IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

In re Guardianship of J.D.S., Jennifer Wixtrom, Appellant	CASE NO: 5D03-1921 Nos. Below: 48-2003-CP-001188-O 48-2003-MH-000414-O

RENEWED BRIEF OF *AMICI CURIAE* ACLU, ACLU OF FLORIDA, FLORIDA NOW, INC. , AND CENTER FOR REPRODUCTIVE RIGHTS IN OPPOSITION TO APPELLANT AND IN SUPPORT OF CIRCUIT COURT'S DECISION DENYING PETITION FOR APPOINTMENT OF GUARDIAN FOR FETUS
TO BE FILED WITH LEAVE OF COURT

Randall C. Marshall
Florida Bar No. 018176
American Civil Liberties Union of Florida
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
(305) 576-2337

Julie Sternberg*
Diana Kasdan*
Jaya Ramji*
ACLU Reproductive Freedom Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2633

Bebe J. Anderson*
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

Susan A. England
Florida Bar Number 0186081
Cooperating Counsel for Florida NOW, Inc.,
Susan A. England P.A.
2805 Lakeview Drive
Fern Park, FL 32730
(407) 339-4600

Counsel for *Amici Curiae*
* Motions for Admission Pro Hac Vice previously filed

Table of Contents

Table of Citations

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Florida Rule of Appellate Procedure 9.370, the American Civil Liberties Union ("ACLU"), the ACLU of Florida, Florida National Organization for Women, Inc. ("Florida NOW"), and the Center for Reproductive Rights ("the Center") (collectively, "*Amici*") submit this brief in opposition to Jennifer Wixtrom's appeal of the denial of her Petition for the Appointment of Guardian Over Unborn Child and in support of the circuit court's decision. *Amici* previously moved for permission to participate as *Amici* in opposition to Appellant in this case and this Court denied that motion. *Amici* recently learned that appeal of this matter is proceeding before this Court without the presence of adversarial parties. In light of the current absence of adversarial positions on matters of great public importance presented by this appeal, *Amici* have filed an emergency motion renewing their request that this Court grant them permission both to present oral argument at the scheduled hearing and to file an *Amici* brief, which addresses both the correctness of the circuit court's decision when issued and its correctness in light of J.D.S.'s decision to carry to term.

Each of the *Amici* is committed to advancing and protecting women's rights to equality, privacy, autonomy and reproductive choice. The ACLU and its state affiliate the ACLU of Florida have long been dedicated to the principles of liberty and equality embodied in the United States and Florida Constitutions and to

protecting the constitutional rights of privacy and reproductive choice. Florida NOW is a subdivision of the national organization, NOW, dedicated to advancing women's equality and self-determination by, *inter alia*, protecting women's reproductive rights through both litigation and advocacy. The Center is a national public interest law firm dedicated to preserving and expanding reproductive rights in the United States and throughout the world. The Center has long been active in working to protect the constitutional right of reproductive choice in Florida.

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

SUMMARY OF THE ARGUMENT

J.D.S. is an adult with multiple developmental and physical disabilities who is now approximately eight months pregnant as the result of a rape that occurred while she was in the custody of a state-licensed group home. On June 2, 2003, J.D.S. was declared incompetent and Patti Jarrell was appointed as her plenary guardian. At that time, Appellant Wixtrom, with the apparent support of the State, petitioned for appointment as guardian on behalf of J.D.S.'s fetus. In considering Appellant's petition, the Ninth Judicial Circuit found no statutory authority or judicial precedent permitting the appointment of a guardian for a fetus and

correctly denied Appellant's motion. This result is correct not only as a matter of Florida statutory law, and well within the lower court's discretion in determining guardianship appointments, but is also required by both the Federal and State Constitutions.

Since the circuit court issued its decision from which Appellant appeals, J.D.S.'s court-appointed guardian has decided that J.D.S. will carry her pregnancy to term; that plan has been approved by the circuit court. Despite that decision and ruling, Appellant continues to assert that a guardian should be appointed for J.D.S.'s fetus. Appointment of a guardian for the fetus was improper as a matter of law at the time the circuit court made its ruling on the petition at issue here and remains improper under the changed factual situation presented by J.D.S.'s decision to continue her pregnancy.

As a threshold matter, Florida law only permits the appointment of guardians for "persons." A fetus, however, is not a person under the guardianship statutes. Indeed, Florida courts have repeatedly held that a fetus is not a person within the meaning of the Florida statutes. Thus, as the circuit court held, under controlling Florida case law, "appointment of a guardian ad litem for a fetus [would be] clear error." Order Denying Verified Petition for Appointment of Guardian Over Unborn Child, Nos. 48-2003-CP-001188-O, 48-2003-MH-000414-O, at 3 (May 30, 2003) (citing *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989)).

Accordingly, the decision below, finding that "no section of Chapter 744 nor any other Florida statute . . . entitles a fetus to a guardian," id., and denying Appellant's petition is without error and should be affirmed.

Further, the appointment of a guardian for the fetus in this matter would violate J.D.S.'s federal and state constitutional rights. J.D.S. has a constitutional right both to decide whether or not to continue her pregnancy and to choose medical care to protect her own health during pregnancy, even if it may pose a risk to the health of the fetus. The appointment of a guardian for the fetus, who would seek to promote only the interests of the fetus and not those of J.D.S., unquestionably constitutes an unwarranted and unconstitutional intrusion into J.D.S.'s ability to make these decisions. Although, due to her incapacitation, J.D.S. is incapable of making these decisions on her own, this does not justify any lesser protection of her constitutional rights. Through her court-appointed plenary guardian, J.D.S is entitled to effectuate the same constitutionally protected choices as a competent woman. Accordingly, allowing Appellant to seek appointment as a guardian on behalf of J.D.S.'s fetus is statutorily and constitutionally impermissible.

STANDARD OF REVIEW

The fact-based decision to deny a petition for appointment as a guardian in any individual case is reviewed under an abuse of discretion standard. *Treloar v.*

Smith, 791 So. 2d 1195, 1197 (Fla. 5th DCA 2001). However, on this appeal, the threshold issue of whether it is statutorily or constitutionally permissible under Chapter 744 competency and guardianship proceedings to appoint a guardian for the fetus of a pregnant woman is a question of law to be reviewed *de novo*. *See Files v. State*, 613 So. 2d 1301, 1304 (Fla. 1992); *First Union Nat'l Bank v. Turney*, 839 So. 2d 774 (Fla. 1st DCA 2003).

ARGUMENT

I. Governing Florida Statutes Do Not Authorize the Appointment of a Guardian for the Fetus.

The applicable guardianship statutes and controlling case law do not authorize the appointment of a guardian for a fetus. Florida guardianship statutes discuss the appointment for guardians for "persons." Thus, in order to appoint a guardian to represent the fetus, the Court must first find that a fetus is a "person." Yet, as the court below correctly ruled, Florida law clearly holds that a statute's reference to a "person" does not encompass a fetus. Thus, appointment of a guardian for the fetus would contravene well-established and longstanding precedent.

Each of the statutes authorizing the appointment of guardians permit guardians to be appointed only for "persons." For example, under Chapter 744, pertaining to guardianship generally, a guardian may be appointed for a minor,

defined as a "person under 18 years of age whose disabilities have not been removed by marriage or otherwise," §§ 744.102, Fla. Stat. (2003), 744.3021, Fla. Stat. (1997), or for an "incapacitated person," § 744.3031(1), Fla. Stat. (2003). Under the Public Health Statute, the Court may appoint a guardian to a "person with developmental disabilities." § 393.12, Fla. Stat. (2002); *see also* § 393.063, Fla. Stat. (2002) (defining "high-risk child" as a "child from *birth* to 5 years of age" with certain identified characteristics) (emphasis added). Similarly, under Chapter 39, Proceedings Relating to Children, a guardian ad litem may be appointed to an abused, neglected or abandoned "child," defined as an "unmarried person under the age of 18 years." §§ 39.01, 39.822, Fla. Stat. (2003).

Appointing a guardian pursuant to any of these statutes would thus require a ruling that a fetus is a "person" for purposes of the statute. Yet the courts of this State – including the Florida Supreme Court – have time and again refused to so extend the meaning of "person." For instance, the Florida Supreme Court has long held that a fetus is not a person within the meaning of the Wrongful Death Act, § 768.19, Fla. Stat. (2003). *See Young v. St. Vincent's Med. Ctr., Inc.*, 673 So. 2d 482 (Fla. 1996); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *Duncan v. Flynn*, 358 So. 2d 178 (Fla. 1978). The Florida courts have also held that a fetus is not a "child" within the meaning of the Florida child abuse statutes. *See State v. Gethers*, 585 So. 2d 1140 (Fla. 4th DCA 1991) (rejecting argument that

amendments to the child abuse and neglect laws were intended to extend the plain meaning of child to include an unborn fetus) (cited by the Supreme Court with approval in *Johnson v. Florida*, 602 So. 2d 1288 (Fla. 1992)). Nor is a fetus a "person" or "human being" within the meaning of Florida's criminal manslaughter statute. *State v. Gonzalez*, 467 So. 2d 723 (Fla. 3d DCA 1985). Likewise, the Florida Supreme Court has held that a statute criminalizing the distribution of a controlled substance to minors was not intended to apply to transmission during birth. *See Johnson v. Florida*, 602 So. 2d 1288 (Fla. 1992). *See also* Order Denying Verified Petition, at 3 (citing additional cases in support of the proposition that a fetus is not a person under Florida law).

Accordingly, a fetus is properly brought under the protection of a Florida statute only when the Legislature has provided explicitly for its coverage.[1] For instance, the Florida Legislature has criminalized fetal homicide, § 782.09, Fla. Stat. (2000), and has imposed regulations restricting when abortions may be performed on a fetus that may be viable, § 390.0111, Fla. Stat. (2002). Thus, as the Court of Appeals for the Fourth District has explained, "[t]he Florida Legislature has indicated it is capable of distinguishing between an unborn child and a person born alive since it has enacted statutes which acknowledge this

[1] It is worth emphasizing that the Legislature may not legitimately grant such protection when doing so would violate the federal and Florida Constitutions. *See* Section II *infra*.

distinction." *Gonzalez*, 467 So. 2d at 725-26. In contrast, each of the Florida statutes which establish the procedures for appointing a guardian apply only to "persons." Appointing a guardian to a fetus would violate the clear language of these legislative enactments and improperly expand the intended coverage of the guardianship laws.

In an attempt to overcome the absence of any Florida Statute or persuasive case law in support of Appellant's position, the Appellant and the State[2] rely on a smattering of inapposite cases that fail to reach the issue before this Court. In short, the cases cited do not support a holding that Florida law permits the appointment of a guardian for the fetus of a pregnant woman, whether competent or incompetent, which would interfere with the woman's ability to make choices concerning the course of her pregnancy and medical care. For instance, contrary to Appellant's suggestion, *Lefebreve v. North Broward Hosp. Dist.*, 566 So. 2d 5568 (Fla. 4th DCA 1990), does not support the appointment of a guardian for a fetus. In *Lefebreve*, the circuit court appointed a guardian for the fetus of a woman who had been involuntarily committed, but not held incompetent, and wanted to continue her pregnancy. The circuit court ordered her pregnancy terminated. On appeal, the legality of appointing a guardian for the fetus was not raised, nor did

[2] Throughout this brief, "the State" refers to the State of Florida and the Department of Children and Families, who had moved to appear as *amici* in support of Appellant.

the appellate court address it.[3] Rather, the District Court of Appeal held that the circuit court failed to follow the proper statutory procedures for determining *Lefebreve*'s competence and for appointing a plenary guardian to act on *her* behalf, and therefore the lower court's order was in error.

The other Florida District Court of Appeal decision relied on by the Appellant and the State, *Shinall v. Pergeorelis*, 325 So. 2d 431 (Fla. 1st DCA 1975), does not involve the appointment of a guardian for a fetus, let alone broach the statutory or constitutional permissibility of such an action. *Shinall* stands for no more than the proposition that, as a matter of public policy, Florida does not permit a woman to contract away, before or after birth, the right a child has once born to receive support from a putative father. In the twenty-eight years since it was decided, *Shinall* has never been relied on in support of a holding that Florida law or public policy permits the State to appoint a guardian for the fetus of a pregnant woman.

Likewise, the other cases identified by Appellant and the State do not provide factual or legal analysis that are instructive in the instant case, nor are they persuasive for purposes of interpreting Florida guardianship law. For example,

[3] Similarly, and as the State concedes, the other cases the State relies on for this proposition – *Taft v. Taft*, 446 N.E.2d 395 (Mass. 1983); *Commonwealth v. Rocha*, 784 N.E.2d 651 (Mass. Ct. App. 2003); and *Ryan v. Beth Israel Hosp.*, 96 Misc. 2d 816, 409 N.Y.S.2d 681, 682 (N.Y. Sup. Ct. 1978) – do not raise or address the question of whether appointment of a guardian for a fetus is proper. Moreover, each of these cases interprets laws and statutes from other states.

Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., 66 F. Supp. 2d 1247 (N.D. Fla. 1999), does not involve, and thus does not consider, the appointment of a guardian for a fetus. In *Pemberton*, a federal trial court considered whether a woman's federal constitutional rights were violated when she was forced to undergo a caesarean section. The court's ruling that there was no federal constitutional violation was quite narrow in scope and based on unique circumstances: a woman in active labor who sought medical assistance; the state's interest in preserving the life of a "full-term fetus" where birth was "imminent;" *and* the woman's desire to have a live birth. *Id.* at 1251, n.10. [4]

Finally, several cases cited by the State were all decided in other jurisdictions and prior to the United States Supreme Court decision in *Roe v. Wade*, 410 U.S. 113 (1973), the seminal case setting forth the constitutional protection for a woman's right of reproductive choice.[5] The State's reliance on these cases only highlights the State's fundamental disregard of J.D.S.'s constitutional rights.

---

[4] Like *Pemberton*, *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981), and *In re Guardianship of Baby K*, 188 Misc. 2d 228, 727 N.Y.S.2d 283 (N.Y. Sur. Ct. 2001), do not involve, let alone address, the appointment of a guardian on behalf of the fetus *to advocate against* the interests of the pregnant woman. Additionally, *In the Matter of Unborn Child*, 179 Misc. 2d 1, 683 N.Y.S.2d 366 (N.Y. Fam. Ct. 1998), cited by Appellant, is a lower court decision interpreting New York State family law and does not address the applicability of state guardianship laws to a fetus.

[5] *See Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964); *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966); *Hatch v. Riggs Nat'l Bank*, 284 F. Supp. 396 (D.D.C. 1968).

The fact that J.D.S. has, through her guardian, decided to carry her pregnancy to term certainly does not change the validity of the circuit court's decision. Pursuant to Florida's law governing guardianships, J.D.S.'s guardian is empowered to exercise the authority over medical treatment decisions that J.D.S. herself would have if she were not incompetent, including decisions regarding her prenatal care and delivery. *See* §§ 744.361(1), 744.102(8)(b), Fla. Stat. (2002). To allow Appellant the authority, as guardian for the fetus, to micro-manage those treatment decisions and interfere with J.D.S.'s effectuation of her decisions regarding that treatment would directly undermine Florida's guardianship law.

Contrary to Appellant's and the State's suggestion, no Florida statute, judicial precedent, or other persuasive case law sustain the proposition that appointment of a guardian for a fetus is appropriate. Indeed, Florida statutes and case law flatly contradict this assertion. Therefore, appointment of a guardian for the fetus in this case would be inconsistent with the extensive case law, discussed *supra*, which has consistently held that a fetus is not a person or child, unless expressly defined as such by Florida statute.

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

Even if the meaning of "person" as used in the Florida guardianship statutes could be interpreted to extend to include a fetus, which it cannot, the United States

and Florida Constitutions preclude the appointment of a guardian for the fetus. Appointing a guardian for a fetus would directly infringe upon a woman's constitutional right to decide whether or not to continue her pregnancy and her right to receive medical care to preserve her own health during the course of her pregnancy. This is no less true in the case of a pregnant woman who has been determined to be legally incompetent and for whom a guardian has been appointed; such a woman is entitled to exercise her constitutional rights and medical choices through her court-appointed guardian. Thus, appointment of a guardian for the fetus here would violate the constitutional rights of J.D.S., just as such an appointment would violate the constitutional rights of any other pregnant woman.

Since its decision in *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court has repeatedly protected a woman's constitutional right to make independent medical decisions related to her pregnancy, including the choice whether to continue a pregnancy. *See, e.g., Stenberg v. Carhart,* 530 U.S. 914, 920 (2000) (reaffirming *Roe*); *Planned Parenthood v. Casey,* 505 U.S. 833, 860 (1992) (same). The basis for this constitutional protection is the recognition that decisions related to pregnancy involve personal considerations that are central to a woman's dignity, autonomy, and health. As the Court has explained:

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

bear.

Casey, 505 U.S. at 852.

Indeed, these principles apply even more strongly in Florida, where state interference with the exercise of a person's right to privacy – including decisions about reproductive health – must further a compelling state interest by the least intrusive means. The Florida Constitution contains an explicit right to individual privacy that has no parallel in the United States Constitution. Article I, section 23 of the Florida Constitution provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life . . . ." The Florida Supreme Court has repeatedly held that this provision provides more protection for the right of individual privacy, including the right to make decisions about reproductive health care, than does the federal Constitution. *See, e.g.*, *North Florida Women's Health & Counseling Servs., Inc. v. State*, 2003 WL 21546546 (Fla. July 10, 2003); *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996); *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995); *In re T.W.*, 551 So. 2d 1186, 1192, 1195 (Fla. 1989) (recognizing there are "few more personal or private decisions concerning one's body that one can make in the course of a lifetime," than whether or not to continue a pregnancy and holding "the Florida constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated").

The United States Supreme Court and Florida Supreme Court have held that the rights of privacy under the federal and Florida constitutions, respectively, prohibit the state from allowing third parties to impose their preferences upon a pregnant woman's reproductive decisions. In *Casey*, the Court held that a state may not require that a woman's husband be notified that she is considering an abortion, notwithstanding its recognition of a husband's "deep and profound concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus that she is carrying." *Casey*, 505 U.S. at 895 (internal quotations omitted). Moreover, the Florida Supreme Court has held in a case where a pregnant minor was seeking an abortion that "the appointment of a guardian ad litem for the fetus was clearly improper." *In re T.W.*, 551 So. 2d at 1189.[6]

Appointment of a guardian for a fetus would directly contravene this binding precedent and violate established constitutional norms. It would create an

[6] Appellant and the State argue that *In re T.W.* only proscribes the appointment of a guardian for a fetus when a plaintiff facially challenges a statute, and that the decision is otherwise inapposite. First, no legal principle supports the theory that judicial rulings that arise in the context of a statutory challenge are only binding with respect to future cases similarly brought as statutory challenges. Second, although the *In re T.W.* decision rests on a factual situation different than the one before the Court, the appointment of a guardian for the fetus in that case served the same purpose as such an appointment here would serve—to elevate the legal status of a fetus to that of a person with rights enforceable against those of the pregnant woman. Thus, the finding that appointment of a guardian for the fetus was clearly improper in that case is equally applicable in the instant case.

automatic adversary to a woman genuinely considering abortion as an option and to a woman carrying to term and considering any medical care detrimental to the fetus, and would ensure vigorous opposition to any potential decision that could risk harm to the fetus. Such a situation would permit a third party to substantially intrude on a woman's reproductive health decisions – including the decision whether to have an abortion and how to carry to term -- and impose risks to the woman's health and well-being. This is plainly unconstitutional. Prior to viability, the decision whether to continue a pregnancy rests entirely with the woman; after viability, not only does a woman retain the right to decide whether to carry to term if doing so would pose a risk to her health or life, but her health is entitled to overriding consideration with respect to her medical treatment throughout her pregnancy. *Stenberg,* 530 U.S. at 930-31; *Casey*, 505 U.S. at 879; *Roe,* 410 U.S. at 164-65; *In re T.W.*, 551 So. 2d at 1193-94; *see also* § 390.0111(4), Fla. Stat. (2003) ("Notwithstanding the provisions of this subsection [regarding abortions performed after viability,] the woman's life and health shall constitute an overriding and superior consideration to the concern for the life and health of the fetus when such concerns are in conflict."). When, as here, a woman chooses to carry to term, she will need to make medical treatment decisions that may have an impact on the fetus; if a guardian is appointed for the fetus, her ability to make those private medical decisions during her pregnancy will necessarily be impaired and her health

may be jeopardized by the fetal guardian's advocacy for medical choices beneficial to the fetus but detrimental to the woman's health.

This is a very real risk in the instant case. As the court below explained, "it is not clear how [a guardian for the fetus] would resolve a situation where the mother's life or health depended upon medications which might adversely affect the fetus. Presumably, if she was guardian for the fetus, she would attempt to prevent J.D.S. from taking her necessary medications. This, too, would be contrary to current law." Order Denying Verified Petition, at 4. Appellant as much as concedes that a guardian for the fetus would insist on measures that could threaten the health of J.D.S.:

> Furthermore, J.D.S. is taking psychotropic medications that may be jeopardizing the welfare of the unborn child. In addition, future medical procedures, tests and medications will be required of J.D.S. that may detrimentally affect the unborn child's welfare. Matters such as whether to obtain a sonogram, use of anesthesia for any medical procedure, the type of vitamins, choice of delivery, medications, and other pre-natal "dilemmas" will have a profound impact on the well-being of the unborn child. These issues alone create a conflict of interest that a court-appointed guardian over J.D.S. cannot resolve, as the guardian owes a fiduciary duty to J.D.S., not to the unborn child. . . .
>
> To resolve this "dilemma," the Court must appoint a guardian for the unborn child.

Brief of Appellant, at pp. 28-29. Thus, in addition to violating the constitutional rights of J.D.S., the appointment of a guardian for the fetus would permit a third

party to interfere in, and potentially prevent, medical care necessary to preserve J.D.S.'s health and well being.

The need for J.D.S. to effectuate her choices through a guardian does not give the State, or other third parties, authority to infringe upon her constitutional rights. When a woman is incapacitated, her right to make reproductive health decisions must be exercised by *her* guardian, upon a full evaluation of her situation. *See* §§ 744.102(8)(h), 744.3215(3)-(4), Fla. Stat. (2003). Under Florida law, the plenary guardian must make these decisions on behalf of the ward using the standard of "substituted judgment." *Rainey v. Guardianship of Mackey,* 773 So. 2d 118, 121 (Fla. 4th DCA 2000). This standard places the guardian "in the shoes of the ward," and requires the guardian to make the same decisions the ward would make for herself, were she so able. *Id.; see also In re Guardianship of Browning,* 568 So. 2d 4 (Fla. 1990); *John F. Kennedy Mem'l Hosp., Inc. v. Bludworth,* 452 So. 2d 921 (Fla. 1984). Thus, the guardian will not act *only* in the "best interest" of J.D.S, rather she will consider *all* the factors that J.D.S. would consider if she were deciding for herself how to proceed with her pregnancy and medical treatment. Based on this substituted judgment, the guardian will effectuate for J.D.S. the very choices J.D.S. would be able—and entitled—to make on her own if she were competent.

Thus, J.D.S.'s legal incompetency provides no additional justification for

appointing a guardian for the fetus and does not change the constitutional analysis: because J.D.S has been appointed a plenary guardian, her guardian's decisions regarding her reproductive health deserve the same constitutional protections as if made by J.D.S. herself. Indeed, if third parties are allowed to represent the fetus under these circumstances, there is no logical reason they would not seek to do so in the case of a competent pregnant woman considering an abortion or medical treatment detrimental to her fetus. However, because a woman's rights and health are constitutionally paramount, the State cannot erect such barriers. *See Stenberg* 530 U.S. at 937-38; *Casey*, 505 U.S. at 895; *In re T.W.*, 551 So. 2d at 1189; *Matter of D.K.*, 497 A.2d 1298, (N.J. Super. Ct. Ch. Div. 1985) (holding that the appointment of a guardian for the fetus of an incompetent woman would be unconstitutional); *see also In re Brown*, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997) (rejecting appointment of guardian for viable fetus in case involving woman's right to refuse medical treatment); *Matter of Klein*, 145 A.D.2d 145 (N.Y. App. Div. 1989) (rejecting appointment of guardian ad litem for comatose woman's fetus).

Additionally, the State's asserted interest in potential viability does not provide justification for appointing a guardian for the fetus. Once J.D.S.'s fetus became medically viable, she was bound by Florida law to the extent it limits, within constitutional bounds, the availability of abortion after viability for all women. Florida law prohibits a woman from having an abortion after the twenty-

fourth week of pregnancy unless "termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman." § 390.0111(1)(a), Fla. Stat. (2003).[7] This law applies no differently to J.D.S. than to any other woman in Florida. Therefore, existing law already protects the State's interest in potential viability. Appointing a guardian for the fetus would only serve to impose a unique burden on J.D.S.'s constitutional rights that the State does not, and could not, impose on competent women. Accordingly, the appointment of a guardian for the fetus is prohibited under both the United States and Florida Constitutions.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court affirm the decision below denying the Appellant's petition for the appointment of a guardian for the fetus. For all the reasons set forth above, the circuit court's decision denying the petition for appointment of a guardian for the fetus was

[7] While the twenty-fourth week of pregnancy is generally recognized as the earliest stage at which viability may be established, "[v]iability is reached when, in the judgment of the attending physician . . . there is a reasonable likelihood of the fetus' sustained survival outside the woman." *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). Thus, the United State Supreme Court has made clear that "viability [as opposed to a particular week in pregnancy] marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Casey*, 505 U.S. at 860. Indeed, the Florida statute recognizes, by its own definition, that viability must be medically determined and cannot be presumed based on weeks of pregnancy. § 390.0111(4) ("'Viability' means that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb.").

correct at the time it was made and remains correct now that J.D.S., through her court-appointed guardian, has decided to carry her pregnancy to term.

Date: August ___, 2003.

Respectfully Submitted,

_____

Randall C. Marshall
Florida Bar No. 018176
American Civil Liberties Union of Florida
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
(305) 576-2337

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is submitted in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210(a)(2).

_____

Bebe J. Anderson*
Counsel for *Amici* ACLU, ACLU of Florida, Florida NOW, and Center for Reproductive Rights
Center for Reproductive Rights
120 Wall St., 14th Floor
New York, NY 10005
(917) 637-3606
fax: (917) 637-3666

*Admitted in New York State; motion for admission *pro hac vice* in this matter previously denied

Certificate of Service

I certify that true and correct copies of the foregoing document have been furnished by Federal Express (overnight delivery) on this ___ day of August, 2003, to:

Edward P. Jordan II, Esq.
Attorney for Jennifer Wixtrom
1460 East Highway 50
Clermont, Florida 34711

Frank P. Nisi Jr., Esq.
Attorney for Patti Riley Jarrell
2003 Lake Howell Lane, Ste. 101
Maitland, FL 32751

Rod Taylor, Esq.
Attorney for J.D.S.
P.O. Box 577
Gotha, Florida 34734-0577

Lynn C. Hearn, Esquire
Deputy Solicitor General
Attorney for the State of Florida
Office of the Attorney General
The Capitol—PL01
Tallahassee, Florida 32399-1050

Robert Cato, Esq.
Kelly McKibben, Esq.
Attorneys for the Department of Children and Families
400 W. Robinson Street, Suite S-1106
Orlando, Florida 32801

_____
Bebe J. Anderson*
*Admitted in New York State; motion for admission *pro hac vice* in this matter previously denied