



State Supreme Court hears 'wrongful life' case

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By Chris Potter / Pittsburgh Post-Gazette

When politicians debate reproductive rights, they don't just argue over when life begins for a fetus. They often also decide how much the woman carrying it should be told.

Before a woman can obtain an abortion, for example, Pennsylvania law requires she be told of alternatives like adoption. If a fetus is diagnosed in utero with Down Syndrome, meanwhile, her doctor must provide information about treatment and support options.

But under a 27-year-old state law, a woman can't sue her doctor for failing to tell her about birth defects in the first place — even if testing suggests they are present.

Similar bans on litigation are in effect in 13 other states, according to the National Conference of State Legislatures, and they are backed by anti-abortion groups and some disability-rights organizations. But Sue Frietsche, an attorney with the Women's Law Project, calls the ban "another law that singles out for special bad treatment a woman's decision about whether to keep a pregnancy."

"If a doctor messes up prenatal-testing results," she said, "there should be the same legal rights any other victim of negligence has."

Parents may get those rights, depending on how the state Supreme Court rules on a challenge to the law. A lower court has already ruled the ban is unconstitutional for technical reasons: The state's highest court heard arguments May 6. But while the case could reshape provocative-sounding legal theories like "wrongful life," few non-lawyers seem to have noticed it at all.

A tragic case

Sernovitz v. Dershaw began in 2008, after Rebecca and Lawrence Sernovitz, of Montgomery County, gave birth to a son.

The attorney representing the Sernovitzes, Theodore Caldwell Jr., said neither he nor his clients would comment on the case. But according to legal filings, the Sernovitzes are Ashkenazi Jews, a population at risk for certain rare genetic disorders. Ms. Sernovitz underwent genetic testing after becoming pregnant, but while blood tests revealed she was at risk for a disease called familial dysautonomia, the complaint contends, doctors never informed them of the positive result. In fact, the complaint asserts, her doctor told her "she was not a carrier of any of the gene mutations tested for."

The Sernovitzes' son wasn't diagnosed with the condition until three months after his birth, the

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suit contends.

Family dysautonomia is a “nasty disease” that impairs automatic body functions, said Dr. Jerry Vockley, chief of medical genetics at Children’s Hospital of UPMC. “It can result in a lack of pain sensations, your blood pressure can bottom out. It’s a tough life.”

It’s also a short one: Many with the condition don’t live to 40, suffering heart problems and declines in vision and balance.

The genetic test itself is straightforward, Dr. Vockley added. “If [a positive] result doesn’t get back to the parents, somebody blew it.”

The Sernovitzes have sued numerous medical providers involved in the pregnancy. Had they received the correct result, their suit argues, “they would have terminated the pregnancy rather than bringing a child into this world ... to endure a lifetime of extreme and debilitating suffering and, ultimately, a premature death.”

Such suits are called “wrongful birth” cases; the Sernovitzes also filed a related claim, called “wrongful life,” on their son’s behalf. And while the lawsuits seek money to improve a child’s quality of life, their very terminology can be controversial.

“These are very sad situations,” said Brandon McGinley of the conservative Pennsylvania Family Institute. “But to say a child’s life isn’t worth living is inappropriate at best, grotesque at worst.”

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The Sernovitzes’ doctors have neither acknowledged nor denied mishandling test results. Their attorneys, who did not return calls for comment, have argued that a 1988 state law bars such suits entirely.

The lawsuit ban was championed by Delaware County Republican Stephen Freind, who argued on the House floor that “to permit these lawsuits is to admit that birth ... can be an evil.”

“When you make that admission, our society, as we know it, ceases to be a society,” he added.

Mr. Freind acknowledged that even “in a case where a doctor lies” about test results, “the law would ensure “he cannot be sued on the basis that the baby was born instead of aborted.” Such behavior would be “outrageous” and could cost a doctor’s medical license, he added.

The ban passed easily and was signed in 1988 by Gov. Robert P. Casey, an anti-abortion Democrat.

Subsequent lawsuits argued the ban infringes on the right to an abortion, an argument rejected by state and federal judges. The Sernovitz case, by contrast, has gone further, even while challenging the law on more limited grounds.

Pennsylvania’s Constitution requires laws to address only a “single subject,” rather than a laundry list of unrelated matters. The Sernovitzes argue the lawsuit ban was among numerous 11th-hour

amendments to a bill that, originally, concerned replacing Philadelphia bail commissioners.

In 2012, a three-judge Superior Court panel agreed. The law including the ban was “a veritable potpourri of legislation” and thus unconstitutional, wrote Judge Christine Donohue, who is running for Supreme Court this year.

Based on oral arguments May 6, it’s unclear the state’s top court will follow suit.

Sheila Haren, one of the attorneys for the medical providers, noted that courts only began applying the single-subject rule stringently in the last dozen year. She called it “patently unfair to apply a 2015 standard to 1988.”

The justices, meanwhile, wondered if repealing a 1988 law would jeopardize older laws. “Can we just go indefinitely and have challenges?” asked Justice Correale Stevens, a former state legislator who’d voted for a “wrongful birth” ban in 1984. “What about ... the law being stable and predictable?”

Such concerns may seem far removed from abortion activists, or families facing unexpected heartbreak. “These are concepts only a lawyer can love,” said Anita Allen, vice-provost for faculty and professor of law at the University of Pennsylvania.

Indeed, the Sernovitz case has so far drawn little controversy, or even attention. The political arm of the state’s Planned Parenthood chapter declined comment, and several anti-abortion groups did not return calls. The Family Institute’s Mr. McGinley said the suit had not been a top concern: “We flagged it at one point, but there was a lot else going on.”

‘Almost Kafkaesque’

Still, Ms. Allen said, broader issues are at stake. Lawsuits “both compensate misconduct and deter it. Barring these suits arguably does limit the ability to deter negligence. On the other hand, it sends a strong signal about the value of life, including the lives of the disabled.”

Ari Ne’eman, the president of the Autistic Self Advocacy Network, says wrongful-birth lawsuits create “an almost Kafkaesque system” in which “parents have to swear that they’d rather their child not have been born.” That can scar families and have social consequences.

“When we ask, ‘Isn’t it a tragedy that these people exist?’, it distracts from [creating] a more equal society,” Mr. Ne’eman said. Allowing parents to sue over genetic testing, he said, may influence doctors to encourage abortion, though he said he lacked data to document such a trend.

The decision to proceed with a pregnancy “shouldn’t be the result of medical error,” countered Ms. Frietsche, of the Women’s Law Project. While anti-abortion groups worry about genetic engineering, she said, empowering individuals to make their own choices “is the opposite of eugenics.”

Even if the Sernovitzes prevail, “it won’t open a floodgate of litigation,” said Harry Cohen, a Pittsburgh attorney with expertise in medical malpractice. In general, malpractice cases are rarer than people think, he said, and while he knew of cases similar to the Sernovitzes’, testing “errors like this are rare.”

A decision by the Supreme Court is likely months away, and Mr. Cohen said it likely won’t remove another major hurdle for such cases. While wrongful birth is “not really an argument that this child wasn’t wanted,” for a defense attorney, “that would be an easy spin on what the case is about.”

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