

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 8, 2007 in Room 313-S of the Capitol.

All members were present except:

Kay Wolf- excused
Paul Davis- excused

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research
Athena Andaya, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Duston Slinkard, Office of Revisor of Statutes
Cindy O'Neal, Committee Assistant

HB 2006 - crimes against an unborn child

Chairman O'Neal provided the committee with memo regarding the Kansas Supreme Court's opinion in the case of **Nold v. Binyon**, 272 Kan.87 (2001). (Attachment 1) The case at issue was a medical malpractice action that questioned what duty, if any, was owed by health care providers to the unborn child of a mother who intended to carry her baby to term. The court concluded that: "We hold, as a matter of law, that a physician who has a doctor-patient relationship with a pregnant woman who intends to carry her fetus to term and deliver a healthy baby also has a doctor-patient relationship with the fetus."

Also provided by the Chairman was a copy of **Commonwealth of Pennsylvania v. Bullock**, in which the court unanimously upheld the constitutionality of an act that makes it a criminal offense for anyone, other than the pregnant woman or her doctors who engage in good faith medical practices or performing an abortion, to kill an unborn child. The court stated that viability outside the womb was not required for people to understand what would constitute killing a fetus. The statute's protection was intended to extend to a fetus, not to "define the concept of personhood or establish when a life begins and ends." (Attachment 2)

The Court went on to further explain that: "Today it is understood that a mother and her unborn child are separate and distinct entities, and that medicine is generally able to prove the *corpus delicti* of the homicide of an unborn child. It is also clear that by defining unborn child to include all stages of gestation, the General Assembly intended to eliminate any viability requirement."

While the Court stated that "People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo is a human being, or on whether or at what stage the embryo or fetus is ensouled or acquires 'personhood'. These questions are entirely irrelevant to criminal liability under the statute. It only requires proof that, whatever the entity within the mother's womb is called, it had life and, because of the act or acts of the defendant, it no longer does."

Chairman O'Neal explained that the Courts have determined that it not necessary to define "conception. He made motion to strike, on page 1, lines 17 & 18 and in line 19 strike the language after "living" to the end of the sentence and replace it with "individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth." (Attachment 3) Representative Kinzer seconded the motion. The motion carried.

Representative Colloton made the motion to limit the bill to homicide as defined in the current criminal code. Representative Crow seconded the motion. The motion carried.

Representative Colloton made the motion to include: attempted homicide, aggravated battery & battery. Representative Crow seconded the motion. The motion carried.

Staff suggested that the committee add "solicitation & conspiracy" to be covered under homicides. Representative Colloton made the motion to include the revisor's suggestion. Representative Kinzer seconded the motion. The motion carried.

CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 8, 2007 in Room 313-S of the Capitol.

Representative Kuether made the motion to table **HB 2006** because she didn't understand what she had voted on and wanted to see a copy of the approved amendments. Representative Roth seconded the motion. The motion carried 9-7. Representative Kinzer requested he be recorded as voting no.

The committee meeting adjourned at 4:30 p.m. The next meeting was scheduled for February 12, 2007.

Alexa's Law Memo

In anticipation of the upcoming committee discussion and deliberation on the Alexa's Law legislation, the Kansas Supreme Court case of Nold v. Binyon, 272 Kan. 87 (2001), is important. At issue in this medical malpractice action was the question of what duty, if any, was owed by health care providers to the unborn child of a mother who intended to carry her baby to term.

The mother was found to be a hepatitis B carrier and the claim involved the failure to advise the mother of her status as a carrier and to take timely action to vaccinate the baby at the time of birth. The claim was brought by the child, through her parents, and no claim was made by the mother on her own behalf. Joined as defendants were several doctors and the delivery hospital. Two of the physicians sued started and ended their treatment while the mother was within the first trimester of pregnancy (well before "viability). Nevertheless, damages against them were assessed and upheld.

One doctor argued that there should be no recognized doctor/patient relationship between a doctor and an unborn child. Two other defendant doctors agreed there was such a doctor/patient relationship, but argued that the relationship with the baby ended when they quit treating the mother. The Kansas Supreme Court adopted the reasoning of the New York Court in Hughson v. St. Francis Hosp., 459 N.Y.S. 2d 814 (1983) which held:

"...it is now beyond dispute that in the case of negligence resulting in prenatal injuries, both the mother and the child in utero may each be directly injured and are each owed a duty, independent of the other."

The Kansas Supreme Court went on to conclude:

"We hold, as a matter of law, that a physician who has a doctor-patient relationship with a pregnant woman who intends to carry her fetus to term and deliver a healthy baby also has a doctor-patient relationship with the fetus."

House Judiciary
Date 2-8-07
Attachment # 1

Pennsylvania Supreme Court Upholds Fetal Homicide Act

By Joseph McHugh

The Supreme Court of Pennsylvania, in *Commonwealth of Pennsylvania v. Matthew Bullock*,¹ unanimously upheld the constitutionality of an act that makes it a criminal offense for anyone—other than the pregnant woman herself or doctors “engaged in good faith medical practice” or performing an abortion—to kill an unborn child. The court rejected three constitutional challenges by Mr. Bullock, including an equal protection argument in which Bullock essentially argued that the father of an unborn child should not be treated differently than a mother who kills her unborn child. The majority found that the pregnant mother, because she is physically carrying the child, is not similarly situated to the father or anyone else, and it therefore was not arbitrary for the legislature to carve out an exception for the mother from the fetal homicide restrictions that apply to everyone else.² Justice Baer joined the majority in full, but wrote separately to stress that *Roe v. Wade*³ “and its progeny remain the law in this nation and any attempt, based upon the legislature’s choice of language in the Act, to undermine its constitutional imperative is unavailing.”⁴

Factual Background

Bullock’s girlfriend, Lisa Hargrave, was twenty-two to twenty-three weeks pregnant when, on New Year’s Eve (2002), the two of them ingested cocaine and alcohol at a party. After returning to their apartment, Hargrave continued ingesting cocaine, ignoring Bullock’s request that she stop doing so—at least for the rest of the night—given her pregnancy. Bullock, in a confession to police, stated that he then “blacked out” while arguing about this and when he regained consciousness found that he was on top of Hargrave, choking her. Worried that Hargrave would call the police, Bullock tied her up, later returning to tape her mouth shut, and ultimately strangling her to death when she continually tried to free herself. The unborn child died of asphyxia. A jury found Bullock guilty of third degree murder as to Hargrave and guilty of voluntary manslaughter as to the unborn child. Bullock’s appeal to the Pennsylvania Supreme Court concerned only the voluntary manslaughter conviction under Pennsylvania’s Crimes Against the Unborn Child Act.⁵

Statutory Scheme

Pennsylvania’s Crimes Against the Unborn Child Act, passed in 1997 and effective on March 31, 1998, is intended to protect unborn children from unlawful injury or death. It establishes three levels of murder, as well as voluntary manslaughter and aggravated assault of an unborn child,⁶ none of which applies to consensual abortion, doctors engaged in good faith medical practice, or pregnant women with regard to their own pregnancies. Under the Act, an unborn child is defined, by reference to the Abortion Control Act,⁷ as a fetus *at any stage* of gestation.⁸ Voluntary manslaughter of an unborn child is defined as negligently or accidentally killing an unborn child, without legal justification, in the course of trying to kill someone else who has done something to seriously provoke “sudden and intense passion” in the would-be killer.⁹

Constitutional Challenges Unavailing

Bullock argued that the Act was unconstitutionally vague and overbroad and that it violated his right to equal protection. According to Bullock, the Act was impermissibly vague because a person of ordinary

intelligence could not understand what “death” means when applied to a non-viable fetus.¹⁰ Because the Act did not require that the fetus be viable outside the womb at the time of death, the Act did not provide fair warning of precisely what conduct was criminal—if the fetus was not viable outside the womb, it was not actually alive and so could not suffer death from anything someone might do to it.¹¹ The court cut short this argument, noting that the definition of unborn child to include *all* stages of gestation was “neither obscure nor difficult to grasp;” viability outside the womb was not required for people to understand what would constitute killing a fetus.¹² The statute’s protection was intended to extend to a fetus, not to “define the concept of personhood or establish when life as a human being begins and ends.”¹³ The court stated that “the concepts of life and its cessation are readily understandable by persons of ordinary intelligence relative to biological life forms beginning at the cellular level . . . Accordingly, viability outside of the womb is immaterial to the question of whether the defendant’s actions have caused a cessation of the biological life of the fetus.”

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Attachment # 2

The court also rejected the overbreadth argument. As an initial matter, it viewed the claim as sounding in substantive due process (not overbreadth, because overbreadth only applies to First Amendment claims).¹⁵ Noting that substantive due process “provides heightened protection against government interference with certain fundamental rights and liberty interests,”¹⁶ the court pointed out that Bullock had no right “to unilaterally kill the unborn child carried by another person” and that the United States Supreme Court has affirmed that states have an “important and legitimate interest” in protecting fetal life at all stages, even if that interest only becomes ‘compelling’ at viability.¹⁷ Bullock’s substantive due process claim failed because he could not identify any fundamental right infringed by the Act.¹⁸

Bullock’s final, and perhaps most significant, constitutional argument was that his right to equal protection was violated by a statute that held a natural father criminally responsible for harm he caused to his unborn child, but excused a mother from such conduct merely by reason of her pregnancy.¹⁹ The court disagreed. Legislatures can draw reasonable classifications; and the appropriate level of scrutiny “depends upon the type of categorization involved and the nature of the right affected.”²⁰ The challenged distinction consisted of “the mother versus everyone else.” It did not involve invidious distinctions based on race, national origin, gender or legitimacy that would be subject to heightened scrutiny.²¹ And the right that Bullock asserted—to unilaterally kill the unborn child that another was carrying—“is neither fundamental nor important—indeed it does not exist.”²² Thus, rational-basis review was proper and the Act passed muster. The legislature’s purpose in distinguishing between the mother and everyone else was deemed rational: “[s]imply put, the mother is not similarly situated to everyone else, as she alone is carrying the unborn child.”²³

The court then went on to reject Bullock’s non-constitutional challenges to a jury instruction.²⁴

Justice Baer wrote a concurring opinion on the constitutional challenges because he felt the need to stress that the court’s opinion offered no basis to undermine *Roe*. The United States Supreme Court “has clearly concluded that states have an important and legitimate interest in protecting fetal gestation from the outset of a pregnancy through the birth of a child” and the legislature was acting consistent with that interest when it passed the Act.²⁵ However, the legislature was only criminalizing “certain acts that would result in the cessation of the gestational process.”²⁶ It was not attempting to define the concept

of personhood or to define when life begins or ends. And the court, in upholding the Act, was not defining a fetus “as a life-in-being” nor was it “endorsing the notion that the interruption of the reproductive process is the killing of human life. *Roe* and its progeny remain the law in this nation and any attempt, based upon the legislature’s choice of language in the Act, to undermine its constitutional imperative is unavailing.”²⁷

Endnotes

1 --- A.2d ---, 2006 WL 3797944 (12/27/06), *hereinafter* *Bullock*.

2 *Bullock*, slip op. at 6.

3 410 U.S. 113 (1973).

4 *Bullock*, slip op. at 8.

5 18 Pa.C.S. §§ 2601-2609 (*hereinafter* “the Act”).

6 *See* 18 Pa.C.S. §§ 2604-2606.

7 18 Pa.C.S. §§ 3201-3220.

8 More precisely, the Abortion Control Act defines both an “unborn child” and a “fetus” as “an individual organism of the species homo sapiens from fertilization until live birth.” 18 Pa.C.S. § 3203, cited in the Act’s definition of “unborn child” at 18 Pa.C.S. § 2602.

9 18 Pa.C.S. § 2605(a).

10 *Bullock*, slip op. at 2-3.

11 *Id.* at 2.

12 *Id.* at 3.

13 *Id.*, citing *State v. Merrill*, 450 N.W.2d 318, 324 (Minn. 1990).

14 *Id.* at 3-4.

15 *Id.* at 4.

16 *Id.* at 4, quoting *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

17 *Id.* at 4, quoting *Roe*, 410 U.S. at 163, and citing, among others, *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

18 *Id.*, slip op. at 4.

19 *Id.* at 5.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 6-8.

25 *Id.* at 8.

26 *Id.* (emphasis added).

27 *Id.*

HOUSE BILL No. 2006

By Representative Brunk

12-14

Proposed amendment
Representative O'Neal
February 6, 2007

House Judiciary
Date 2-8-07
Attachment # 3

9 AN ACT enacting Alexa's law; relating to crimes against unborn children.

10

11 *Be it enacted by the Legislature of the State of Kansas:*

12 Section 1. (a) This act shall be known and may be cited as Alexa's
13 law.

14 (b) As used in this section:

15 (1) "Abortion" means an abortion as defined by K.S.A. 65-6701, and
16 amendments thereto.

17 (2) ~~"Conception" means the fusion of a human spermatozoon with a~~
18 ~~human ovum.~~

19 (3) ~~"Unborn child" means a living fetus in utero at any stage of de-~~
20 ~~velopment or gestation from conception until live birth.~~

individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth.

21 (c) This section shall not apply to:

22 (1) Any act committed by the mother of the unborn child;

23 (2) any medical procedure, including abortion, performed by a phy-
24 sician or other licensed medical professional at the request of the preg-
25 nant woman or her legal guardian; or

26 (3) the lawful dispensation or administration of lawfully prescribed
27 medication.

28 Sec. 2. As used in the Kansas criminal code, "person" and "human
29 being" also mean an unborn child.

30 Sec. 3. The provisions of this act shall be part of and supplemental
31 to the Kansas criminal code.

32 Sec. 4. The provisions of this act are declared to be severable and if
33 any provision, word, phrase or clause of the act of the application thereof
34 to any person shall be held invalid, such invalidity shall not affect the
35 validity of the remaining portions of this act.

36 Sec. 5. This act shall take effect and be in force from and after its
37 publication in the statute book.