



STATE OF KANSAS

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October 4, 1991

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ATTORNEY GENERAL OPINION NO. 91- 123

The Honorable Garry G. Boston  
State Representative, Seventy-Second District  
14 Circle Drive  
Newton, Kansas 67114-1411

Re: Cities and Municipalities--Ordinances of  
Cities--Petition for Proposed Ordinance;  
Requirements; Passage or Election

Synopsis: An ordinance regulating abortions may be the proper  
subject of an initiative petition under K.S.A.  
12-3013. A city may, however, refuse to place an  
unconstitutional initiative ordinance on an  
election ballot. Such a refusal is reviewable by  
the courts. Cited herein: K.S.A. 12-3013.

\* \* \*

Dear Representative Boston:

You request our interpretation of K.S.A. 12-3013.  
Specifically, you have enclosed an ordinance (attached hereto  
as Exhibit "A") which regulates and prohibits abortions in  
certain instances, and ask whether the ordinance is the proper  
subject of an initiative petition under the aforesaid  
statute.

K.S.A. 12-3013 prescribes procedures whereby city electors may  
directly propose and enact legislation independently of the  
legislative powers of the governing body. Subsection (e) of  
the statute sets forth three types of ordinances which are not  
subject to the initiative process:

- (1) Administrative ordinances;
- (2) Ordinances relating to a public improvement to be paid wholly or in part by the levy of special assessments; or
- (3) Ordinances subject to referendum or election under another statute.

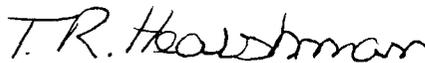
An ordinance regulating the performance of abortions is not within any of the above-quoted exceptions to the initiative process, and this office has opined that cities may exercise their police power by enacting abortion regulations since the legislature has not expressly preempted the field. See Attorney General Opinion No. 90-107. Accordingly, an ordinance regulating the performance of abortions appears to be a proper subject of an initiative petition under K.S.A. 12-3013. However, as we noted in Attorney General Opinion No. 90-107, any abortion regulation is subject to Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973), and any limitations imposed by the federal and Kansas constitutions.

In regard to constitutional questions related to proposed ordinances on abortion, the Kansas Supreme Court has indicated that a city will not be forced to place on an election ballot an unconstitutional initiative ordinance. See State v. Paulsen, 204 Kan. 857 (1970). Accordingly, if a city governing body refuses to place an initiative ordinance on an election ballot because of alleged constitutional defects, it would be necessary for a court to examine the constitutionality of the ordinance at the time it is submitted under the initiative statute.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE CREATING PROVISIONS FOR THE  
REGULATION OF ABORTIONS AND PROHIBITING  
ABORTIONS IN CERTAIN INSTANCES.

WHEREAS, the City of Wichita has an interest in the health of pregnant women and in unborn children; and

WHEREAS, the Governing Body of the City of Wichita desires to enact an ordinance regulating abortion under its constitutional Home Rule powers to determine local affairs and government that supplements, adds to, and provides a higher standard of performance than set by state law and does not conflict with state law; and

WHEREAS, the Governing Body desires to create an additional offense and not duplicate the state offense of criminal abortion, K.S.A. 21-3407, as modified by court decision; and

WHEREAS, the Governing Body finds that the enactment of an ordinance regulating abortion after the unborn child is viable is a reasonable and prudent action which will significantly contribute to the preservation of the public health, safety, morals, and welfare;

WHEREAS, the Governing Body finds that:

- (1) The life of each human being begins at conception;
- (2) Unborn children have protectable interests in life, health, and well-being;
- (3) The natural parents of unborn children have protectable interests in life, health, and well-being of their unborn child.

WHEREAS, it is the intention of the Governing Body of the City of Wichita to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, the Constitution of the State of Kansas, decisions of the United States Supreme Court, and federal statutes.

NOW THEREFORE BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS:

SECTION 1. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purposes of this ordinance shall be given the meaning ascribed to them:

- (1) "Abortion", means the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus;
- (2) "Born alive", "live born" and "live birth" means the

complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which after such separation, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached;

(3) "Fertilization" and conception" each means the union of a human ovum and a human sperm, which takes place when a human spermatozoon has penetrated the cell membrane of the human ovum;

(4) "Gestational age", means the length of pregnancy as measured from the first day of the woman's last menstrual period;

(5) "Physician", means any person licensed to practice medicine and surgery in the state of Kansas;

(6) "Fetus" and Unborn child", each means an individual organism of the species homo sapiens from fertilization until live birth;

(7) "Viability", means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.

SECTION 2. No person other than a physician shall perform or induce an abortion.

SECTION 3. No abortion shall be performed except with the prior, informed and written consent freely given of the pregnant woman.

SECTION 4. To enable the physician to exercise his or her best medical judgment in considering a possible abortion, the physician shall:

(a) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

(1) Her physical, emotional and psychological health and safety,

(2) Her age,

(3) Her familial situation.

(b) Notify, if possible, one parent or guardian of the woman upon whom the abortion is to be performed, if she is an unemancipated minor.

SECTION 5. Before a physician performs an abortion on a woman he or she has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child

and shall enter such findings and determination of viability in the medical record of the mother.

SECTION 6. A. No abortion of a viable unborn child shall be performed unless necessary to preserve the life or immediate physical health of the woman. Before a physician may perform an abortion upon a pregnant woman after such time as her unborn child has become viable, such physician shall first certify in writing that the abortion is necessary to preserve the life or immediate physical health of the woman and shall further certify in writing the medical indications for such abortion and the probable health consequences to the mother.

B. Any physician who performs an abortion upon a woman carrying a viable unborn child shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child. In cases where the method or technique of abortion which would most likely preserve the life and health of the unborn child would present a greater risk to the life and immediate physical health of the woman than another available method or technique, the physician may utilize such other method or technique. In all cases where the physician performs an abortion upon a viable unborn child, the physician shall certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed.

C. An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or immediate physical health of the woman.

SECTION 7. A. It shall be unlawful for any public funds of the City to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

B. It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or person of similar occupation who is a City employee within the scope of his or her public employment to encourage or counsel a woman to have an abortion not necessary to save her life.

C. It shall be unlawful for any City facility to be maintained for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

SECTION 8. Any person who contrary to the provisions of this ordinance knowingly performs or aids in the performance of any

abortion, knowingly violates any provision of this ordinance, or knowingly fails to perform any action required by this ordinance shall be guilty of a misdemeanor and, upon conviction shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year or both.

SECTION 9. If any provision, word, phrase, or clause of this ordinance or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this ordinance which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this ordinance are declared to be severable.

SECTION 10. This ordinance shall be included in the Code of the City of Wichita and shall be effective upon its passage and publication once in the official City newspaper.

ADOPTED at Wichita, Kansas, this \_\_\_\_\_ day of \_\_\_\_\_, 1991.

\_\_\_\_\_  
Bob Knight, Mayor

ATTEST:

\_\_\_\_\_  
Ray Trail, Director of Finance/  
City Clerk

Approved as to Form:

\_\_\_\_\_  
Joe Allen Lang, Interim City Attorney