights of life and liberty described in the Preamble to the Declaration of Independence. *Cf. Severns I*, 421 A.2d at 1344. The preservation of that

¹⁴ tit. 24, § 1780 seems to have been enacted in response to the Supreme Court's decision. In the Matter of Diane, 318 A.2d 629 (Del. 1974).

¹⁵ See, e.g., *Dorsey v. State*, 761 A.2d 807 (Del. 2000) (scope of exclusionary rule).

common law right of self-determination has been implemented by the Fifth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution.¹⁶

The Court could plausibly extend the “self-determination” right to include a right to abortion.

Protection of the Unborn from Criminal Violence

For criminal law purposes, Delaware statutes define a person as “. . . a human being who has been born alive.”¹⁷ In an unpublished decision, a superior court held that defendants who had caused injuries *in utero* resulting in death *ex utero* (specifically 17 minutes after birth) could be prosecuted for manslaughter.¹⁸

The Court reversed the conviction, holding, “even if it is assumed that the fetus could be the victim of a homicide,” the defendants lacked the requisite intent to be convicted of second degree murder or manslaughter, because the state failed to prove that they were aware of the victim's pregnancy.¹⁹

After this decision, the Legislature enacted 5 Del. C. § 605, providing that a third degree assault or violent felony committed upon a pregnant woman, resulting in the death of the fetus, constitutes abuse of a pregnant female in the second degree and is a Class C felony. If the defendant acts intentionally, it is first degree abuse and a Class B felony.²⁰ In neither case is it a defense that the defendant was unaware that the victim was pregnant.

There appears to be no law in Delaware governing the protection of children who are placed in danger *in utero*. While there is at least one lower court case holding that the term “child” under Delaware's form of the Uniform Child Custody Act does not include a fetus,²¹ there are no similar definitions or interpretations governing children in need of protective services.

¹⁶ Matter of Tavel, 661 A.2d 1061, 1068 (Del. 1995).

¹⁷ DEL. CODE ANN. tit. 11, § 222(19)

¹⁸ State v. Jackson, 2000 WL 33113958 (Del. Super. 2000).

¹⁹ Hamilton v. State, 816 A.2d 770, 776 (Del. 2003).

²⁰ DEL. CODE ANN. tit. 5, § 606.

²¹ Schoenbeck v. Schoenbeck, 1997 WL 906038 (Fam. Ct. 1997).

Although the Court has not reached the issue of civil remedies, parents have generally been recognized to have a cause of action for wrongful death of a viable fetus.²²

The Court has held, on certification, that parents have a cause of action for wrongful birth against a health care provider whose negligence deprives them of the right to decide whether to bring a "defective" child to term.²³ Recovery, however, is limited to the extraordinary (*i.e.*, in excess of "normal") costs of raising the child. The child, moreover, has no recovery for wrongful life. The Court's rationale, set forth in a subsequent decision, made no mention of state law or policy on abortion.²⁴

Assisted Suicide

Delaware law prohibits one person from causing or aiding another person to attempt or commit suicide.²⁵ To do so is a Class F felony. No case has addressed whether there is a constitutional right to assisted suicide.

There is an elaborate statutory framework for advance health care directives governing the refusal of medical or surgical treatment or the designation of an agent or identification of a surrogate to make such decisions.²⁶

This statutory framework, known as the Death With Dignity Act, was enacted in 1982. *In Matter of Tavel*,²⁷ the Court held that it is nonexclusive and that an incompetent ward has a constitutional right to accept or refuse medical care apart from the state's statutory framework. For such individuals, a surrogate decision-maker may consider a patient's personal value system and prior statements about, and reactions to, medical issues and then extrapolate what course of medical treatment the patient would choose. If, however, the decision is to refuse or withhold treatment, it must be supported by clear and convincing evidence.

²² See, e.g., *Luff v. Hawkins*, 551 A.2d 437 (Del. Supr. 1988); *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del. Supr. 1956).

²³ *Garrison v. Medical Center of Delaware, Inc.*, 571 A.2d 786 (Del. 1989).

²⁴ *Garrison v. Medical Center of Delaware, Inc.*, 581 A.2d 288 (Del. 1990).

²⁵ DEL. CODE ANN. tit. 5, § 645.

²⁶ tit. 16, § 2501, *et seq.*

²⁷ 661 A.2d 1061 (Del. 1995).

Healthcare Rights of Conscience

Although there are no cases interpreting them, Delaware law includes a number of conscience protection provisions, protecting individuals from being compelled to participate in abortion²⁸ or the termination of life support.²⁹ There are no statutes explicitly protecting pharmacists from the obligation to dispense abortifacents.

No case has addressed whether any form of conscience protection is constitutionally compelled.

Cloning and Embryo Destructive Research

There are no statutes or case law in this area.

Destructive Embryo Research

There are no statutes or case law in this area.

In sum, there are more unanswered questions than settled law with respect to the protection of life in Delaware. It is one of the relatively few states that have retained an unamended pre-*Roe* statute, albeit one that might be read in a way that permits a substantial number of abortions. The state has a parental notification law, albeit one that is readily avoided. There is little case law treating the question of constitutional limitations on these and other life issues.

II. JUDICIAL RESTRAINT

As one might expect, the Court is best known for its expertise in corporate law and, although corporate cases make up a relatively small percentage of its docket, they comprise its more significant decisions. As a result, justices appointed to the Court seem to be more likely to have a background in business law than in other states. Because the Court is business-oriented, it values predictability and is less likely to adopt novel or expansive interpretations of the law or to find extra-textual rights or obligations.

²⁸ DEL. CODE ANN. tit. 24, § 1791.

²⁹ *Id.* at §§ 2508(e) and 2510(a)(5).

. The Court has made numerous statements suggesting that it values judicial restraint. For example, in *Helman v. State*,³⁰ the Court rejected a challenge to the state's version of "Megan's Law," requiring sex offender registration and community notification of the offender's presence. In so doing, the Court recited a fairly standard doctrine about the presumption of constitutionality and observed that "[c]ourts are not super-Legislatures and it is not a proper judicial function to decide what is or is not wise legislative policy."³¹

In *Price Corner Liquors, Inc. v. Delaware Alcoholic Beverage Control Commission*,³² the Court rejected a challenge to a statute that required more distance between liquor stores in unincorporated than in incorporated areas, applying traditional rational basis scrutiny. The Court, once again emphasizing the presumption of constitutionality, observed that "[i]t is not a proper judicial function to decide or even to express an opinion on what is or is not wise legislative policy."³³

While even the most activist courts may make such pledges of judicial circumspection, the Court appears to have abided by its pledges. The Court has resisted striking down legislative enactments of all kinds. In short, it has not aggressively wielded its authority.

III. THE COURT

The Court consists of a chief justice and four associate justices nominated by the Governor and confirmed by the Delaware State Senate. Three must represent one of the major political parties, while the remaining two justices must be members of the other party.

³⁰ 784 A.2d 1058 (Del. 2001).

³¹ *Id.* at 1068.

³² 705 A.2d 571 (Del. 1998).

³³ *Id.* at 575. *See also* Konstantopoulos v. Westvaco, 690 A.2d 936, 940 (Del. 1996) ("It is not our role to assume the prerogative of the General Assembly."); *Wilmington Medical Center, Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978) (Judicial restraint requires deference to legislative judgment in matters "fairly debatable.")

Judge	Appointed by/ Year	Term Expires	Miscellaneous
Myron T. Steele, Chief Justice	Governor R.A. Minner/ 2000; Appointed Chief Justice in 2004.	2016	<p>– Biographical information: J.D., 1970; LL.M. 2005 University of Virginia Law School; B.A. University of Virginia; Served as a trial court judge for ten years before appointment.</p> <p>– Professional affiliations: Former Deputy Attorney General, Senate (Delaware) Attorney and Chairman of the Consumer Affairs Board; Also served as former outside counsel, Board Member and Chairman of the Central Delaware Health Care Corporation; A member of the American Board of Trial Attorneys (the first member of the Delaware Judiciary selected) and a former litigation partner in Prickett, Jones & Elliott of Wilmington and Dover. He has presided over major corporate litigation, limited liability corporation and limited partner governance disputes. He writes frequently on issues of corporate document interpretation and corporate governance.</p> <p>– Noteworthy opinions/dissents: Presided over trials including the Viacom/Universal Studio dispute over ownership of the USA Television Networks, <i>Painewebber v. Centocor</i>, an internal governance dispute in a nationally traded limited partnership, <i>CFLP v. Cantor, et al.</i>, a dispute seeking injunctive and contractual remedies between limited partners and a general</p>

			<p>partner in a closed partnership and the <i>DuPont v. Admiral</i> environmental insurance coverage litigation.</p> <p>– Speeches/Articles: Published over 300 opinions resolving disputes among members of limited liability companies, and limited partnerships, and between shareholders and management of both publicly traded and close corporations; His thesis for the LL.M. degree, <i>Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies</i>, highlighted a view of the operation of common law fiduciary duties within the contractual framework of alternative business organizations.</p>
Randy J. Holland	Appointed in 1986.	2011	<p>– Biographical information: J.D. University of Pennsylvania Law School; LL.M. the University of Virginia; B.A. Swarthmore College; Practiced with a business firm in Wilmington.</p> <p>– Professional affiliations: The immediate past national President of the American Inns of Court Foundation; Chaired the national Advisory Committee to the American Judicature Society's Center for Judicial Ethics; Also chairs the American Bar Association National Joint Committee on Lawyer Regulation; An adjunct professor at several law schools; Has received numerous awards, including the 1992 Judge of the Year Award from the National Child Support Enforcement Association, the</p>

			<p>2002 Alumni Award of Merit from the University of Pennsylvania School of Law, the 2003 American Judicature Society's Herbert Harley Award, and the 2004 Widener Law School Adjunct Professor Distinguished Service Award .</p> <p>– Other: Elected in 2004 to be an Honorary Master of the Bench by Lincoln's Inn in London; Chief Justice Rehnquist recently appointed Justice Holland to serve as the State Judge Member of the Federal Judicial Conference Advisory Committee on Appellate Rules.</p> <p>– Speeches/Articles: Published several books: <i>The Delaware Constitution: A Reference Guide</i> (Greenwood Press 2002); <i>Delaware Supreme Court: Golden Anniversary</i> (2001), co-editor; and <i>The Delaware Constitution of 1897 – The First One Hundred Years</i>, co-editor. Also published several law review articles, primarily dealing with judicial ethics and legal history;</p>
--	--	--	--

Carolyn Berger	Appointed 1986; Reappointed to second twelve-year term 2006.	2018	<p>– Biographical information: J.D. Boston University 1976; M.A. in Elementary Education, Boston University 1971; B.A. the University of Rochester 1969; Served as Deputy Attorney General from 1976 to 1979 with the Delaware Department of Justice and spent seven years with corporate firms in Wilmington.</p> <p>– Professional affiliations: Served as an Associate Member on the Board of Bar Examiners; as President and Vice President of the Milton and Hattie Kutz Home; and on the Board of Directors with the Jewish Federation and the Delaware Region National Conference of Christians and Jews; Currently a member of the American Bar Foundation, the American Law Institute and the Rodney Inn of Court.</p>
Jack B. Jacobs	Appointed in 2003.	2015	<p>– Biographical information: LL.B. Harvard 1967; B.A. the University of Chicago 1964; Practiced corporate and business law in Wilmington until serving on the Delaware Court of Chancery from 1985.</p> <p>– Professional affiliations: Serves as an Adjunct Professor of Law at the Widener University School of Law; A director of the American Judicature Society, and as a member of the American Law Institute, where he is an Advisor to its Restatement (Third) of Restitution; A member of the Delaware and American Bar Associations (where he is a</p>

			<p>member of the Committee on Corporate Laws of the ABA Business Law Section).</p> <p>– Speeches/Articles: Authored several legal articles and participated in national symposia and programs related to corporate and securities law sponsored by various law schools and legal and Continuing Legal Education organizations, including the American Bar Association, ALI-ABA, and the Practicing Law Institute; Authored (or co-authored) several law review articles, including: "Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law," 56 Bus. Lwyer. 1287 (2001); "Realigning the Standard of Director Due Care with Public Policy," 96 N.W.L. Rev. 449 (2002); "The Great Takeover Debate: A Meditation of Bridging the Conceptual Divide," 69 U. Chi. L. Rev. (2002); "Comments on Contestability," 54 U. Miami L. Rev. 847 (2000); 7 Del. J. Corp. L. 251 (1982); (co-author), "The New Delaware Director Consent To Service Statute, 33 Bus. Lwyer. 701 (1978).</p>
Henry duPont Ridgely	Appointed in 2004.	2016	<p>– Biographical information: J.D. Catholic University 1973; LL.M. in corporate law from George Washington University; B.S. Syracuse 1971; Practiced civil, criminal and administrative law in Dover; Spent 20 years on the Delaware Superior Court.</p> <p>– Professional affiliations: A</p>

			<p>member of the National Advisory Council of the American Judicature Society and a former Member of the Society's Board of Directors (2003-2005); Chair-Elect of the National Conference of State Trial Judges (Executive Committee 1997-2004); Chair, Drug Court Standard Task Force (2000-2002); Based upon the work of ABA Committees³⁴, Ridgely has chaired or co-chaired three ABA Standards relating to Court Organization or Relating to Trial Courts have been adopted by the ABA House of Delegates; Chair of the Delaware Supreme Court's eFiling Committee; received the American Bar Association's and National Center for State Courts' Award for Outstanding Service in Adopting and Implementing Standards Relating to Juror Use and Management in 1993. In 1997 he received the Chief Justice's Award for Outstanding Judicial Service; in 2000 received the American Board of Trial Advocates– Delaware Chapter's Award for Judicial Professionalism and Civility;</p> <p>– Other: During his tenure as President Judge, the Superior Court was the first court in the nation to implement electronic filing in 1991 and a state-wide drug court in 1994; In 2005 the Delaware Supreme Court became</p>
--	--	--	--

³⁴ The ABA Standards address best practices in establishing and operating drug treatment courts, electronic filing, and court automation.

			the first appellate court in the nation to implement electronic filing of appeals.
--	--	--	--

CONCLUSION

Both statutory and case law treating life issues are relatively thin. Should *Roe* be overturned, it seems likely that abortions will be generally available up to twenty weeks gestation. Late term abortions will be severely restricted. While one imagines that the Court may be cautious in developing an expansive state constitutional jurisprudence of privacy, it has recognized a state constitutional right of self determination that might afford a foundation for doing so.