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October 15, 1991

ATTORNEY GENERAL OPINION NO. 91- 130

The Honorable Don Montgomery
State Senator, Twenty-First District
1218 Main
Sabetha, Kansas 66534-1835

Re: Crimes and Punishments--Kansas Criminal Code; Crimes Against Persons--Abortion; Ability of State to Regulate

Synopsis: Kansas law does not currently prohibit licensed physicians from performing abortions and, under current court decisions, the state may not prohibit abortions at any stage when the woman's life or health is at risk. The state may suggest guidelines for determining, after viability, when the woman's health is at risk, but the decision in a particular case must be left to the woman's physician. The physician's decision would be reviewable by the courts. Cited herein: K.S.A. 21-3407, 65-443; 65-444; 65-445; K.S.A. 1990 Supp. 65-2837, as amended by L. 1991, ch. 192, § 3.

* * *

Dear Senator Montgomery:

You request our opinion regarding state regulation of abortion. Specifically your questions are as follows:

"1. Under current Kansas law, in what circumstances if any, is it illegal for a physician to perform an abortion on an adult woman where the physician claims that in his or her judgement an abortion is necessary for the woman's health?

"2. Within the guidelines of current court decisions, is it possible to draft a law that would prohibit an abortion if the physician claimed that in his or her judgement the abortion is needed for the woman's health? Do these guidelines change if the pregnancy is in the third trimester?

"3. Are there standards which could legally be set by statute which would define or set limits as to what abortions are necessary for a woman's health? In other words, can the legislature statutorily prevent abortions which the average person would consider unrelated to a woman's health, but which a particular physician might argue are for the woman's health such as abortions performed because of fetal deformity or because the fetus was the wrong sex?"

K.S.A. 21-3407 purports to prohibit abortion at any stage of pregnancy except when "there is substantial risk that a continuance of the pregnancy would impair the physical or mental health of the mother or that the child would be born with physical or mental defect, or [when] the pregnancy resulted from rape, incest, or other felonious intercourse. . . ." While this statute has never been repealed, it is generally believed to be unenforceable because of its similarity to the Georgia statute which was struck down by the United States Supreme Court in Doe v. Bolton, 410 U.S. 179, 35 L.Ed.2d 201, 93 S.Ct. 739 (1973), the companion case to Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973). See also Poe v. Menghini, 339 F.Supp. 986 (1972) (striking down portions of statute prior to Roe v. Wade). Further, in Attorney General Opinion No. 89-98 we concluded that the Court's decision in Webster v. Reproductive Health Services, 492 U.S. 490, 106 L.Ed.2d 410, 109 S.Ct. 3040 (1989) did not go so far as to revive the Kansas criminal abortion statute. Even if currently enforceable, however, this statute would not prohibit the performance of abortions when the woman's health is at risk.

Other statutes which speak directly to abortion do not attempt to prohibit or regulate their performance. K.S.A. 65-443 protects individuals who refuse to perform or participate in procedures which result in pregnancy termination. K.S.A. 65-444 provides a similar protection for hospitals and their administrators. K.S.A. 65-445 requires hospital reporting of induced pregnancy terminations. K.S.A. 1990 Supp. 65-2837(b)(5), as amended by L. 1991, ch. 192, § 3 makes performance or procurement of a criminal abortion unprofessional conduct and grounds for action on the license of anyone regulated by the board of healing arts. Still other

statutes provide where and how medical procedures in general should be performed to insure safety of the patient. None of these statutes make the performance of an abortion illegal. Thus, under current Kansas law, it is not illegal for a licensed physician to perform an abortion with the woman's consent, regardless whether it is deemed necessary to protect her health.

Nor is its possible under current case law to prohibit abortions at any time when the woman's health is at risk. The Court summed up its opinion in Roe v. Wade as follows:

> "1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
>
> "(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> "(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> "(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. . . ." Roe v. Wade, 410 U.S. at 164, 165 (emphasis added).

The Court held that the right to privacy under the 14th amendment encompasses a woman's decision to terminate her

pregnancy, but this right is not absolute. Id. at 154. A state may limit the right to terminate pregnancy if there is a compelling state interest and the limitation is narrowly drawn to achieve only that legitimate compelling interest. Id. at 155. At some point during pregnancy, protecting the health of the mother and the potentiality of human life become compelling state interests. Id. at 162, 163. At the time Roe v. Wade was decided, protection of maternal health became compelling at the end of the first trimester. Id. at 163. The protection of potential human life was held to become compelling at viability. Id. In Webster, supra, the Court renounced this rigid time table, but did not overrule Roe v. Wade.

Thus, addressing your third question, under Roe v. Wade if the state's goal is to protect potential human life (the fetus), regulations limiting or defining what is necessary for the preservation of the woman's health could only apply, if at all, after the point of viability. Further, what is necessary for preservation or protection of a particular individual's health is typically a determination to be made by that individual's physician taking all the circumstances into account; what is necessary for one person's health may not be necessary for another's. See Doe v. Bolton, 410 U.S. at 192. In our opinion, if the state prohibited abortion of a viable fetus except when the woman's life or health was at risk, a physician's determination that termination is necessary to protect the woman's health would have to be supportable, however we believe it would be a judicial function to review the physician's decision. We therefore believe that while the legislature may suggest guidelines for determining what is necessary to preserve the woman's health after viability (in effect making a policy statement similar to Missouri's preamble discussed in Webster, 492 U.S. at 506), it may not enact across the board limitations. A physician's decision to deviate from the guidelines under specific circumstances would be reviewable by the courts.

In conclusion, Kansas law does not currently prohibit licensed physicians from performing abortions and, under current court decisions, the state may not prohibit abortions at any stage when the woman's life or health is at risk. The state may suggest guidelines for determining, after viability, when the

woman's health is at risk, but the decision in a particular case must be left to the woman's physician. The physician's decision would be reviewable by the courts.

Very truly yours,

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RTS:JLM:jm