Opinion No. 70-91

December 8, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Michael McCormick Assistant District Attorney Fifth Judicial District Chaves County Carlsbad, New Mexico

QUESTIONS

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1. Can a female under the age of eighteen, who has been emancipated from her parents or guardian by a lawful marriage, request a justified medical termination of her pregnancy without the consent of her parents or guardian?

2. In the same case, is the consent of her spouse required?

3. Is the consent of the spouse of a woman over the age of eighteen required when she requests a justified medical termination of her pregnancy?

4. In the case of a female under the age of eighteen, who has been emancipated by lawfully marrying another, but who is now divorced or separated, is there a requirement that someone consent to her request for a justified medical termination of her pregnancy?

CONCLUSIONS

1. Yes.

2. No.

3. No.

4. No.

OPINION

*{*155}* **ANALYSIS**

(1) The New Mexico State Legislature, in the enactment of Chapter 67, Laws of 1969 [**§§** 40A-5-1 through 40A-5-3, N.M.S.A., 1953 Comp.] created the means by which a woman over the age of eighteen could request "justified medical termination" of a pregnancy by a licensed physician using acceptable medical procedures, in an accredited hospital **§** 40A-5-1(C), supra. "Justified medical termination" can only be

performed upon written certification of a "special hospital board", consisting of two [2] licensed physicians who are staff members of the accredited hospital. **§** 40A-5-1(C) and (D), supra. Such certification must be to the effect that:

(1) the continuation of the pregnancy, in their opinion, is likely to result in the death of the woman or the grave impairment of the physical or mental health of the woman; or

(2) the child probably will have a grave physical or mental defect; or

(3) the pregnancy resulted from rape, as defined in sections 40A-9-2 through 40A-9-4, N.M.S.A., 1953. Under this paragraph, to justify a medical termination of the pregnancy, the woman must present to the special hospital board an affidavit that she has been raped and that the rape has been or will be reported to an appropriate law enforcement official; or

(4) the pregnancy resulted from incest. **§** 40A-5-1(C), supra.

Criminal abortion results wherever "the termination is not a 'justified medical termination.'" **§** 40A-5-3, supra.

Under **§** 40A-5-1(C), supra, "justified medical termination" of the pregnancy of a woman can be had "at the request of **said woman** or if said woman is under the age of eighteen [18] years, then at the request of said woman and her then living parent or guardian." (emphasis added) However, when a female under the age of eighteen has been emancipated from her parents or guardian by a lawful marriage her request for medical termination *{*156}* of a pregnancy, without further request from her parent or guardian, is sufficient consent under the criminal law.

Section 32-1-42, N.M.S.A., 1953 Comp. states that **"[t]he guardianship over men and women shall cease with their marriage."** The Supreme Court has held that this statute refers to guardianship of the person and not of the property. **In re Hays' Guardianship,** 37 N.M. 55, 17 P.2d 943 (1932); **Montoya de Antonio v. Miller,** 7 N.M. 289, 34 P.40, 21 L.R.A. 699 (1893). However, since "[g]uardianship of the person is absolutely inconsistent with the conjugal right of the husband and wife," **Montoya de Antonio v. Miller, supra,** it is clear that a woman under eighteen, but lawfully married, can request a medical termination of her pregnancy without the consent of her parent or guardian.

(2) Attorney General Opinion No. 4462, issued February 18, 1944, states that:

Since all guardianship of a person ceases upon marriage and the Supreme Court has stated, in the early case cited above, that 'guardianship of the person is absolutely inconsistent with the conjugal rights of husband and wife', it is apparent that **the husband is not the legal guardian of his minor wife.** (Emphasis added.)

The statute [40A-5-1(C), supra] requiring only the request of "said woman," if the woman is over eighteen cannot be said to impose a requirement that a minor wife obtain the consent of her husband. Therefore, a married woman under the age of eighteen has the right to request a medical termination of her pregnancy without the consent of her husband.

(3) Similarly, the language of Section 40A-5-1(C), supra, quoted above, is clear in requiring **only** the request of the woman over the age of eighteen where she desires medical termination of pregnancy. There is no provision in the statute requiring a married woman over eighteen to obtain the consent of her husband, nor can we find any other provisions in New Mexico law which would require the husband's consent. See **§** 57-2-2, N.M.S.A., 1953 Comp. and **§** 32-1-4, N.M.S.A., 1953 Comp.

Section 57-2-2, supra, states that the husband is head of the family, but certainly does not imply that his consent be obtained for a therapeutic abortion.

Section 32-1-4, supra, states that parents (mother and father) have equal powers, rights, and duties concerning the minor. It might be argued from this section that the husband has an equal voice regarding his wife's contemplated abortion; however, Section 32-1-4 can in no way abridge the wife's personal rights guaranteed her by the federal constitution. The United States Supreme Court has held that the constitution guarantees a right of privacy at least in matters of sex and reproduction, which cannot be easily invaded by the state. **Griswold v. Connecticut,** 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

This doctrine has been applied to a mother's right to an abortion in two recent cases. **Babbitz v. McCann,** 310 F. Supp. 293 (1970) U.S. Appeal pending; **People v. Belous,** 80 Cal. Rptr. 354, 458 P.2d 194 (1969).

A three-judge federal district court recently held that a Wisconsin statute making it a criminal offense to perform an abortion which is not necessary to save the life of the mother is an unconstitutional invasion of the woman's right of privacy. **Babbitz v. McCann, supra.** Upon urging that the state's interest in protecting the embryo is a sufficient basis to sustain the statute, the court said:

A woman's right to refuse to carry an embyro during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed 'rights' of an embryo of four months or less, we hold that the mother's right transcends that of the embryo.

California's Supreme Court has also invalidated its state statute making it illegal to perform an abortion on a woman unless it was necessary to save her life. In so doing the court said:

The fundamental right of the woman to choose whether to bear *{*157}* children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right of

privacy' or 'liberty' in matters related to marriage, family, and sex. **People v. Belous, supra.**

Both of the above opinions recognize that while this protected area of privacy is not explicitly stated in the constitution, it is a fundamental liberty implicit in the penumbrae of the Bill of Rights. See also **United States v. Vuitch,** 38 U.S.L. W. 3421 (U.S. Appeal pending). It therefore may be an infringement on the constitutional rights of a woman to require her husband's consent in this, a personal decision.

(4) Because of the personal rights of a woman discussed above and because marriage has emancipated the woman from the guardianship of her parents, where a female under the age of eighteen [18] who has been married but is later divorced or separated requests medical termination of her pregnancy, no other person's consent is required.

In New Mexico the district courts are vested with full power and authority to "decree divorces from the bonds of matrimony . . ." **§** 22-7-1, N.M.S.A., 1953 Comp. In so doing all ties and obligations of a married couple are deemed severed.

We find no law requiring that the wife under eighteen revert to her unemancipated state after a divorce or separation. Further, we find no authority in either our marriage or divorce laws which would support such an interpretation. There is no requirement in the Act in issue. A married woman, subsequently divorced or separated, regardless of age, is an emancipated person who is entitled to determine herself, without the consent of any other person, whether she will request the medical termination of her pregnancy under the provisions of **§§** 40A-5-1 through 40A-5-3, supra. See **§** 12-12-1, N.M.S.A., 1953 Comp.

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