

ABORTION: Unlawful to perform abortion on pregnant women
CRIMINAL LAW: who has contracted German measles unless necessary
to preserve the life of woman or life of unborn
child.



May 14, 1952

5-15-52

Honorable Milton B. Kirby
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This is in answer to your letter of recent date re-
questing an official opinion of this department and reading
as follows:

"During the past several weeks, Greene County has suffered an epidemic of German measles. Numerous cases are reported of prospective mothers in the early stages of pregnancy who have contracted the disease. Local medical authorities report that reliable medical statistics indicate that in cases during the early stages of pregnancy in which the mother suffers from German measles that the child when born, in a large majority of cases, will be mentally deficient or otherwise deformed.

"A question is submitted as to whether or not a therapeutic abortion in such a case would be a violation of Section 559.100, Missouri Revised Statutes of 1949. Your early reply to this question is urgently requested and will be greatly appreciated by this office."

Section 559.100, RSMo 1949, provides as follows:

"Any person who, with intent to produce

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or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take, any drug, medicine or article, or uses upon her, or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue, such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three years nor more than five years, or by imprisonment in jail nor exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is above defined, shall be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked by the state board of medical examiners in its discretion."

In the case of State v. Gunther, 169 S.W.2d 404, 1.c. 406, the Supreme Court of Missouri said:

"It was also in evidence that appellant had agreed to perform the abortion before she had seen Mrs. Powell. In other words, the health of Mrs. Powell or that of the unborn child was not considered by either appellant or the

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Powells. Appellant's only concern was the \$35 for which she agreed to perform the illegal operation. We deem the evidence sufficient as to the state of health of Mrs. Powell."

In the case of State v. Fitzgerald, 174 S.W.2d 211, the Supreme Court said l.c. 213:

"With this assumption it is unquestionably the rule in this state that the burden is upon the state in this type case to prove the negative, that is the non-necessity of the operation to save the life of the mother or of the unborn child. The two State v. Smith cases, supra. However, our mere recital of the evidence demonstrates that the state did make a prima facie showing of the non-necessity of any such operation. Both lay and professional witnesses stated that Maude was a healthy girl and that they found no condition making such treatment advisable, or necessary, and Maude said that no physician had advised an abortion as necessary for any reason. There was no evidence to the contrary and neither the appellant nor anyone else claimed such an operation was necessary. The appellant only claimed that he did not perform the operation. Under such circumstances the state's evidence sufficiently proved the non-necessity of the operation (State v. Gunther, Mo. Sup., 169 S.W.2d 404; State v. Anderson, 298 Mo. 382, 250 S.W. 68; State v. Hawkins, Mo. Sup., 210 S.W. 4), and the case is unlike the Smith cases and State v. DeGroat in this respect, where there was no substantial evidence of the non-necessity of the operation or where there was evidence from which the jury could reasonably find the operation was necessary for the health of the mother or the unborn child, consequently the appellant's demurrers were properly overruled."

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From the plain, clear and unequivocal language of the statute, supra, and its reiteration by the Supreme Court of this state in the Gunther and Fitzgerald cases, supra, the only justification for the production of an abortion is that the abortion is required to preserve the life of the woman or that of an unborn child.

Under such statute the fact that it may be thought that a child born to a mother who has had German measles during early pregnancy may be mentally deficient or deformed does not afford any justification for an abortion to be performed on such woman.

CONCLUSION

It is the opinion of this department that Section 559.100, RSMo 1949, makes illegal the performance of an abortion on a woman who has contracted German measles in the early stages of pregnancy unless such abortion is necessary for the preservation of the life of the woman or that of her unborn child.

Respectfully submitted,

C. B. BURNS, JR.,
Assistant Attorney General

APPROVED:

AOK

J. E. TAYLOR
Attorney General

CBB:lrt