

# THE MEANING OF LIFE: OKLAHOMA'S COURTS OF LAST RESORT ON LIFE ISSUES

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If someone were to ask the Oklahoma Supreme Court what the meaning of life is, one answer is evident—human life begins at conception, and the unborn are entitled to certain rights and protections. Moreover, according to the Oklahoma Court of Criminal Appeals, the highest state court with jurisdiction over criminal cases, a viable fetus is nothing less than human life, and both viable and unviable unborn children are entitled to protection from criminal violence.

Oklahoma has a bifurcated appellate system: two courts of last resort. The Oklahoma Supreme Court has final jurisdiction over matters of a civil nature, and the Oklahoma Court of Criminal Appeals has final jurisdiction over criminal matters.<sup>2</sup> Generally, both have been fairly protective of life, especially of the unborn. However, for the most part, the courts have not addressed other stages of life or other life issues, including healthcare rights of conscience, destructive embryo research, or human cloning.

## I. LIFE ISSUES

### Abortion

The Oklahoma Supreme Court first considered whether restrictions on abortions were constitutional in 1987 in *Spencer v. Seikel*,<sup>3</sup> and it did so in an indirect manner. The case involved a claim by a mother, whose child had been born with virtually no brain, against the physician who provided the prenatal care.<sup>4</sup> The mother contended the physician was negligent for failing to disclose abortion as an available alternative when he discovered the child's condition.<sup>5</sup>

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<sup>2</sup> OKLA. CONST. art. 7, § 4.

<sup>3</sup> 742 P.2d 1126 (Okla. 1987).

<sup>4</sup> *Id.* at 1128.

<sup>5</sup> *Id.*

The Court rejected the mother’s argument and found the doctor was entitled to rely upon the statute prohibiting abortion on a viable fetus,<sup>6</sup> as the statute was constitutional.<sup>7</sup> The Court based its conclusion on United States Supreme Court (“USSC”) decisions, which have “consistently held that the state’s interest in fetal survival becomes compelling at viability.”<sup>8</sup> It observed viability is determined by the facts of a given case, based on the judgment of the attending physician that it is reasonably likely the fetus could survive outside the womb with or without support.<sup>9</sup> Because the physician had determined the fetus was viable at approximately 24 weeks old, he was prohibited from performing an abortion “by that part of the Oklahoma law which passes constitutional scrutiny.”<sup>10</sup>

In 1992, the Court again indirectly addressed the constitutionality of restrictions on abortion. The case, *In re Initiative Petition No. 349, State Question No. 642*,<sup>11</sup> involved an initiative petition proposing legislation<sup>12</sup> that would have criminalized and prohibited abortions, except in four limited circumstances.<sup>13</sup> Proponents filed the initiative petition with the Secretary of State, seeking to have it placed on the ballot and submitted to a vote of the people.<sup>14</sup>

A sharply divided Court, with Justice Yvonne Kauger writing for the majority, held the proposed legislation impermissibly restricted the constitutional right to abortion.<sup>15</sup> The majority, consisting of Justices Kauger, Lavender, Simms, Summers, and Watt, determined the

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<sup>6</sup> OKLA. STAT. tit. 63, § 1-732. This statute provided: “No person shall perform or induce an abortion upon a pregnant woman after such time as her unborn child has become viable unless such abortion is necessary to prevent the death of the pregnant woman or to prevent impairment to her health.”

<sup>7</sup> *Spencer*, 742 P.2d at 1130. The decision was unanimous. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (quoting *Colautti v. Franklin*, 439 U.S. 379, 388 (1970)).

<sup>10</sup> *Id.* Although the Court made this statement implying other parts were not constitutional, the Court did not indicate which parts those were.

<sup>11</sup> 838 P.2d 1 (Okla. 1992); 61 U.S.L.W. 2102 (1992).

<sup>12</sup> The case involved an initiative petition, which is authorized by the state Constitution. OKLA. CONST. art. 5, § 2. “Initiative” is defined as “[a]n electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate. Recognized in some state constitutions, the initiative is one of the few methods of direct democracy in an otherwise representative system.” BLACK’S LAW DICTIONARY 799 (8th ed. 2004).

<sup>13</sup> *In re Initiative Petition No. 349*, 838 P.2d at 6. The proponents of the petition apparently conceded it was unconstitutional as drafted, but wanted it to go to a vote of the people as an exercise in political advocacy. *Id.* at 4.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 2, 7.

constitutionality of the petition was controlled by *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>16</sup> held the petition invalid, and struck it from the ballot.<sup>17</sup>

The dissenters, Justice Marian Opala, as well as Justices Wilson, Hodges, and Hargrave, who dissented in part, enumerated several bases for their disagreement with the majority, including arguments that 1) the Court's action violated the separation of powers, 2) the Court's action violated the proponents' rights to political speech, 3) the protestants lacked standing to assert a challenge based on *Planned Parenthood v. Casey*, and 4) the Court of Criminal Appeals had exclusive jurisdiction over the constitutionality of the proposed legislation, as it was criminal in nature.<sup>18</sup> Justice Hodges (with whom Justice Hargrave joined) disagreed with the majority's ordering the parties to brief the effect of *Casey* when the parties had not raised the issue on their own.<sup>19</sup> According to the dissent, the Court's review should be limited to determining the validity of the initiative petition ballot title and whether the petition had the requisite number of valid signatures.<sup>20</sup>

In *Davis v. Fieker*,<sup>21</sup> a physician, several legislators, and a patient who claimed to have suffered an injury, following an abortion at a private clinic, sought mandamus against the Oklahoma State Department of Health ("OSDH") to compel it to enforce statutes restricting the performance of abortions to certain facilities.<sup>22</sup> The issue was whether Oklahoma Statute title 63, sections 1-731(B) and 1-737,<sup>23</sup> and the regulations promulgated pursuant thereto were constitutional. These statutes, passed by the Oklahoma legislature in 1978, required first

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<sup>16</sup> 505 U.S. 833 (1992).

<sup>17</sup> *In re Initiative Petition No. 349*, 838 P.2d at 13.

<sup>18</sup> *Id.* at 14 (Hodges, J., concurring in part, dissenting in part); *Id.* at 15 (Wilson, J., dissenting); *Id.* at 18–28 (Opala, J., dissenting).

<sup>19</sup> *Id.* at 14.

<sup>20</sup> *Id.* at 17–18 (Wilson, J., dissenting in part); *Id.* at 20 (Opala, C.J., dissenting).

<sup>21</sup> 952 P.2d 505 (Okla. 1998).

<sup>22</sup> *Id.* at 507.

<sup>23</sup> Oklahoma has numerous other statutes regulating abortion in various respects, but the Oklahoma Supreme Court has not addressed these, although some have been challenged in federal court. *See* *Reproductive Services v. Keating*, 35 F. Supp. 2d 1332 (D. Okla. 1998); *see also* *Nova Health Systems v. Gandy*, 416 F.3d 1149 (10th Cir. 2005). Among the Oklahoma statutes regulating abortion is a prohibition on a woman inducing an abortion on herself without the supervision of a physician. OKLA. STAT. tit. 63, § 1-733. While the Oklahoma Supreme Court has not interpreted this statute, with the Food and Drug Administration making the morning-after pill available on an over-the-counter basis, there may be an opportunity to do so.

trimester abortions to be performed in facilities licensed by OSDH<sup>24</sup> and required abortions performed thereafter, but before viability, to occur in general hospitals.<sup>25</sup>

In the early 1980s, the Oklahoma Attorney General had issued an opinion concluding the statutes were unconstitutional.<sup>26</sup> Several years later, the Attorney General issued another opinion stating OSDH was bound by the United States Constitution and had no duty to enforce the statutes.<sup>27</sup> OSDH had promulgated regulations to carry out the statutes, but, following the Attorney General opinions, the Commissioner of OSDH chose not to enforce the statutes or regulations.<sup>28</sup>

Justice Hodges, writing for the majority,<sup>29</sup> reviewed USSC decisions addressing the constitutionality of restrictions on abortions from *Roe v. Wade*<sup>30</sup> through *Casey*<sup>31</sup> and beyond.<sup>32</sup> Citing the standard set forth in *Casey*, the Court determined Oklahoma law should “not be upheld against a facial attack if it ‘has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.’”<sup>33</sup>

The Court upheld the statutes, finding the statutes restricted only the place where an abortion can be performed, rather than “prohibit all abortions.”<sup>34</sup> Moreover, there was no

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<sup>24</sup> OKLA. STAT. tit. 63, § 1-737 (1991). Section 1-737 provided: “An abortion otherwise permitted by law shall be performed only in a hospital, as defined in this article, which meets standards set by the Department. The Department shall develop and promulgate reasonable standards relating to abortions.” The definition of hospitals included abortion clinics, OKLA. STAT. tit. 63, § 1-701(1), and hospitals were required to be licensed, OKLA. STAT. tit. 63, § 1-702.

<sup>25</sup> OKLA. STAT. tit. 63, § 1-731(B). Section 1-731(B) provided: “No person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed or induced in a general hospital.” Abortions after viability were prohibited altogether except to preserve the life or health of the mother. OKLA. STAT. tit. 63, § 1-732.

<sup>26</sup> 1983 Op. Att’y Gen. 183 (1984).

<sup>27</sup> 1991 Op. Att’y Gen. 10 (1991).

<sup>28</sup> *Davis v. Fieker*, 952 P.2d 505, 507–08 (Okla. 1998).

<sup>29</sup> There was only one justice, Justice Simms, who dissented, and Justice Wilson concurred in part and dissented in part. Neither wrote a separate opinion. *Id.* at 516.

<sup>30</sup> 410 U.S. 113 (1973).

<sup>31</sup> 505 U.S. 833 (1992).

<sup>32</sup> *See Davis*, 952 P.2d at 510–14.

<sup>33</sup> *Id.* at 514 (quoting *Casey*, 505 U.S. at 877).

<sup>34</sup> *Id.* at 515.

evidence the restrictions on location created a substantial obstacle to the right to have an abortion.<sup>35</sup> The Court held mandamus was proper to enforce the statutes.<sup>36</sup>

### **Protection of the Unborn from Criminal Violence**

In *Hughes v. State*,<sup>37</sup> the Oklahoma Court of Criminal Appeals abandoned the “born alive” rule<sup>38</sup> and held a person may be convicted of homicide for causing the death of an unborn, viable child. Writing for a nearly unanimous Court,<sup>39</sup> Judge Charles Chapel specifically held the term “human being” used in the statute defining homicide<sup>40</sup> includes a viable, human fetus.<sup>41</sup> The Court overruled *State v. Harbert*,<sup>42</sup> which held a viable fetus was not a “person” within the meaning of the assault and battery statute. The holding in *Hughes* placed the Court in a minority with only two other states—Massachusetts and South Carolina.<sup>43</sup>

In *Hughes*, the jury convicted the defendant of first-degree manslaughter under Oklahoma Statute title 21, section 711.<sup>44</sup> On appeal, the defendant sought reversal of the conviction based on the “born alive” rule. Although the Court abandoned the “born alive” rule, it nevertheless overturned the conviction and applied the ruling prospectively.<sup>45</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 516.

<sup>37</sup> 868 P.2d 730 (Okla. Crim. App. 1994).

<sup>38</sup> The “born alive” rule is a common law principle under which a child cannot be subject to homicide until it is born and completely independent of its mother. *Id.* at 731 (citing O. WARREN, WARREN ON HOMICIDE § 55 (1938)).

<sup>39</sup> Vice Presiding Judge Johnson and Judge Strubhar specially concurred; Presiding Judge Lumpkin concurred in part and dissented in part. *Id.* at 736.

<sup>40</sup> OKLA. STAT. tit. 21, § 691.

<sup>41</sup> *Hughes*, 868 P.2d at 734.

<sup>42</sup> 758 P.2d 826 (Okla. Crim. App. 1988). Although *Harbert* found “persuasive” the reasoning of the Oklahoma Supreme Court in *Evans v. Olson*, it determined penal statutes must be strictly interpreted and the legislature must have intended not to include fetus in the assault and battery statute. *Id.* at 827–28. It based this conclusion on the fact the legislature specifically included fetus in the statute providing the killing of an unborn quick child is manslaughter. *Id.* at 828.

<sup>43</sup> *Hughes*, 868 P.2d at 732.

<sup>44</sup> *Id.* at 730. Section 711 provides homicide is first degree manslaughter when it is perpetrated while engaged in the commission of a misdemeanor. OKLA. STAT. tit. 21, § 711.

<sup>45</sup> *Hughes*, at 735–36. Judge Lumpkin dissented from the decision to reverse the manslaughter conviction because, in his opinion, the Court substituted its view for the jury given that there was evidence the baby was born with a weak heartbeat from which the jury could have determined the baby was born alive, making the defendant guilty of manslaughter even under the old “born alive” rule. *Id.* at 737–38 (Lumpkin, P.J., dissenting).

The Court based its decision on the “origins, history and purpose” of the “born alive” rule.<sup>46</sup> The rule was a product of common law and was developed at a time when it was not possible to know whether a child in the womb was alive.<sup>47</sup> Now, the Court said, medical and scientific evidence can establish whether a child was alive within the womb and what caused the child’s death.<sup>48</sup> The Court reasoned the definition of “human being” under the homicide statute should not be based on an outdated common law rule.<sup>49</sup> The Court stated: “The purpose of Section 691 is, ultimately, to protect human life. A viable human fetus is nothing less than human life.”<sup>50</sup>

The Court distinguished its holding in *Hooks v. State*,<sup>51</sup> where the defendant had been convicted under Section 713 of the Criminal Code, which made it manslaughter to kill an unborn “quick” child by injuring the mother.<sup>52</sup>

The Court concluded by stating its ruling had no effect on “a woman’s constitutional right to choose a lawful abortion based upon her constitutional right to privacy or a physician’s right to perform one.”<sup>53</sup> The holding “shall not be used as the basis for bringing homicide charges against either a woman who chooses a lawful abortion or a physician who performs a lawful abortion.”<sup>54</sup>

Unlike the Oklahoma Supreme Court,<sup>55</sup> the Court of Criminal Appeals has stuck to viability as the determining factor in how a defendant is held responsible for the death of a fetus. In *McCarty v. State*,<sup>56</sup> the defendant was convicted of three counts of first-degree murder, including a guilty verdict for murder of the unborn child of one of the victims.<sup>57</sup> The evidence at

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<sup>46</sup> *Id.* at 732.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 733.

<sup>49</sup> *Id.* at 733–34.

<sup>50</sup> *Id.* at 734.

<sup>51</sup> 862 P.2d 1273 (Okla. Crim. App. 1993).

<sup>52</sup> *Hughes*, 868 P.2d at 733 n.3. Section 713 has since been repealed by the legislature. 2006 Okla. Sess. L. c. 185, § 23, effective Nov. 1, 2006.

<sup>53</sup> *Hughes*, 734–35.

<sup>54</sup> *Id.* at 735.

<sup>55</sup> See discussion of *Nealis v. Baird*, I(C) *infra*.

<sup>56</sup> 41 P.3d 981 (Okla. Crim. App. 2002).

<sup>57</sup> *Id.* at 983.

trial indicated the fetus had a gestational age of approximately 22 weeks.<sup>58</sup> The Court of Criminal Appeals, Vice Presiding Judge Charles Johnson writing the opinion, held the unborn child was not viable. Thus, the death of the nonviable fetus supported only a manslaughter conviction for death of a “quick child” under Section 713 and not a murder conviction.<sup>59</sup>

According to the majority in *McCarty*, the state’s interest in protecting fetal survival becomes compelling at viability.<sup>60</sup> Relying on the statutes in Title 63 regulating abortion, the Court found an unborn child is presumed to be viable at 24 weeks of gestation.<sup>61</sup> Then, the Court looked at several statutes,<sup>62</sup> including the statute prohibiting abortions performed outside authorized facilities,<sup>63</sup> the statute providing any person who performs an abortion once a fetus has attained viability is guilty of homicide,<sup>64</sup> and the statute (since repealed) providing the willful killing of an unborn “quick”<sup>65</sup> child by injuring the mother is first degree manslaughter.<sup>66</sup> The Court stated:

These statutes emphasize that before criminal liability for homicide of a fetus may be imposed, there must be a showing that the fetus was viable and potentially able to live outside of the womb of the mother[.]<sup>67</sup>

Nonetheless, the Court determined the defendant was guilty of first degree manslaughter (which is also homicide) under Oklahoma Statute title 21, section 713, for killing an unborn quick child.<sup>68</sup>

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<sup>58</sup> *Id.* at 984.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 983 (citing *Spencer v. Seikel*, 742 P.2d 1126 (Okla. 1987)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 983–84.

<sup>63</sup> OKLA. STAT. tit. 63, § 1-731. Like the federal judge in *Reproductive Services v. Keating*, Judge Johnson apparently mistakenly believed Section 1-731 “criminalized” abortions performed after the first trimester outside a general hospital, which is in Subsection B. *McCarty*, 41 P.3d at 984. However, the language stating it is a crime to violate the section is in Subsection A, which prohibits anyone other than a physician from performing an abortion.

<sup>64</sup> OKLA. STAT. tit. 63, § 1-732(E).

<sup>65</sup> Relying on *Black’s Law Dictionary*, the Court determined a “quick child” was one that was able to move within its mother’s womb. *McCarty*, 41 P.3d at 984 n.2.

<sup>66</sup> OKLA. STAT. tit. 21, § 713, repealed by SB 1742, 2006 Okla. Sess. L. c. 185, § 23, effective Nov. 1, 2006.

<sup>67</sup> *McCarty*, 41 P.3d at 984. *McCarty* overruled *Tarver v. State*, 651 P.2d 1332 (Okla. Crim. App. 2002), which had held the defendant must know the woman is pregnant to sustain a conviction under Section 713. Two judges (Judge Strubhar and Judge Chapel) in *McCarty* concurred in the result but dissented in part because they would not have overruled *Tarver*. *Id.* at 987–92.

Judges Chapel and Reta Strubhar agreed the defendant's murder conviction should be reversed but dissented in part to the modification of the conviction under Section 713.<sup>69</sup> Both objected to the majority's overruling *Tarver v. State*,<sup>70</sup> which, as Judge Chapel explained, had determined the "willful killing" requirement of Section 713 required the defendant know of the existence of the unborn child.<sup>71</sup>

*McCarty* has since been legislatively overruled. Effective November 1, 2006, the legislature repealed Section 713 and amended the statute defining homicide so viability is no longer a requirement for criminal liability. The Court has not yet had an opportunity to construe the new provisions.

### **Wrongful Death Actions on Behalf of a Fetus**

A majority of jurisdictions have recognized a wrongful death cause of action for viable, stillborn children.<sup>72</sup> However, the earliest Oklahoma decision expressly dealing with life issues was the 1953 decision of *Howell v. Rushing*,<sup>73</sup> where the Supreme Court refused to recognize a wrongful death cause of action for the death of an unborn child.<sup>74</sup> In a one-page decision, the Court simply adopted the reasoning of the Nebraska Supreme Court in *Drabbels v. Skelly Oil Co.*<sup>75</sup>

In *Padillow v. Elrod*,<sup>76</sup> a unanimous Court again held there was no such cause of action. Specifically, the issue the Court considered was whether there is a cause of action, under the wrongful death statute, against a person who negligently caused the death of a viable, stillborn fetus.<sup>77</sup> The Court was not persuaded by a statute criminalizing abortion.<sup>78</sup> Nor was it

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 988, 989, 991–92 (Chapel, J., dissenting); *Id.* at 992 (Strubhar, J., dissenting).

<sup>70</sup> 651 P.2d 1332 (Okla. Crim. App. 1982).

<sup>71</sup> *McCarty*, 41 P.3d at 989 (Chapel, J., dissenting).

<sup>72</sup> D. Meade, *Wrongful Death and the Unborn Child: Should Viability Be a Prerequisite for a Cause of Action*, 14 J. CONTEMP. HEALTH L. & POL'Y 421, 432 (1998).

<sup>73</sup> 261 P.2d 217 (Okla. 1953).

<sup>74</sup> *Id.* at 218.

<sup>75</sup> 50 N.W. 2d 229 (Neb. 1951).

<sup>76</sup> 424 P.2d 16 (Okla. 1967).

<sup>77</sup> *Id.* at 17.

<sup>78</sup> *Id.* at 18.

persuaded by *Herndon v. St. Louis and San Francisco Railway Co.*,<sup>79</sup> which held a child, unborn at the time of his father's death but later born alive, is considered a person existing at the time of the father's death and entitled to recover for his father's wrongful death.<sup>80</sup>

In 1976, the Oklahoma Supreme Court overruled *Howell* and *Padillow*, holding "[i]t is time this jurisdiction recognizes the right of a viable unborn child to a cause of action for injury and wrongful death."<sup>81</sup> In *Evans v. Olson*, the Court determined the term "one," used in the wrongful death statute,<sup>82</sup> was synonymous with the word "person;" and, thus, the phrase "death of one," used in the statute, includes the death of a viable unborn child.<sup>83</sup> Justice Lavender, writing for the majority, which included then-Vice Chief Justice Hodges and Justice Simms, rejected an argument that the legislature's failure to amend the statute to include stillborn children since the ruling 20 years earlier in *Howell* was an indication of legislative intent not to allow such an action.<sup>84</sup>

Oklahoma does not have legislative history materials from which courts can discern the legislature's intent.<sup>85</sup> At times, the Court has determined legislative intent can be realized from legislative silence; it has concluded the failure of the legislature to amend a statute following its judicial construction indicates legislative acquiescence in the construction.<sup>86</sup> Nonetheless, the *Evans* Court reasoned its decision reflected a change in the common law, which should be flexible enough to adapt to the facts of life in light of current scientific knowledge.<sup>87</sup>

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<sup>79</sup> 128 P. 727 (Okla. 1912).

<sup>80</sup> *Padillow*, 424 P.2d at 18.

<sup>81</sup> *Evans v. Olson*, 550 P.2d 924, 925 (Okla. 1976).

<sup>82</sup> OKLA. STAT. tit. 12, § 1053. Section 1053(A), which reads substantially the same as it did when *Evans* was decided, provides in relevant part:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his or her personal representative if he or she is also deceased, if the former might have maintained an action, had he or she lived, against the latter, or his or her representative, for an injury for the same act or omission. *Id.* § 1053(A).

<sup>83</sup> *Evans*, 550 P.2d at 928.

<sup>84</sup> *Id.* Justices Davison, Berry and Barnes dissented, but did not write separate opinions. *Id.* at 928.

<sup>85</sup> See *Gladstone v. Bartlesville Ind. Sch. Dist. No. 30*, 66 P.3d 442, 450–51 (Okla. 2003) ("Although Oklahoma . . . lacks legislative history materials that identify the basis for the exception in contest, that fact alone affords no basis for judging the legislative wisdom in excluding the disputed category of claims from public tort liability.").

<sup>86</sup> See, e.g., *Burch v. Allstate Ins. Co.*, 977 P.2d 1057, 1068 (Okla. 1998).

<sup>87</sup> *Evans*, 550 P.2d at 928.

In *Graham v. Keuchel*,<sup>88</sup> the Court clarified *Evans* did not preclude a wrongful death action where the negligent act occurred prior to viability or even prior to conception. Parents brought a malpractice action against a hospital and physicians for the wrongful death of their newborn son, allegedly caused by the failure to properly treat the mother, who was Rh-negative, during a previous pregnancy.<sup>89</sup> Justice Opala, who authored *Graham*, noted the case before the Court dealt with a child born alive rather than a stillborn child as in *Evans*.<sup>90</sup> However, the Court reiterated the reasoning of *Evans* that

damages should be recoverable for a person’s wrongful conduct which interferes with a child’s right to begin life with a sound mind and body; competent proof must establish the causal connection between the wrongful interference and the harm suffered by the child when born.<sup>91</sup>

The Court specifically concluded recovery was not precluded because there was evidence of a direct causal connection between the negligent act, though it preceded conception, and the death of the newborn.<sup>92</sup>

In *Nealis v. Baird*,<sup>93</sup> the Oklahoma Supreme Court extended fetal rights in wrongful death suits to nonviable fetuses born alive. In a five-to-four decision, the Court admitted its precedent was “sketchy.”<sup>94</sup> The decision was unusual, because three of the justices participating in the decision were sitting by designation.<sup>95</sup> Four members of the current Court—Hargrave, Lavender, Opala, and Watt—were in the majority; no member of the current Court was in the dissent.<sup>96</sup>

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<sup>88</sup> 847 P.2d 342 (Okla. 1993).

<sup>89</sup> *Id.* at 346.

<sup>90</sup> *Id.* at 364. Two justices concurred in part and dissented in part and one justice dissented, but only Justice Simms wrote a separate opinion, which was related to a different issue raised in the appeal.

<sup>91</sup> *Id.* (citing *Evans*, 550 P.2d at 927) (italics in original).

<sup>92</sup> *Id.* at 365–66.

<sup>93</sup> 996 P.2d 438 (Okla. 1999).

<sup>94</sup> *Id.* at 454.

<sup>95</sup> *Id.* 463. Judge Lumpkin of the Court of Criminal Appeals sat in lieu of Justice Boudreau, who certified his disqualification; Court of Criminal Appeals Judge, Reta Strubhar, sat in lieu of Justice Kauger, who recused; and, Judge Johnson also of the Court of Criminal Appeals sat by designation due the death of Justice Alma Wilson.

<sup>96</sup> *Id.*

The question in *Nealis*, as framed by Justice Opala, again writing for the majority, was “whether a wrongful death action can be predicated upon a prenatal injury occurring prior to viability if the fetus is thereafter born alive before attaining viability.”<sup>97</sup> The Court specifically declined to reach the issue of whether nonviable, stillborn fetuses have rights under the wrongful death statute.<sup>98</sup>

In looking “to the language and intent of Oklahoma’s wrongful death statute to determine whether a wrongful death action will lie for the death of a nonviable fetus born alive,”<sup>99</sup> the Court hinted it would extend liability to the wrongful death of a nonviable, stillborn fetus and also hinted at how it might rule regarding other life issues.<sup>100</sup> With regard to the wrongful death statute’s requirement that there be a “death of one,” the Court noted a fetus is a person, regardless of whether the fetus has ever drawn a breath.<sup>101</sup> It held when a child is born alive, that child attains the status of “one.”<sup>102</sup> The statute also requires the decedent be one who could have maintained an action for injury “had he lived.”<sup>103</sup> Regarding this requirement, the Court made the following, powerful statement:

Although a nonviable fetus has never lived outside the womb and is incapable of surviving outside the womb, it does not follow that it has never lived. Contemporary scientific precepts accept as a given that human life begins at conception. Unless terminated naturally or by human agency, that life will continue to develop not just until birth but throughout life.<sup>104</sup>

The Court concluded the had-he-lived phrase did not require the fetus to actually possess the ability to go forth, live, and sue; it meant if, hypothetically, a person merely had been injured by the negligent acts causing his death, he could have brought a personal injury action to recover for the injuries.<sup>105</sup>

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<sup>97</sup> *Id.* at 452 (italics in original).

<sup>98</sup> *Id.* at 455.

<sup>99</sup> *Id.* at 452.

<sup>100</sup> *Id.* at 455.

<sup>101</sup> *Id.* at 453.

<sup>102</sup> *Id.*

<sup>103</sup> OKLA. STAT. tit. 12, § 1053.

<sup>104</sup> *Nealis*, 996 P.2d at 453–54.

<sup>105</sup> *Id.* at 454.

The *Nealis* Court also found no conflict between its decision and the cases granting women a federal constitutional right to terminate a pregnancy by abortion.<sup>106</sup> It held “*Roe*’s conclusion a fetus is not a person for purposes of the Fourteenth Amendment . . . does not require that it be so considered for every other purpose.”<sup>107</sup>

On a related matter, the question presented in *Matter of Unborn Child of Starks*<sup>108</sup> was whether a fetus is a “child” for purposes of a child protection proceeding under the Oklahoma Children’s Code, Oklahoma Statute title 10, sections 7001, *et seq.*<sup>109</sup> The Oklahoma Supreme Court determined the district court erred when it took temporary emergency custody of the viable fetus of a woman arrested for manufacturing and possessing methamphetamine.<sup>110</sup>

Writing for a unanimous Court, Justice James Winchester limited his analysis to one of statutory interpretation and held the “Oklahoma Children’s Code does not apply to a fetus, viable or nonviable.”<sup>111</sup> The Court reasoned that, although a fetus is a human being, the legislature uses the word “child” to denote a born human being and does not use the words fetus and child interchangeably.<sup>112</sup> It stated if the legislature meant for the Children’s Code to apply to a fetus or to a pregnant woman, it would have used those terms.<sup>113</sup>

The legislature has not amended the definition of “child” under the statute.<sup>114</sup> In 2001, however, it did amend the definition of “deprived child” to include a child

who has been born to a parent whose parental rights to another child have been involuntarily terminated by the court and the conditions which led to the making of the finding, which resulted in the termination of the parental rights of the parent to the other child, have not been corrected.<sup>115</sup>

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<sup>106</sup> *Id.* at 454–55.

<sup>107</sup> *Id.* at 455 (internal citation omitted).

<sup>108</sup> 18 P.3d 342 (Okla. 2001).

<sup>109</sup> *Id.* at 343.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 348.

<sup>112</sup> *Id.* at 347.

<sup>113</sup> *Id.* at 348.

<sup>114</sup> OKLA. STAT. tit. 10, § 7001-1.3(4).

<sup>115</sup> OKLA. STAT. tit. 10, § 7001-1.3(14)(g), amended by HB 1670, 2001 Okla. Sess. L., c. 434, § 4, *emerg. eff.* June 8, 2001.

## Assisted Suicide

The only time either of Oklahoma's high courts has addressed the protection of life other than of the unborn was in *Edinburgh v. State*.<sup>116</sup> The defendant shot the victim in the head, claiming he did it at the victim's request.<sup>117</sup> On appeal, he argued the trial court should have instructed the jury on "Aiding and Abetting Suicide" pursuant to Oklahoma Statute title 21, section 813,<sup>118</sup> because the victim, the defendant's step-father, was dying of cancer, was in considerable pain, and had begged the defendant to kill him.<sup>119</sup>

The case presented an issue of first impression for the Court of Criminal Appeals.<sup>120</sup> Writing for the Court,<sup>121</sup> Judge Charles Johnson rejected the defendant's argument that, because there was another statute making it a crime to furnish a weapon to a person knowing the person intends to take his life,<sup>122</sup> the legislature must have meant for Section 813 to apply to both active euthanasia and passive euthanasia.<sup>123</sup> The Court focused its analysis on cases interpreting criminal homicide statutes.<sup>124</sup> The Court concluded:

[W]here the defendant only furnishes the means by which the victim kills herself, he has merely assisted suicide. But, where the defendant proximately causes the defendant's death he can be held liable for homicide.<sup>125</sup>

Nevertheless, as noted by the Court,<sup>126</sup> "The Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act [now renamed the Oklahoma Advance Directive Act] does not

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<sup>116</sup> 1995 OK CR 16, 896 P.2d 1176.

<sup>117</sup> *Id.* at ¶¶ 4, 5, 896 P.2d at 1177.

<sup>118</sup> Under Section 813, a "person who willfully, in any manner, advises, encourages, abets, or assists another person in taking his own life, is guilty of aiding suicide," which is a felony punishable by not less than seven years in prison. OKLA. STAT. tit. 21, §§ 813, 817.

<sup>119</sup> 1995 OK CR 16 at ¶¶ 2-4, 896 P.2d at 1178.

<sup>120</sup> *Id.* at ¶ 10, 896 P.2d at 1178.

<sup>121</sup> It was a 3-1, with Judge Strubhar recusing. *Id.* at ¶ 28, 896 P.2d at 1182.

<sup>122</sup> OKLA. STAT. tit. 21, § 814.

<sup>123</sup> 1995 OK CR 16, ¶¶ 12, 17, 896 P.2d at 1179, 1180.

<sup>124</sup> *Id.* at ¶¶ 13-16, 896 P.2d at 1179-80.

<sup>125</sup> *Id.* at ¶ 14, 896 P.2d at 1180. No member of the Court dissented from this portion of the decision. Vice Presiding Judge Chapel dissented the refusal to grant the defendant's indigent application for an expert when he had pled insanity as a defense. *Id.* at ¶ 1, 896 P.2d at 1182 (Chapel, V.C.J., dissenting).

<sup>126</sup> *Id.* at ¶ 13 n. 3, 896 P.2d at 1179 n. 3.

condone, authorize, or approve mercy killing, assisted suicide or euthanasia.”<sup>127</sup> Murder is murder, the Court added, regardless of the victim’s request or consent to the crime.<sup>128</sup>

### **Healthcare Rights of Conscience, Destructive Embryo Research, & Cloning**

Oklahoma’s highest courts have not addressed the issues of healthcare rights of conscience, destructive embryo research, or cloning.

Because the Courts’ treatment of life issues has been essentially limited to matters related to the unborn, it is difficult to determine the attitude of the Courts toward life issues in general. However, when it comes to the unborn, at least four current members of the Oklahoma Supreme Court have made clear their stance that life begins at conception and that they will not extend *Roe v. Wade* and its progeny to cases unrelated to abortion.<sup>129</sup> Justice Kauger joined those same four members in upholding Oklahoma statutes restricting abortions to certain facilities,<sup>130</sup> although Justice Kauger previously engaged in pre-election judicial review of an initiative petition to find the petition impermissibly restricted the right to abortion.<sup>131</sup> A unanimous Court, which included six current members (Hargrave, Opala, Lavender, Kauger, Watt, and Winchester), showed it will not contort a statute to achieve the result of protecting the unborn.<sup>132</sup> Nonetheless, in doing so, the Court effectively invited the legislature to change the statute and include the unborn among those protected from child abuse. Conversely, while the Court of Criminal Appeals would not extend criminal liability to the death of unviable fetuses, the Oklahoma legislature did so.

## **II. JUDICIAL RESTRAINT**

The neat categories of judicial activism and judicial restraint do not paint a proper picture of either the Oklahoma Supreme Court or the Oklahoma Court of Criminal Appeals. Neither

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<sup>127</sup> OKLA. STAT. tit. 63, § 3101.2(C).

<sup>128</sup> 1995 OK CR 16 at ¶ 15, 896 P.2d at 1180.

<sup>129</sup> Justices Hargrave, Opala, Lavendar and Watt in *Nealis v. Baird*, *supra*.

<sup>130</sup> *Davis v. Fieker*, *supra*.

<sup>131</sup> *In re Initiative Petition No. 349*, *supra*.

<sup>132</sup> See *Matter of Unborn Child of Starks*, *supra*. The other three current members of the Court, Justices Taylor, Edmondson and Colbert, have not yet participated in a decision involving a life issue.

court can readily be described as activist. Nor would it be proper to say the courts usually exercise judicial restraint.

For instance, there are examples of both judicial restraint and what is considered judicial activism just among the decisions addressing life issues. In his dissent in *Initiative Petition No. 349*,<sup>133</sup> Justice Opala disapproved of the majority's continued rejection of the rule pronounced in *Threadgill v. Cross*,<sup>134</sup> which held the constitutionality of an initiative petition is not subject to review prior to its enactment by the voters.<sup>135</sup> In advocating the Court adhere to the prudential rule of not addressing constitutional questions in advance of necessity, Justice Opala stated, "*Threadgill* should be kept in full force because it raises a necessary barrier of insulation between judicature and initiative lawmaking."<sup>136</sup> At least one commentator has criticized the Court's move toward pre-election judicial review of initiative petitions as "an unnecessary and costly burden on core political speech," which is inconsistent with the principles of judicial restraint and separation of powers.<sup>137</sup>

This—prudential rule counseling against judicial review—is a common theme for Justice Opala. But it is not necessarily a call for judicial restraint. In writing a similar dissent in the 2002 Congressional redistricting case,<sup>138</sup> Justice Opala essentially rejected 40 years of electoral jurisprudence since the seminal USSC decision in *Baker v. Carr*,<sup>139</sup> stating he "recoil[ed]" from any holding allowing courts to draw Congressional districts. Yet, as the USSC has stated

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<sup>133</sup> 838 P.2d 1 (Okla. 1992).

<sup>134</sup> 109 P. 558 (Okla. 1910).

<sup>135</sup> The *Threadgill* Court determined the citizens proposing an initiative petition are exercising legislative powers and pre-election review of a petition would violate the requirement of separation of powers. *Id.* at 559. The Court first moved away from the judicial restraint required by *Threadgill* in the 1975 decision of *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma Numbered 74-1 & 74-2*, 534 P.2d 3 (Okla. 1975).

<sup>136</sup> *Initiative Petition No. 349*, 838 P.2d at 21 (Opala, C.J., dissenting).

<sup>137</sup> M.S. Radcliffe, *Pre-election Judicial Review of Initiative Petitions: An Unreasonable Limitation on Political Speech*, 30 TULSA L.J. 425 (1994).

<sup>138</sup> *Alexander v. Taylor*, 51 P.3d 1204, 1214 (Okla. 2002) (Opala, J., dissenting).

<sup>139</sup> 369 U.S. 186 (1962).

repeatedly, courts have a duty to involve themselves in the face of a legislative “failure to redistrict constitutionally.”<sup>140</sup>

On the other hand, in *Matter of Unborn Child of Starks*,<sup>141</sup> the Oklahoma Supreme Court strictly construed the Oklahoma Children’s Code. Although protective of the unborn, the Court was wary of including the unborn in the definition of child when the language of the statute indicated otherwise.<sup>142</sup>

A decision bloggers have described as “quite conservative,”<sup>143</sup> *Board of County Com'rs of Muskogee County v. Lowery*,<sup>144</sup> held the County could not use the power of eminent domain to take an easement for water pipelines for a private electric generation plant. Interpreting the state constitution, the Court declined to extend the reasoning of the USSC’s decision in *Kelo v. City of New London*,<sup>145</sup> which permitted eminent domain for private development. Citing Justice O’Connor’s dissent, the Oklahoma Supreme Court noted Oklahoma Constitution article II, sections 23, 24 provide greater protection to Oklahoma citizens than the Fifth Amendment of the U.S. Constitution and concluded economic development alone was not a public use or purpose justifying the taking of landowners’ private property.<sup>146</sup>

### III. THE COURT

The Oklahoma Supreme Court is a constitutionally created tribunal consisting of nine justices.<sup>147</sup> The Court of Criminal Appeals has five members.<sup>148</sup> The state Constitution vests

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<sup>140</sup> In *Branch v. Smith*, 538 U.S. 254, 270 (2003), the United States Supreme Court subsequently confirmed that courts have a duty to draw districts “when they are remedying a [legislative] failure to redistrict constitutionally,” and thereby rejected anew the bulk of the arguments put forth by Justice Opala.

<sup>141</sup> 18 P.3d 342 (Okla. 2001).

<sup>142</sup> *Id.* at 346–48.

<sup>143</sup> An example of such blogs is available at <http://volokh.com/posts/1147889748.shtml>.

<sup>144</sup> 136 P.3d 639 (Okla. 2006).

<sup>145</sup> 545 U.S. 469 (2005).

<sup>146</sup> *Board of County Com'rs of Muskogee County*, 136 P.3d at 646, 652 (quoting *Kelo*, 545 U.S. at 494 (O’Connor, J., dissenting)).

<sup>147</sup> OKLA. CONST. art. 7, § 2; OKLA. STAT. tit. 20, §§ 1, 2.

<sup>148</sup> OKLA. STAT. tit. 20, § 31.

judicial power in both the Supreme Court and the Court of Criminal Appeals but provides the legislature may abolish the latter.<sup>149</sup>

The governor appoints the members of both courts from a list of three nominees submitted by the Oklahoma Judicial Nominating Commission.<sup>150</sup> The members are selected from districts and sit for six-year terms.<sup>151</sup> Each is subject to retention during the first general election after his or her first year on the bench.<sup>152</sup> Thereafter, the members are subject to a retention vote during the general election on a six-year rotating schedule.<sup>153</sup>

The Court of Criminal Appeals has exclusive jurisdiction of criminal matters.<sup>154</sup> In the event a conflict arises over the jurisdiction of the two courts, the Oklahoma Supreme Court determines which court has jurisdiction.<sup>155</sup> In civil cases, all appeals are directed to the Oklahoma Supreme Court.<sup>156</sup> However, the Court of Civil Appeals is a statutorily created intermediate appellate court to which the Supreme Court directs most civil appeals.<sup>157</sup> The Supreme Court has complete discretion in determining which cases it will hear.<sup>158</sup>

A majority of the justices may agree to issue a writ of certiorari on an appeal decided by the Court of Civil Appeals or may retain an appeal directly from the trial court.<sup>159</sup> The factors the Court considers in exercising discretion to retain an appeal are: 1) whether a case presents an issue of first impression; 2) whether different divisions of the Court of Civil Appeal are not in accord; and 3) whether important legal issues affecting public policy and having widespread public impact are at stake.<sup>160</sup>

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<sup>149</sup> OKLA. CONST. art. 7, § 1; *see also* OKLA. STAT. tit. 20, § 31 (legislative authority for Court of Criminal Appeals).

<sup>150</sup> OKLA. CONST. art. 7B, § 4.

<sup>151</sup> OKLA. CONST. art. 7, § 2 (terms of Supreme Court Justices); OKLA. CONST. art. 7B, § 5 (terms of both); OKLA. STAT. tit. 20, § 35 (terms of members of Court of Criminal Appeals).

<sup>152</sup> OKLA. CONST. art. 7B, § 5; OKLA. STAT. tit. 20, § 33.

<sup>153</sup> OKLA. CONST. art. 7B, § 2.

<sup>154</sup> OKLA. STAT. tit. 20, § 40.

<sup>155</sup> OKLA. CONST. 7, § 4.

<sup>156</sup> OKLA. CONST. art. 7, § 5.

<sup>157</sup> OKLA. CONST. art. 7, § 5; OKLA. STAT. tit. 20, § 30.1; *See also* Oklahoma Supreme Court Network, *Supreme Court Brochure*, [www.oscn.net](http://www.oscn.net).

<sup>158</sup> OKLA. CONST. art. 7, § 5.

<sup>159</sup> *Id.*

<sup>160</sup> OKLA. SUP. CT. R. 1.24(c).

## Oklahoma Supreme Court

The current Justices of the Oklahoma Supreme Court are as follows:

<b>Member</b>	<b>Appointed by/ Year</b>	<b>Term Expires</b>	<b>Miscellaneous</b>
Robert E. Lavender	Governor Bellmon (R)/ 1965	2008	- Biographical Information: Law degree, University of Tulsa, 1953; served as Chief Justice 1979–80 - Other: World War II veteran; 32 <sup>nd</sup> Degree Mason; Member, Claremore American Legion post
Rudolph Hargrave	Governor Boren (D)/ 1978	2010	- Biographical Information: Law degree, University of Oklahoma, 1949; practiced in Wewoka until 1964; Judge in Seminole County, 1964–78 Professional Affiliations: served as vice-president of National Conference of Chief Justices during his term as Chief Justice
Marian Opala	Governor Boren (D)/ 1978	2012	- Biographical Information: J.D., Oklahoma City University, 1953; LLM, New York University School of Law, 1957; Prosecutor, and referee, staff attorney and court administrator for Oklahoma Supreme Court; Chief Justice, 1991–92; Born in Poland
Yvonne Kauger	Governor Nigh	2012	- Social Affiliations: Coordinator

	(D)/ 1984		<p>for annual Sovereignty Symposium on Indian Law, since its inception</p> <ul style="list-style-type: none"> <li>- Awards: Herbert Harley Award, American Judicature Society, 1999; OBA Judicial Excellence Award, 1999</li> <li>- Other: First in law school class, Oklahoma City University; only female justice currently on the Court</li> </ul>
Joseph M. Watt	Governor Walters (D)/ 1992	2008	<ul style="list-style-type: none"> <li>- Biographical Information: University of Texas Law School, 1972; former General Counsel to Governor David Walters; Associate District Judge, Jackson County, 1986-91</li> <li>- Social Affiliations: Past President &amp; Secretary, Altus Rotary Club</li> </ul>
James Winchester	Governor Keating (R)/ 2000	2010	<ul style="list-style-type: none"> <li>- Biographical Information: J.D., Oklahoma City University; trial judge, Caddo County, 1983–1997; former ALJ for Social Security Administration</li> <li>- Other: Outstanding Trial Court Judge, Oklahoma Trial Lawyers Association, 1986; wife is Republican member of Oklahoma House of Representatives; member,</li> </ul>

			Leadership Oklahoma; believes “children of this state are one of our most valuable assets”
James E. Edmondson	Governor Henry (D)/ 2003	2012	- Biographical Information: Law degree, Georgetown University, 1973; District Judge, 15 <sup>th</sup> Judicial District, 1983–2004; Asst. and Acting U.S. Attorney, Eastern District Oklahoma, 1978–81; Asst. District Attorney, Muskogee County - Other: Brother, Drew Edmondson, is current Attorney General
Steven W. Taylor	Governor Henry/ 2004	2012	- Biographical Information: J.D., University of Oklahoma College of Law, 1974 - Civic/Social Affiliations: Member, Methodist Church & Rotary Club in McAlester; Board of Directors, Oklahoma Medical Research Foundation & Oklahoma Heritage Association - Other: Trial judge for 20 years Presided over state trial of Oklahoma City bombing conspirator, Terry Nichols
Tom Colbert	Governor Henry/ 2004	2012	- Biographical Information: J.D., University of Oklahoma, 1982;

			<p>appointed to Court of Civil Appeals in 2000; former Assistant Dean, Marquette University ; Asst. District Attorney, Oklahoma County, 1984–86</p> <p>- Other: Formerly in private practice with Vicki Miles-LaGrange, a Clinton appointee to the federal bench in Oklahoma City; Worked as a lawyer for Oklahoma Dept. of Human Services</p> <p>Newest member of the Court; First African-American to serve on Court of Civil Appeals and Supreme Court</p>
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The justices choose a Chief Justice and a Vice-Chief Justice from their peers.<sup>161</sup> James Winchester is the current Chief Justice, and James Edmondson is the current Vice-Chief Justice.

In 2004, Justice Marian Opala filed a lawsuit in federal court against his fellow justices, alleging age discrimination.<sup>162</sup> The suit was related to a change in the rules for selection of the Chief Justice, allowing a justice to succeed himself or herself as Chief Justice. The USSC recently denied his petition for a writ of certiorari after the dismissal of his case.<sup>163</sup>

Justices Taylor, Opala, Kauger, Colbert, and Edmondson all faced retention during the last general election on November 7, 2006.<sup>164</sup> Before every general election, the Oklahoma

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<sup>161</sup> OKLA. CONST. art. 7, § 2.

<sup>162</sup> *Opala v. Watt*, 454 F.3d 1154 (10th Cir. 2006).

<sup>163</sup> *Opala v. Watt*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 738, (Dec. 4, 2006), and 454 F.3d 1154 (10<sup>th</sup> Cir.2006) (reversing the district court and dismissing the case).

<sup>164</sup> Oklahoma State Election Board, *Summary Results*, [www.elections.state.ok.us](http://www.elections.state.ok.us).

County Bar Association (“OCBA”) conducts a survey of Oklahoma County<sup>165</sup> attorneys to obtain their opinions of individuals running for judicial slots.<sup>166</sup> The most recent results are as follows:<sup>167</sup>

<b><u>Justice</u></b>	<b><u>Not Qualified</u></b>	<b><u>Qualified</u></b>	<b><u>Highly Qualified</u></b>
Taylor	6%	39%	55%
Opala	12%	30%	58%
Kauger	14%	41%	45%
Colbert	9%	44%	47%
Edmondson	7%	44%	49%

In the 2006 election, all justices were retained, with each receiving greater than 65% of votes.<sup>168</sup>

### **Oklahoma Court of Criminal Appeals**

The following are the current members of the Court of Criminal Appeals:

<b>Member</b>	<b>Appointed by/ Year</b>	<b>Term Expires</b>	<b>Miscellaneous</b>
Gary Lumpkin	Governor Bellmon/ 1989	2008	- Biographical Information: J.D., University of Oklahoma, 1974; Former District Attorney Marshall County; Trial judge, Marshall County, 1982–89 - Other: Retired Marine; active Southern Baptist
Charles Johnson	Governor Bellmon/ 1989	2008	- Biographical Information: Law degree, University of Oklahoma,

<sup>165</sup> Oklahoma City, the state’s most populous city and capital, is the county seat of Oklahoma County.

<sup>166</sup> Press Release, OCBA & Results of Survey (Oct. 2, 2006).

<sup>167</sup> *Id.* (885 out of 4,731 attorneys responded).

<sup>168</sup> *Id.*

			<p>1955</p> <p>- Other: Former active duty Air Force; past President, Kay County Bar Association; 1993 Oklahoma Appellate Judge of the Year, Oklahoma Trial Lawyers Association</p>
Charles Chapel	Governor Walters; 1993	2010	<p>- Biographical Information: J.D., University of Tulsa School of Law; LLM, University of Virginia</p> <p>- Professional Affiliations: Founded Chapel, Riggs, Abney, Neal &amp; Turpen, a large Tulsa-based law firm</p> <p>- Civic/Social Affiliations: Past vice president &amp; director, Arkansas River Development Corp.; President, Green Country Council of Camp Fire; Member, Jenks Public School Foundation</p>
Arlene Johnson	Governor Henry/ 2005	2012	<p>- Biographical Information: J.D., University of Oklahoma; Former law clerk, Court of Criminal Appeals; Former Oklahoma County Asst. District Attorney; Former Asst. Attorney General; Asst. U.S. Attorney for the Western Dist. of Oklahoma for 21 years</p>

			- Other: U.S. Attorney General's John Marshall Award for Outstanding Legal Achievement, 1998; FBI's Commendation for Exceptional Service in Public Interest, 1998
David B. Lewis	Governor Henry/ 2005	2012	- Biographical Information: 1983 graduate of University of Oklahoma School of Law; Private practice for 3 years; Asst. Dist. Attorney, Comanche County; Trial judge, 1991-2005

Charles Chapel is Presiding Judge, and Gary Lumpkin is Vice-Presiding Judge.<sup>169</sup> Judge Arlene Johnson and Judge Lewis were retained by the voters during the last general election in 2006.<sup>170</sup> In the OCBA survey, 93 and 91 percent of those responding found Judges Johnson and Lewis qualified or highly qualified.<sup>171</sup>

## CONCLUSION

According to the Oklahoma Supreme Court, it is clear human life begins at conception, and an unborn child is a person. As a result, the Supreme Court is quite protective of the unborn from negligent injury and wrongful death. Additionally, for the most part, the Court has been reluctant to strike down restrictions on abortion. Similarly, Oklahoma's other court of last resort, the Court of Criminal Appeals, has been protective of the unborn from criminal violence. Both Courts have made it clear they are restrained from giving greater protection to the unborn by United States Supreme Court precedent, rather than by their own reasoning. It is unknown,

<sup>169</sup> For the justices' positions, see [www.occa.state.ok.us](http://www.occa.state.ok.us).

<sup>170</sup> Oklahoma State Election Board, *Summary Results*, [www.elections.state.ok.us](http://www.elections.state.ok.us).

<sup>171</sup> Press Release, Oklahoma County Bar Association & Results of Survey (Oct. 2, 2006).

however, where either court stands regarding other stages of life and other life issues, such as assisted suicide, healthcare rights of conscience, or cloning.

