

VOLUME NO. 35

Opinion No. 9

ABORTIONS — Criminal abortion statutes, presumption of validity; CONSTITUTIONAL LAW — Statutes presumption of validity; STATUTES — Constitutional law, presumption of validity. Sections 94-401 and 94-402, R.C.M. 1947.

HELD: Montana criminal abortion statutes are presumed to be constitutional and in full force and effect until ruled otherwise.

February 22, 1973

Representative Lloyd C. Lockrem, Jr.
Assistant Minority Leader
Montana State House of Representatives
State Capitol
Helena, Montana 59601

Dear Representative Lockrem:

This is in response to your letter of February 21, 1973, in which you ask the status of Montana's criminal abortion statutes (sections 94-401 and 94-402, Revised Codes of Montana, 1947) in light of the recent United States Supreme Court decisions in **Roe v. Wade**, No. 70-18, and **Doe v. Bolton, Attorney General of Georgia**, No. 70-40. Section 94-401, supra, prohibits abortions except to preserve the life of the mother.

The two above-named cases dealt with the criminal abortion statutes of Texas and Georgia, respectively. It is a general principle of law that statutes are presumed to be constitutional until ruled to the contrary. See: **State ex rel. Keast v. Krieg**, 145 Mont. 521, 402 P.2d 495 (1965), and **United States v. Vuitch**, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971). Although, on initial examination, Montana criminal abortion provisions appear to be similar to those of Texas, the inclusion of section 94-402, supra, prohibiting a woman from procuring an abortion, presents a different legislative purpose and enactment which has not been ruled on by the United States Supreme Court. Until such time as a court of competent jurisdiction rules to the contrary, the criminal abortion statutes of Montana are presumed to be constitutional.

However, in light of the decisions in **Roe v. Wade**, supra, and **Doe v. Bolton, Attorney General of Georgia**, supra, I would suggest that the following new provisions be adopted to regulate abortions permitted to save the life of the prospective mother:

SECTION 1. The legislature reaffirms the tradition of the State of Montana to protect every human life whether unborn or aged, healthy or sick. In keeping with that tradition we reaffirm that an embryo and fetus has potential life, that the State of Montana has a compelling interest in protecting that potential life and that the only interest which may override the compelling interest of the state is the necessity of preserving the existing life of the prospective mother.

SECTION 2. Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years.

SECTION 3. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years.

SECTION 4. Where an abortion is permitted by law, such abortion may only be performed by a physician licensed by this state.

SECTION 5. Where an abortion is permitted by law, such abortion, if performed after the end of the first three months of pregnancy may be performed only in a hospital currently licensed by this state.

SECTION 6. Nothing in this act shall require any hospital, clinic or any person to participate in such abortion, nor shall any hospital, clinic or person be held liable for such refusal, nor shall the same be subject to any disciplinary or recriminatory action for such refusal, nor may refusal by any person to participate in abortion be made a consideration in employment practices of any medical facility.

SECTION 7. The state board of health shall establish regulations and reporting procedures to implement the provisions of this act. The names of all persons submitting to an abortion shall remain confidential.

SECTION 8. Every person who performs an abortion or submits to an abortion in violation of sections 4 and/or 5, or fails to comply with the reporting provisions of section 7, is punishable by imprisonment in the state prison not less than two nor more than five years.

SECTION 9. It is the intent of the Legislature that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid application.

SECTION 10. Sections 94-401 and 94-402, R.C.M. 1947, are hereby repealed.

SECTION 11. This act is effective on its passage and approval.

Sections 2 and 3 above are reenactment of sections 94-401 and 94-402, R.C.M. 1947, respectively.

THEREFORE, IT IS MY OPINION:

Sections 94-401 and 94-402, R.C.M. 1947, are constitutional and in full force and effect until ruled otherwise by a court of competent jurisdiction.

Very truly yours,

ROBERT L. WOODAHL
Attorney General