

# ALABAMA SUPREME COURT ISSUES LANDMARK RULING PROTECTING EMBRYONIC CHILDREN CREATED THROUGH IVF

02/23/2024 0 COMMENTS



On Friday, February 16th the Alabama Supreme Court issued a landmark ruling in the case of [LePage v. Center for Reproductive Medicine](#), holding that embryonic children created through IVF are protected by the Alabama Wrongful Death Act and the Alabama Constitution.

The case originated when several embryonic children created through the IVF process were killed when an unauthorized person entered an IVF cryogenic facility through an unlocked door and attempted to steal the embryos. The person dropped the embryos after receiving freeze-burns. As a result, the embryos perished.

At the heart of the case is the question of the legal status of a human child cryogenically preserved at the embryonic stage but not yet implanted in the woman's uterus. The lower court determined that the human embryos did not fit the definition of a "person" or "child" and dismissed the case.

In a remarkable win for pro-life advocates, the Alabama Supreme Court reversed the trial court, holding that Alabama's Wrongful Death Statute and the Alabama Constitution recognize the personhood of the preborn child at every stage of development regardless of whether the embryonic child is in the womb or outside of it.

## Personhood in Alabama Law

Since approximately the 2010's, the Supreme Court of Alabama has developed a robust case law that has been incrementally recognizing the personhood of the preborn child.

In the 2011 case of [Baby Mack](#), Alabama's top court ruled that the wrongful death act applied where a woman miscarried as a result of a car accident caused by another's negligence even though the accident occurred before the point of fetal viability .

In 2012, in the case of [Hamilton v. Warren](#) the court allowed the parents of preborn children to sue doctors for wrongful death arising out of medical negligence even though the preborn child was also killed before

viability.

In the 2013 case of *Ankrom v. Alabama*, the court also recognized the *personhood* of the preborn child when it determined that the state's *chemical endangerment* law protected both children outside as well as children in the womb.

In 2014, the top Alabama court then ruled in favor of recognizing the personhood of preborn children in the *Hicks v. Alabama* case, which held that the word "child" as used in Alabama's chemical endangerment law included all children, born and unborn, and furthered Alabama's policy of protecting life from the earliest stages of development.

In late 2016, the court's ruling in *Stinnett v. Kennedy* further extended the personhood of preborn child within the context of medical malpractice.

Finally, in the 2018 case of *Ex Parte Phillips v. Alabama*, the court upheld the conviction of a man for the dual homicide of his wife and her 6-8 week old unborn child. In that opinion, now Chief Justice Tom Parker wrote boldly calling for the overturning of Roe v. Wade and asserted that "the value of the life of an unborn child is no less than the value of the lives of other persons."

## The Alabama Sanctity of Life Amendment

In 2018, Alabama voters passed the Alabama Sanctity of Life Amendment by a wide margin of nearly 20%. They did so despite Planned Parenthood spending nearly *1.5 million dollars* compared to less than \$8,000 raised by pro-lifers.

In its opinion, the Supreme Court of Alabama referred to the Sanctity of Life Amendment when explaining their constitutional duty to extend the equal protection of the law in all practicable ways to the preborn embryonic human beings, using the broad pro-life policy enshrined in the constitution to clarify any gray areas in the law in favor of the equal protection of preborn children.

[T]he Wrongful Death of a Minor Act is sweeping and unqualified. It applies to all children, born and unborn, without limitation. It is not the role of this Court to craft a new limitation based on our own view of what is or is not wise public policy. That is especially true where, as here, the People of this State have adopted a Constitutional amendment directly aimed at stopping courts from excluding 'unborn life' from legal protection.

*Justice Mitchell, majority opinion in LePage v. Center for Reproductive Medicine*

## Unintended Consequence

The Alabama Supreme Court's majority opinion rebuts one of the common arguments employed by the pro-abortion medical lobby, namely, that human rights when it comes to mother and child is a zero sum game pitting mothers against their children and doctors against the preborn.

In particular, the IVF industry has long held that any regulation of its practice would catastrophically impact the ability to provide reproductive services. The majority opinion brushed aside the argument, stating that the court's role was not to be a policy maker. In his concurrence, examined in more detail below, Chief Justice Parker pointed out that many Western nations significantly regulate the IVF industry to prevent ethical abuses common in the unregulated United States IVF industry without completely banning the practice.

Another argument put forward by the IVF industry is that broadly recognizing the personhood of the preborn child would make the treatment of ectopic pregnancies impossible. However, the Alabama court points out

that in the case of an ectopic pregnancy, the embryonic child cannot be saved, and therefore the consensual removal of the embryo “could not establish the core elements of a wrongful-death claim, including breach of duty and causation.”

## Chief Justice Parker’s Concurrence

### Part I: Sanctity of Life and the Imago Dei

Chief Justice Parker, who concurred with Justice Mitchell’s majority opinion, further examined the meaning of the Alabama Sanctity of Life Amendment, pointing out that “the principle itself — that human life is fundamentally distinct from other forms of life and cannot be taken intentionally without justification — has deep roots that reach back to the creation of man “in the image of God. Genesis 1:27.”

In a remarkable summation of the consistent Christian doctrine on the sanctity of life which informed the people of Alabama’s incorporation of the term in its constitution, Justice Parker states:

In summary, the theologically based view of the sanctity of life adopted by the People of Alabama encompasses the following: (1) God made every person in His image; (2) each person therefore has a value that far exceeds the ability of human beings to calculate; and (3) human life cannot be wrongfully destroyed without incurring the wrath of a holy God, who views the destruction of His image as an affront to Himself. Section 36.06 recognizes that this is true of unborn human life no less than it is of all other human life — that even before birth, all human beings bear the image of God, and their lives cannot be destroyed without effacing his glory.

*Chief Justice Parker in LePage v. Center for Reproductive Medicine*

### Part II: Constitutional Supremacy

Chief Justice Parker’s concurrence also delves into the proper role of the Sanctity of Life Amendment in light of future acts of the legislature. The chief justice explains that not only is the court obliged to use the constitution to clarify grey areas in the statutory law; the constitution must also necessarily limit the ability of the legislature to act in contravention of the supreme policy of the state of Alabama, embodied in the constitution itself. In this case, the people of Alabama chose to enshrine the sanctity of life of the unborn child within the constitution itself, and therefore any future legislative act to the contrary would be subject to state constitutional judicial review.

§ 36.06 does much more than simply declare a moral value that the People of Alabama like. Instead, this constitutional provision tilts the scales of the law in favor of protecting unborn life. Although § 36.06 may not resolve every case involving unborn life, if reasonable minds could differ on whether a common-law rule, a statute, or even a constitutional provision protects life, § 36.06 instructs the Alabama government to construe the law in favor of protecting the unborn.

*Chief Justice Parker in LePage v. Center for Reproductive Medicine*

### Part III: Taming the Wild West: IVF Industry in the USA

Chief Justice Parker responds to the argument made in Justice Cook’s dissent that “applying § 36.06 and the Wrongful Death of a Minor Act to frozen embryos will have disastrous consequences for the in vitro

fertilization (“IVF”) industry in Alabama” by pointing out that the Alabama legislature is free to regulate the IVF industry in a way that attempts to uphold the sanctity of life and promote parenthood among infertile couples. To do so, Justice Parker points to the differing approaches taken in other nations such as New Zealand, Germany, and Italy. While neither the majority nor Chief Justice Parker create a constitutional regime for regulating IVF, they do make clear that whatever the regulations end up being, they must respect the sanctity of the life being created through the IVF process.

[R]egulations adopted by other countries seem much more likely to comport with upholding the sanctity of life than the prevailing practice of creating and transferring at once many embryos that have little chance of survival and then throwing embryos away after a while. The American states, unfortunately, have not followed the example of other Westernized countries that have regulations that achieve both the protection of life and the promotion of parenthood. Ultimately, however, it is for the Legislature to decide how the IVF industry can help parents have children. The Legislature is free to do so in any way it decides, provided that it comports with the Alabama Constitution, including the Sanctity of Unborn Life Amendment.

*Chief Justice Parker in **LePage v. Center for Reproductive Medicine***

## Part IV: Chief Justice Parker’s Legacy

In a memorable closing paragraph, Chief Justice Parker, who has served on the Alabama Supreme Court since 2014 and is slated for mandatory retirement at the end of 2024, summarizes the case – and his illustrious 20-year tenure on the bench – with the clarity of a man who has fought the good fight is about to finish the race.

The People of Alabama have declared the public policy of this State to be that unborn human life is sacred. We believe that each human being, from the moment of conception, is made in the image of God, created by Him to reflect His likeness. It is as if the People of Alabama took what was spoken of the prophet Jeremiah and applied it to every unborn person in this state: “Before I formed you in the womb I knew you, Before you were born I sanctified you.” Jeremiah 1:5 (NKJV 1982). All three branches of government are subject to a constitutional mandate to treat each unborn human life with reverence. Carving out an exception for the people in this case, small as they were, would be unacceptable to the People of this State, who have required us to treat every human being in accordance with the fear of a holy God who made them in His image. For these reasons, and for the reasons stated in the main opinion, I concur.

*Chief Justice Parker in **LePage v. Center for Reproductive Medicine***