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## **Prisoner Procreation and Abortion Issues**

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### **1. Introduction**

Prisons and jails nationwide often confront issues concerning prisoners' requests to marry, procreate (including through artificial insemination), or obtain an abortion if they are pregnant during incarceration.

This article attempts to briefly examine some of the important court decisions on these issues, especially from the perspective of federal constitutional law. No attempt has been made to be exhaustive, or to summarize many particular wrinkles that may arise under applicable state law.

The article also does not attempt to fully examine issues concerning inmate divorce, conjugal visits, visitation in general, or issues concerning childbirth, child custody, and child placement that arise when pregnant prisoners give birth while incarcerated.

Additionally, while at least one state [Massachusetts, see [Goodridge v. Dep't of Pub. Health](#), 440 Mass. 309, 798 N.E.2d 941 (2003)] and a number of foreign countries have now sanctioned same-sex marriage, and a growing number of states have recognized same sex civil unions which have many of the characteristics of marriage, the article does not attempt to address special questions that may arise out of same-sex marriage and civil unions, given the current dearth of case law on the subject as it relates to prisoners.

In the final section of the article, there are links to a number of useful

resources, including some sample policies or regulations.

## **2. Prisoner Procreation**

In addition to the right to marry, constitutional protections are extended to the right to procreate and bear children—or decide not to. For many prisoners, of course, the entire issue has been moot, in that incarceration, by its very nature, normally involves denial of normal intimate association with a spouse or intimate partner for such purposes (with the exception of certain correctional facilities which provide conjugal visits, family “reunion” programs, or similar opportunities).

The development of modern reproductive assistance technology, however, including artificial insemination, has made the issue a much more immediate and practical one, and one which is clearly still very controversial. There is no definitive decision by the U.S. Supreme Court on the issue, but there are two federal appeals courts which have rejected the argument that prisoners have a constitutional right to have their semen gathered and transported out of a correctional facility for purposes of artificial insemination, although in one of the cases, the right was only rejected by a 6-5 vote.

In [Gerber v. Hickman](#), #00-16494, 291 F.3d 617 (9th Cir. 2002), the court ruled, by that 6-5 vote, that a prisoner serving a sentence of 100 years to life plus eleven years had no constitutional right to provide his wife with a sperm specimen that she could use to be artificially inseminated.

Gerber involved an inmate in the California state prison system who claimed that the prison in which he is incarcerated was violating his constitutional rights by not allowing him to provide his wife with a sperm specimen for that purpose.

The trial court dismissed the lawsuit for failure to state a claim, ruling that a prisoner does not have a constitutional right to procreate while incarcerated. The appeals court upheld that ruling, stating that the "right to procreate is fundamentally inconsistent with incarceration."

The 41-year-old prisoner is serving a sentence of 100 years to life plus eleven years. The state Department of Corrections prohibits family visits for inmates "sentenced to life without the possibility of parole [or] sentenced to life, without a parole date" set. No parole date has been set for the prisoner and "due to the length of his sentence, no parole date seems likely."

His lawsuit requested that he be allowed to be mailed, from a laboratory, a plastic container into which he would ejaculate, and then be allowed to return the

container back to the lab by overnight mail. In the alternative, he requested that his lawyer be allowed to pick up the container. He offered to bear all of the costs, including any costs incurred by the correctional facility, but the prison refused to accommodate his request.

In rejecting the prisoner's claim, the majority of the appeals court stated that "our conclusion that the right to procreate is inconsistent with incarceration is not dependent on the science of artificial insemination, or on how easy or difficult it is to accomplish. Rather, it is a conclusion that stems from consideration of the nature and goals of the correctional system, including isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation."

The court distinguished the ruling in [Skinner v. Oklahoma](#), No. 782, 316 U.S. 535 (1942), in which a right to be free of forced surgical sterilization was recognized. "The right to procreate while incarcerated and the right to be free from surgical sterilization by prison officials are two very different things." Inmates have the right to maintain their procreative abilities for "later use, not current use."

Additionally, the court majority stated, while the right to marry and "many important attributes of marriage" survive incarceration, [Turner v. Safley](#), 482 U.S. 78, at 95-96 (1987), this does not include the inmate's right to consummate the marriage while in prison or to enjoy the other tangible aspects of marital intimacy.

The majority found it unnecessary to reach the question of whether the prison's regulation is related to a valid penological interest, holding instead that it simply didn't violate any right the prisoner had.

The court also rejected the claim that the prisoner had a right to procreate under California law while incarcerated, or that denial of his request to artificially inseminate his wife was cruel and unusual punishment in violation of the Eighth Amendment. The denial of this request the court said, "can by no means be considered a deprivation" of the "minimal civilized measure of life's necessities."

A strong dissent by five judges on the court stated that "there is absolutely nothing in the record indicating that procreation" by itself, "the right to have a child--is fundamentally inconsistent with the fact of incarceration. The majority has cited no facts to support such a conclusion and common sense does not lead to such a result." The minority argued that marital intimacy may be inconsistent with incarceration because of security concerns, but that those security concerns do not apply to artificial insemination.

In another federal appeals court decision, a [Bureau of Prisons'](#) action restricting inmate procreation, including artificial insemination of wives by male inmates was

held to be reasonably related to legitimate governmental interest in treating all inmates equally. Goodwin v. Turner, #89-1101, 908 F.2d 1395 (8th Cir. 1990).

See also Percy v. Dept. of Corrections, #A-900-9312, 278 N.J. Super. 543, 651 A.2d 1044 (1995) (refusal to allow New Jersey male prisoner to artificially inseminate his wife did not violate his constitutional right to procreation; security concerns and scarce resources adequately justified policy).

In another case, a court was unsympathetic with a prisoner's spouse who attempted to accomplish the goal of artificial insemination without seeking permission. In U.S. v. Parlavecchio, #4-CR:00-312-3192 F. Supp. 2d 349 (M.D. Pa. 2002), the court ruled that a woman who pled guilty to providing a prohibited object to an inmate, a cryogenic sperm preservation kit intended to preserve her inmate husband's sperm, was not entitled, post-conviction, to the return of the confiscated seminal fluids. The wife was not entitled to equitable relief in the form of return of the seized property since she had "unclean hands," having bribed a correctional officer to smuggle her husband's semen out of the prison.

### **3. Prisoner Abortion**

Some female prisoners are pregnant, either because they were already pregnant when first incarcerated, or as a result of sexual activity taking place in a correctional facility, whether consensual or otherwise. Under Roe v. Wade, #70-18, 410 U.S. 113 (1973), and subsequent cases, the U.S. Supreme Court has upheld a constitutional right to seek to terminate a pregnancy through abortion, subject to reasonable regulations and restrictions. What about a pregnant prisoner seeking an abortion?

The U.S. Supreme Court has never directly addressed this issue in a substantive opinion. In one case, however, the Court vacated a temporary stay order issued by Supreme Court Justice Clarence Thomas that prevented a Missouri prison inmate from obtaining an abortion. The Missouri prisoner, who was pregnant when incarcerated on a parole violation, had obtained an order from a federal trial court requiring the state to provide access to an abortion by providing transportation to a clinic 80 miles away, despite a Department of Corrections policy under which such transportation is not provided for abortions that the Department does not deem "medically necessary." The prisoner reportedly planned to pay for the abortion herself. The Supreme Court action, which was a brief two-sentence order, with no dissents, had the effect of reinstating the trial court's order, and allowing the abortion to take place. Crawford v. Roe, No. 05A333, 546 U.S. 955 (2005).

In Monmouth Co. Corr. Inst. Inmates v. Lanzaro, #86-5527, 834 F.2d 326 (3<sup>rd</sup> Cir. 1987), cert. denied, 486 U.S. 1006 (1987), the court ruled that a county policy

requiring court ordered releases for prisoner elective abortions was unconstitutional, and ruled that the county might have to provide funding for the procedure if the inmate was indigent.

In [Victoria W. v. Larpenter](#), No. 02-30598, 369 F.3d 475 (5<sup>th</sup> Cir. 2004), on the other hand, a federal appeals court ruled that a prison policy requiring an inmate to get a court order to obtain an elective abortion did not violate her constitutional rights.

The case involved a pregnant inmate in Louisiana who challenged a prison's policy of requiring her to obtain a court order to receive an elective medical procedure, including an elective abortion. The prisoner claimed that the court order policy frustrated her decision to abort her pregnancy, her constitutional right, and constitutes cruel and unusual punishment through deliberate indifference to a serious medical need. She also argued that the policy was not reasonably related to legitimate penological interests because:

inmates are often moved without a court order for emergency medical care, so the policy cannot further inmate security; (2) she would have paid for the procedure and for the costs associated with her custodial release, so no prison resources would have been lost; and (3) there were alternatives to the court order policy.

A federal appeals court rejected these arguments, and upheld summary judgment for the defendant prison officials.

The defendants' insistence that the prisoner receive a court order to obtain temporary release for the abortion stemmed from the prison's general policy governing elective medical procedures. While it was unwritten, it was the policy that an inmate who wishes to obtain an elective medical procedure must obtain a court order allowing transport or temporary release. By contrast, emergency medical situations that cannot be managed in the prison are transported to a hospital without a court order.

The policy governing emergency medical situations listed examples, including severe internal/external hemorrhage, loss of consciousness, difficult or labored breathing, heat stroke, chest pains, labor pains less than seven minutes apart, and excessive vaginal bleeding. Inmates seeking an elective medical procedure were always required to get a court order, but the plaintiff was the first inmate who sought an abortion.

It was undisputed that the abortion was not medically necessary, but was sought for emotional and financial reasons, and that the prisoner could not obtain

an abortion locally, but would have to be transported elsewhere for one.

The prisoner's attorney, rather than requesting release or transport in order to obtain an abortion, filed a motion with the court seeking her release from the remainder of her sentence based on an assertion of the prison's inadequate prenatal care. She was ultimately released too late to obtain a legal abortion in Louisiana, carried the child to term, and placed it for adoption.

Summarizing the issues, the appeals court stated:

At issue here are the rights to an abortion and to be free of cruel and unusual punishment. The Fourteenth Amendment protects a woman's right to choose to terminate her pregnancy prior to viability. Government regulation of abortions is allowed so long as it does not impose an undue burden on a woman's ability to choose. A state regulation constitutes an undue burden 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."

Such rights, however, may be limited in the prison context if reasonably related to a legitimate penological interest, the court stated.

We are persuaded that the policy of requiring judicial approval of elective medical procedures is here reasonably related to legitimate penological interests. The policy was not promulgated with deliberate indifference to its consequences and was not the direct cause of Victoria's injury.

There are, the court found, valid, rational connections between legitimate interests in ensuring inmate security and avoiding unnecessary liability and the policy requiring inmates to obtain court orders allowing elective medical procedures. Transportation of prisoners outside the facility for such elective procedures places the prisoner "in a less-secure environment and increases the chance of escape." To minimize these risks, the court found, there was nothing unreasonable in insisting upon judicial approval, which "places an unbiased judge between the prison officials and inmates seeking off-site transport for purely elective procedures."

Further, rather than singling out abortion for special burdens, the court noted, the policy in question applied to all elective medical procedures. "The policy's aim is to maximize inmate security and avoid liability. Nothing suggests that its purpose or effect was to deter abortions."

The appeals court also rejected the argument that the policy, as applied in this case, amounted to deliberate indifference to the prisoner's serious medical needs. It

noted that the prisoner received prenatal care three times during the first nine days of her imprisonment, and information about the court order policy and the procedures that she needed to follow if she wanted to obtain an abortion. The failure to seek such an order was the responsibility of the prisoner's attorney. "Her attorney's action, not the policy, denied Victoria an abortion."

If an abortion is deemed "medically necessary," as opposed to elective, which would be a case by case determination, it is clearly subject to all the general rules concerning the constitutional duty to provide adequate medical care and treatment as discussed in a prior article on [Civil Liability for Inadequate Medical Care](#) in this Journal. See also Doe v. Barron, #C-1-99-611, 92 F. Supp. 2d 694 (S.D. Ohio 1999) (denying a female prisoner access to abortion services violated her rights and constituted deliberate indifference to the serious medical needs of a pregnant prisoner).

Mere negligence or administrative delays in providing an inmate with access to abortion services have been held not to be a violation of prisoner rights. See Bryant v. Maffucci, #90-7220, 923 F.2d 979 (2<sup>nd</sup> Cir. 1991) (administrative delays in scheduling female detainee's abortion, resulting in birth of child, did not deprive her of her right to privacy or due process; the delay was mere negligence at worst, insufficient to show a constitutional violation).

In Gibson v. Matthews, #89-5284, 926 F.2d 532 (6th Cir. 1991), a woman accused of bank robbery, which is a federal crime, was incarcerated in a Texas jail. She was technically under federal jurisdiction, although physically in the custody of the county. She was pregnant and sought an abortion, making requests to federal marshals, her attorney, and a judge, as well as county jail personnel. While a judge allegedly stated that an abortion should occur soon, and prior to her transfer to a federal prison, it did not, and she was then transferred to a number of federal correctional facilities in Oklahoma, Georgia, West Virginia, and Kentucky. No abortion took place, despite the fact that the Bureau of Prisons had policies mandating that abortions be provided. Under the circumstances, however, the court ruled that federal prison employees and officials were entitled to qualified immunity for failing to facilitate the abortion. At the time the events occurred, the court found, there were no reported cases regarding the abortion rights of prisoners, so that there was no clearly established law on the subject.

Current federal prison regulations provide, [28 C.F.R. Sec. 551.23](#), that a pregnant inmate has the responsibility of deciding whether to have an abortion or to bear the child, that such inmates are to be provided with medical, religious, and social counseling, and that an inmate requesting an abortion must sign a statement to that effect, as well as an acknowledgement that she has been provided with the opportunity for the counseling. Upon receipt of these statements, medical

personnel shall arrange for an abortion to take place.

#### **4. Relevant Resources**

The federal [Bureau of Prisons](#) (BOP) has regulations which govern the topics of prisoner birth control, pregnancy, abortion, and child placement of a female inmate's newborn child. [28 C.F.R. Secs. 551.10-551.551.24](#).

Some sample policies or regulations of interest available online include policies on birth control, pregnancy, child placement, and abortion of correctional departments in [Colorado](#), and [Minnesota](#). No attempt has been made to be exhaustive, and the policies listed are provided purely for informational purposes. As always, any policy developed for a particular department or facility should be developed in consultation with local legal counsel.

An Interesting article available online is "[Artificial Insemination Behind Bars: The Boundaries of Due Process](#)," by Lisa Walgenbach, 36 Loyola of Los Angeles Law Review 1357 (Spring 2003).

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