



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

July 22, 2022

ATTORNEY GENERAL OPINION NO. 2022- 7

The Honorable John Eplee
State Representative, 63rd District
State Capitol, Room 352-S
Topeka, KS 66612

Re: Constitution of the State of Kansas—Bill of Rights—Regulation of Abortion
Public Health—Abortion

Synopsis: The Value Them Both Amendment to the Kansas Constitution, if adopted, would not ban or restrict abortion or any medical treatment. Rather, it leaves the regulation of abortion to the people, through their elected representatives.

The Value Them Both Amendment to the Kansas Constitution, if adopted, would not affect a physician's ability to render care for ectopic pregnancies, miscarriages, or fetal demise. Cited herein: 2021 House Concurrent Resolution 5003; K.S.A. 21-5419; 38-2003; 40-2,190; 60-1901; 65-4a01; 65-6701; 65-6703; 65-6704; 65-6705; 65-6709; 65-6721; 65-6723; 65-6724; 65-6731; 65-6732; 65-6738; 65-6742; 65-6743.

* * *

Dear Representative Eplee:

As State Representative for the 63rd District, you ask whether the proposed Value Them Both Amendment to the Kansas Constitution, if adopted, will have any effect on a physician's ability to render care for tubal-ectopic pregnancies, documented miscarriages, and fetal demise at any state of gestation. In short, the answer is no.

Value Them Both Amendment

The proposed Value Them Both Amendment to the Kansas Constitution was passed as 2021 House Concurrent Resolution 5003 (HCR 5003) by two-thirds majorities of each house of the Legislature as required by Article 14 of the Kansas Constitution.¹ HCR 5003 provides for an August 2, 2022 special election to be held in conjunction with the 2022 primary election.²

If approved by a majority of the voters at the August 2 election, the Value Them Both Amendment would add the following new section to the Kansas Constitution Bill of Rights:

§ 22. Regulation of abortion. Because Kansans value both women and children, the constitution of the state of Kansas does not require government funding of abortion and does not create or secure a right to abortion. To the extent permitted by the constitution of the United States, the people, through their elected state representatives and state senators, may pass laws regarding abortion, including, but not limited to, laws that account for circumstances of pregnancy resulting from rape or incest, or circumstances of necessity to save the life of the mother.³

This language does not ban or restrict abortion or medical treatment in any way. Rather, it leaves decisions about the regulation of abortion to the people, through their elected representatives.

Thus, to answer your question, we turn to existing Kansas statutes governing abortion. These statutes are already in place and would not be altered by passage of the Amendment.⁴

Miscarriages and Fetal Demise

Kansas statutes consistently define “abortion” to mean:

the use or prescription 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

¹ See 2021 Journal of the Kansas Senate at 118 (January 28, 2021); 2021 Journal of the Kansas House at 106-07 (January 22, 2021).

² HCR 5003, § 3.

³ HCR 5003, § 1.

⁴ The Value Them Both Amendment does not define “abortion,” so the term would be given its common public meaning at the time of adoption. See *Solomon v. State*, 303 Kan. 512, 523, 364 P.3d 536 (2015) (constitutional language should be interpreted based on the common understanding of the people when they adopted it); *State ex rel. Schneider v. Kennedy*, 225 Kan. 13, 21, 587 P.2d 844 (1978) (“The test is rather whether the legislation conforms with the common understanding of the masses at the time they adopted such provisions and the presumption is in favor of the natural and popular meaning in which the words were understood by the adopters.”). In determining the common public meaning of “abortion,” current statutory definitions might be instructive.

birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy.⁵

This definition excludes the removal of “a dead unborn child who died as the result of natural causes in utero, accidental trauma or a criminal assault on the pregnant woman or her unborn child.” The removal of a dead unborn child also would not “cause[] the premature termination of [a] pregnancy.”

Thus, treatment of a miscarriage or fetal demise⁶ does not constitute an abortion under Kansas law and would not be impacted by passage of the Value Them Both Amendment.

Ectopic Pregnancies

You also asked about the treatment of ectopic pregnancies. “An ectopic pregnancy is a pregnancy that occurs outside the womb (uterus).”⁷ “The most common site for an ectopic pregnancy is the fallopian tube” but in rare cases, it may occur in the ovary, abdomen, or cervix.⁸ The pregnancy cannot continue to birth (term).⁹ “An ectopic pregnancy is a life-threatening condition that requires emergency treatment.”¹⁰

The term “ectopic pregnancy” does not appear in any Kansas statute. Nevertheless, the best conclusion under the Kansas statutes generally addressing abortion is that the termination of an ectopic pregnancy does not constitute an abortion.

The definition of “abortion” in Kansas statutes requires the termination of a “pregnancy,”¹¹ and “pregnancy” is defined as “that female reproductive condition of having an unborn child in the mother’s body.”¹² These statutes do not define the term “unborn child,” so we give the term its plain meaning.¹³ One dictionary defines “unborn child” as a “child not yet born.”¹⁴ This would appear to exclude an ectopic pregnancy, which is not capable of

⁵ K.S.A. 65-6701(a); K.S.A. 65-6723(a); K.S.A. 65-6731(a); K.S.A. 65-6742(a); K.S.A. 65-4a01(a); K.S.A. 40-2,190(c)(1).

⁶ A miscarriage involves fetal demise before the 20th week of pregnancy, while fetal demise at or after 20 weeks is classified as a stillbirth. See <https://www.cdc.gov/ncbddd/stillbirth/facts.html> (Centers for Disease Control and Prevention).

⁷ <https://medlineplus.gov/ency/article/000895.htm> (National Institutes of Health, National Library of Medicine).

⁸ *Id.*

⁹ See <https://my.clevelandclinic.org/health/diseases/9687-ectopic-pregnancy>.

¹⁰ <https://my.clevelandclinic.org/health/diseases/9687-ectopic-pregnancy>; see also <https://www.mayoclinic.org/diseases-conditions/ectopic-pregnancy/diagnosis-treatment/drc-20372093> (“To prevent life-threatening complications, the ectopic tissue needs to be removed.”).

¹¹ See *supra* note 4.

¹² K.S.A. 65-6701(j); K.S.A. 65-6723(h). The other statutes defining abortion do not include a definition of pregnancy.

¹³ See, e.g., *State v. Carter*, 311 Kan. 206, 213, 459 P.3d 186 (2020).

¹⁴ *Child - unborn child*. Black’s Law Dictionary (11th ed. 2019).

continuing to birth. “Unborn child” is also defined in other Kansas statutes. Although those definitions only apply to those statutory sections, they may be instructive here. K.S.A. 65-6732, which contains a legislative declaration that life begins at fertilization, defines “unborn child” as “all unborn children or the offspring of human beings from the moment of fertilization until birth at every stage of biological development.”¹⁵ On the one hand, the fact that an ectopic pregnancy involves a fertilized egg suggests that it is an unborn child. On the other hand, an ectopic pregnancy is no longer at a stage of biological development leading to birth. Finally, K.S.A. 21-5419 and K.S.A. 60-1901 define “unborn child” as “a living individual organism of the species homo sapiens, *in utero*, at any stage of gestation from fertilization to birth.”¹⁶ Because an ectopic pregnancy occurs outside the uterus, this definition would exclude an ectopic pregnancy. On balance, we believe the best interpretation is that the termination of an ectopic pregnancy does not constitute an abortion as defined by Kansas law.

But even if the termination of an ectopic pregnancy were considered an abortion, Kansas laws governing abortion consistently make exception for abortions that are necessary to preserve the life of the mother.¹⁷ Because ectopic pregnancies threaten the life of the mother, passage of the Value Them Both Amendment would not affect a physician’s ability to render care for ectopic pregnancies in any event.

Conclusion

Passage of the Value Them Both Amendment would not ban or restrict abortion or any medical treatment. Nor would it affect a physician’s ability to render care for ectopic pregnancies, miscarriages, or fetal demise.

¹⁵ K.S.A. 65-6732(c)(2).

¹⁶ K.S.A. 21-5419(a)(2) (emphasis added); K.S.A. 60-1901(c) (emphasis added).

¹⁷ K.S.A. 65-6701(g) (“‘Medical emergency’ means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the woman or for which a delay necessary to comply with the applicable statutory requirements will create serious risk of substantial and irreversible physical impairment of a major bodily function.”); K.S.A. 65-6703(a); K.S.A. 65-6704(f); K.S.A. 65-6705(a) and (j)(1); K.S.A. 65-6709 (exception for medical emergency); K.S.A. 65-6721(a); K.S.A. 65-6724(a); K.S.A. 65-6738; K.S.A. 65-6743(a); K.S.A. 40-2,190(a); K.S.A. 38-2003(b)(2).

Sincerely,

Handwritten signature of Derek Schmidt in black ink.

Derek Schmidt
Kansas Attorney General

Handwritten signature of Dwight R. Carswell in blue ink.

Dwight R. Carswell
Deputy Solicitor General

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