

Missouri’s Newly-Effective Abortion Law’s Impact on Health Care Providers

In response to the U.S. Supreme Court decision overturning *Roe v. Wade*, which was followed by Governor Mike Parson signing a proclamation triggering the effectiveness of Section 188.017 RSMo, which ends elective abortions in the State of Missouri, Spencer Fane’s health care team is sharing this memo outlining the broad scope and ambiguities in Missouri’s law and the potential issues it presents to Missouri health care providers.

I. KEY PRINCIPLES OF ABORTION LAW REVIEW

MISSOURI’S DEFINITION OF TERMS

Central to the analysis of Missouri’s abortion law and its consequences are the definitions of the terms used in Chapter 188 RSMo. The following terms are defined in §188.015 of HB 126:

“Abortion”,	“Physician”,
“Abortion facility”,	“Reasonable medical judgment”,
“Conception”,	“Unborn child”,
“Department”,	“Viability” or “viable”,
“Down Syndrome”,	“Viable pregnancy” or
“Gestational age”,	“viable intrauterine pregnancy”.
“Medical emergency”,	

The definitions for the following words and/or phrases are of particular significance to the analysis:

Abortion,	Unborn child,
Conception,	Viability,
Gestational age,	Viable pregnancy or
Medical emergency,	viable intrauterine pregnancy.

1. The Definition of Abortion.

Webster’s Third New International Dictionary (“Webster’s”) (the dictionary the Missouri Supreme Court often refers to determine the “plain and ordinary meaning” of a word) defines “abortion” very simply as “*the expulsion of a nonviable fetus.*”

However, the Missouri statute defines abortion differently and more broadly.

Missouri has adopted two definitions for “Abortion”¹ in §188.015(1) RSMo, and neither is as simple to understand as Webster’s:

(a) **The act of using or prescribing** any instrument, device, medicine, drug, or any other means or substance **with the intent to destroy** *the life of an embryo or fetus* in his or her mother’s womb; or

(b) **the intentional termination of the pregnancy** of a mother **by using or prescribing** any instrument, device, medicine, drug, or other means or substance *with an intention other than to increase the probability of a live birth or to remove a dead unborn child;*²

§188.015(1)(a) is focused on the destruction of an embryo or fetus, while §188.015(1)(b) is focused on acting “...*with an intention other than to increase the probability of a live birth or to remove a dead unborn child*”.

2. Key words within the definition of abortion.

The first key words within the definition of “abortion” to be defined are: “embryo”, “fetus”, “pregnancy” and “unborn child”, so we can determine at what point in the timing of biological reproduction does the ban on abortion begin. “Unborn child” is the only term of the four that is set out specifically as a defined term. The terms “embryo” and “fetus” are stages of development referenced in the definition of “Unborn child”, and “pregnancy” is defined within the definition of “Gestational age”. Most of the distinct stages of development referenced in the definition of “unborn” child occurred “pre-viability”. A “fetus” could be both viable and not viable, depending upon the stage of development.

“Pregnancy,” while it is not segregated as a defined term it statutorily defined in §188.015 RSMo, within the definition for “Gestational age” which is defined as “...length of pregnancy as measured from the first day of the woman’s last menstrual period” therefore “gestational age” is the “length of pregnancy”

¹ §188.015(1) RSMo 2019.

² §188.015(1) RSMo 2011.

so we can ascertain when, under Missouri law, pregnancy begins, not at fertilization of the egg, but from the first day of the woman’s last menstrual period.

“Unborn child” is defined as “...the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus.

The significance of listing “...every stage of its biological development...” differentiates the human conceptus, the fertilized ovum, zygote, morula, blastocyst, from the embryo and fetus, as each biological term relates to a specific time period of development of the fertilized ovum (“post fertilization”), and then with the definition of “pregnancy” within the definition of “Gestational age”, one might argue constructs three distinct periods of time that are intended to be captured by Missouri, pre-fertilization, pre-implantation of the embryo to the uterine wall, a fetus, a viable fetus.

None of the terms used within the definition of “unborn child” are defined in statute so we use their plain and ordinary meaning which basically delineates periods of development of the fertilized egg prior to implantation to the uterine wall at which point it is called an “embryo” until about the eighth week at which point it is called a “fetus”.

Understanding now that the time period for the prohibition of abortions may actually be triggered pre-fertilization, the impact of the use of the phrase “...using or prescribing any instrument, device, medicine, drug, or any other means or substance...” is better understood as a “morning after” pill or an IUD or a birth control pill designed to prevent fertilization and/or implantation to the uterine wall, *as all are utilized to decrease the probability of a live birth and are not used to remove a dead zygote morula, blastocyst, embryo or fetus and all can be used to prevent the implantation of the fertilized egg to the uterine wall.*

3. What are the differences between §188.015(1)(a) RSMo and §188.015(1)(b) RSMo?

The first definition, §188.015(1)(a) RSMo., of abortion is:

- (a) The act of using or prescribing any instrument, device, medicine, drug, or any other means or substance with the intent to destroy the life of an embryo or fetus in his or her mother's womb;

The first definition defines an abortion as conduct (prescribing any instrument, device, medicine, drug, or any other means or substance) performed with an intent as to a particular object (the intent to destroy the life of an embryo or fetus) and in a specific location (in his or her mother's womb). The conduct that constitutes one definition of an abortion as defined in Missouri, is an act committed with the intent to destroy the life of an embryo or fetus, and the embryo or fetus is located in his or her mother’s womb.

Interestingly enough, the first definition does not require the life of the embryo or fetus to be destroyed, only that an attempt to destroy was made.

The second definition of abortion, §188.015(1)(b) RSMo 2019, is:

(b) The intentional termination of the pregnancy of a mother by using or prescribing any instrument, device, medicine, drug, or other means or substance with an intention other than to increase the probability of a live birth or to remove a dead unborn child;

The second definition requires the termination of the pregnancy, pregnancy being defined by Black’s Law Dictionary, (also used for reference by the Missouri Supreme Court) as the “condition resulting from the fertilized ovum. The existence beginning at the moment of conception and terminating with delivery of the child.” However, §188.015(6) RSMo., has redefined pregnancy in the way it is defined within the definition of “Gestational age” as “the length of *pregnancy* as measured from the first day of the woman’s last menstrual period”. Pregnancy does not begin from the “date of fertilization”.

A liberal interpretation of time period encompassed by §188.015(1)(b) RSMo, would include the time period between the “first day of the woman’s last menstrual period...” and fertilization, as opposed to limiting the time period to the development of an embryo and then fetus as is limited by §188.015(1)(a).RSMo.

§188.015(1)(b) RSMo, also states that the use or prescription of any instrument, device, medicine, drug, or other means or substance was done *with an intention* other than, one, to increase the probability of a live birth, or two, remove a dead unborn child. §188.015(1)(b) RSMo 2019. (*Emphasis added.*). HB 126, enacted in 2019, removes the previously existing exception of a “dying” “unborn child”, as that would really mean a dying zygote to a dying fetus, a zygote is dying if it cannot implant itself on the uterine wall, and a fetus may die for a number of medical reasons. However, when Roe is overturned a doctor will have to wait for the fetus to die, before it is removed from the woman. §188.015(1)(b) RSMo, broadens the target of protection from an embryo or fetus targeted in §188.015(1)(a) RSMo, to include the human conceptus, zygote, morula and blastocyst, in addition to the embryo and fetus.

Also interesting about §188.015(1)(b) RSMo and its application to certain forms of birth control is to compare its language to the language in the Connecticut statute found unconstitutional in *Griswold v. Connecticut*, 381 U.S. 479, 480, 85 S.Ct. 1678, 1679, 14 L.Ed.2d 510 (1965).

Missouri law:

The intentional termination of the pregnancy of a mother by *using or prescribing any instrument, device, medicine, drug, or other means or substance with an intention other than to increase the probability of a live birth* or to remove a dead unborn child

The Connecticut statute that criminalized the use of certain birth control methods at issue in Griswold:

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

To summarize, the second definition of abortion, §188.015(1)(b) RSMo 2019, which states a purpose of the “...*intentional termination of pregnancy...*”, in a time period by which pregnancy is measured as “...*from the first day of the woman’s last menstrual period*”, pre-fertilization of the egg, with the added “*intention*” being defined within §188.015(1)(b) RSMo 2019 as “*an intention other than to increase the probability of a live birth or to remove a dead unborn child* (human conceptus (fertilized ovum), zygote, morula, blastocyst, embryo or fetus) can be interpreted as a ban on certain birth control devices.

4. Distinguishing the two alternative definitions for “abortion” – a Summary.

Therefore, the two alternatives as to how an abortion is defined can be differentiated in multiple ways.

(i) Target of protection. In (a) it is an implanted embryo or fetus, while (b) targets a fertilized egg not yet implanted, and possibly simply an egg.

(ii) Time period. (a) is measured from the time of implantation of the embryo to the uterine wall because of the use of the terms embryo and fetus, (b) is measured from the moment of the first day of the woman’s last menstrual period because of the use of the term pregnancy, human conceptus, zygote, morula and blastocyst in addition to the embryo and fetus.

(iii) “Destroy” v. “Intentional Termination.” In (a), the use of the word “destroy” and in (b) the use of the words “intentional termination”. Why? What is the significance?

(iv) Focus of intent. In (a), one intends to destroy an embryo or fetus, in (b), one intends to something other than to increase the probability of a live birth or to remove a dead fertilized ovum. Why? What is the significance?

(v) Required result. In (a), destruction of the embryo or fetus does not have to occur, only that the means or substances were used with the intent to destroy the embryo or fetus, while (b) use or prescription of means or substances used with the intent other than to increase the probability of a live birth or to remove a dead fertilized ovum. It requires an intentional “termination of the pregnancy”.

However, given the definitions, the use of any device to prevent implantation, (and possibly fertilization given the use of the word pregnancy in the second alternative but not the first alternative), and the lack of a pregnancy beyond 5-8 weeks, (absence of a corpus) a zealous prosecuting attorney could assert that as a result of the use or prescription of an instrument, device, medicine, drug, or other means or substance coupled with an intent other than to increase the probability of a live birth or to remove a dead fertilized ovum, an abortion occurred, or the individuals are guilty of “attempted abortion”.

As a result, the second definition use of the terms “...*instrument, device, medicine, drug, or other means or substance...*” include emergency contraception pills and devices known as “morning after” pills, certain IUD’s and other birth control pills and devices as abortion mechanisms.

5. Plain and ordinary meaning of certain terms undefined by statute.

The plain and ordinary meaning of:

- a. “conception” is the process of becoming pregnant involving fertilization or implantation or both;
- b. “human conceptus” is undefined used together, but human is a human being and conceptus is defined in Merriam Webster’s Dictionary as a fertilized egg, embryo or fetus;
- c. “zygote” a fertilized ovum; the new cell formed when a sperm cell joins with an egg cell;
- d. “morula” is defined as a solid ball of cells resulting from division of a fertilized ovum, and from which a blastula is formed;
- e. “blastocyst”, is the modified blastula of a placental mammal having an outer layer composed of the trophoblast; blastula is defined as an early metazoan embryo typically having the form of a hollow fluid-filled rounded cavity bounded by a single layer of cells; the first nine days after fertilization;
- f. “embryo” the developing human individual from the time of implantation to the end of the eighth week after conception; implantation occurs between the fifth and tenth day after fertilization;
- g. “fetus” is a developing human from usually two months after conception to birth.

To illustrate the plain meaning of the statute I insert the plain language definitions instead of the statutory words:

1. Notwithstanding any other provision of law to the contrary, no *act of using or prescribing any instrument, device, medicine, drug, or any other means or substance with the intent to destroy the life of an embryo or fetus in his or her mother's womb, or the intentional termination of the condition resulting from the fertilized ovum* of a mother by using or prescribing any IUD or a Plan B or Ella Pill or any other contraception drug or device with an intention other than to increase the probability of a live birth or to remove a dead offspring of*

human beings from the moment of conception until birth and at every stage of its biological development, including human conceptus, zygote, morula, blastocyst, embryo, and fetus at eight weeks gestational age or later, shall be performed or induced upon a woman except in cases of medical emergency. Any person who knowingly performs or induces the use or prescription *of any instrument, device, medicine, drug, or any other means or substance with the intent to destroy the life of an embryo or fetus in his or her mother's womb, or cause the intentional termination of the condition resulting from the fertilized ovum** of a mother by using or prescribing *an IUD or a Plan B or Ella Pill or any other contraception drug or device* with an intention other than to increase the probability of a live birth or to remove a dead *offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus* in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board. A woman upon whom an abortion is performed or induced in violation of this subsection shall not be prosecuted for a conspiracy to violate the provisions of this subsection.

A. KEY PROVISIONS OF CHAPTER 188

1. Eliminates a woman's right to an abortion and makes the performance or inducement of an abortion a crime from the moment of conception

The only exception is if there is a "medical emergency" which is defined as:

"a condition which, based on reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the pregnant woman or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman;"

The Legislature did not create an exception for rape or incest.

B. PROSECUTION OF THE FEMALE AND STRICT LIABILITY

The woman is subject to prosecution because the law only states that she cannot be prosecuted for a conspiracy to violate the provisions of this subsection. A female that uses any contraceptive drug or device could be prosecuted, *whether or not she was actually pregnant* because she was utilizing the drugs or the IUD "*with an intention other than to increase the probability of a live birth or to remove a dead fertilized ovum, zygote, morula, blastocyst, embryo, or fetus.*

This is not to say the woman would be prosecuted, but if a prosecutor believes she should be prosecuted he has the authority to do so.

Below is an example of a zealous prosecutor who believes Missouri law included birth control pills or devices could make to the Court:

“Your honor, prior to *Roe v. Wade* and *Planned Parenthood v. Casey* being overturned, there were legal abortions and illegal abortions. The demarcation line for illegality was viability of the fetus. I will explain:

A quote from *Casey*, 505 U.S. 833, 870, 112 S. Ct. 2791, 2816:

*“Liberty must not be extinguished for want of a line that is clear. And it falls to us to give some real substance to the woman’s liberty to determine whether to carry **her pregnancy to full term.**”*

*[16] *870 We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of stare decisis. Any judicial act of line-drawing may seem somewhat arbitrary, but Roe was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition.*

The second reason is that the concept of viability, as we noted in Roe, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.

A quote from *Casey* at pg 2817, or page 872:

“Roe established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman’s health, but not to further the State’s interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake.”

from *Casey* at pg 2812 or page 860:

*“Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since Roe was **2812 decided; which is to say that no change in Roe’s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.”*

A fertilized egg becomes a fetus generally around the 8th week after the egg is fertilized. Viability at the time of *Casey* was generally considered to be around the 23rd or 24th week after fertilization of the egg. The issue of “when” someone first became pregnant, or when did pregnancy begin was not the issue, viability of the fetus, a particular stage of development, was the issue.

Prior to viability the State’s interest in potential life was secondary to the woman’s liberty interest in the decision to have an abortion or not.

In prohibiting the abortion of a “viable” “unborn child” prior to the overturning of *Roe* and *Casey* the following Missouri statutory section applied:

“Prior to performing or inducing an abortion upon a woman, the physician shall determine the gestational age of the unborn child in a manner consistent with accepted obstetrical and neonatal practices and standards....” §188.030.2(1) RSMo.

The gestational age is defined in as:
“length of pregnancy as measured from the first day of the woman's last menstrual period.”
§188.015.(1) RSMo

Gestational age was also used when the State of Missouri defined when a woman’s liberty interest is extinguished in three “trigger” sections §188.056, §188.057 and §188.058.

Those three specific “trigger” provisions that utilize the term “gestational age” as follows:

§188.056 RSMo: Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman at eight weeks gestational age or later, except in cases of medical emergency

§188.057 RSMo: Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman at fourteen weeks gestational age or later, except in cases of medical emergency.

§188.058 RSMo: Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman at eighteen weeks gestational age or later, except in cases of medical emergency.

However §188.017 RSMo is now in effect that prohibits abortion at any gestational age:

Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board. A woman upon whom an abortion is performed or induced in violation of this subsection shall not be prosecuted for a conspiracy to violate the provisions of this subsection.

Abortion is defined as:

(b) The intentional termination of the pregnancy of a mother by using or prescribing any instrument, device, medicine, drug, or other means or substance with an intention other than to increase the probability of a live birth or to remove a dead unborn child. §188.015(1)(b) RSMo

Pregnancy as provided for within the definition of gestational age, the term utilized by at least four other sections prohibiting abortion, begins the first day of the woman’s last menstrual period as §188.015.(6) RSMo states the “length of pregnancy as measured from the first day of the woman's last menstrual period.” That establishes when pregnancy begins. Gestational age is not defined as when the egg is fertilized as it could have been.

Pregnancy is defined as beginning the first day of Defendant Jane Doe’s last menstrual period.

Jane Doe is pregnant as defined in §188.015.(6) RSMo, using an IUD or other form of birth control with an intention other than to increase the probability of live birth.

Defendant Jane Doe was prescribed by Defendant Dr. John Doe an IUD that she used with the intention other than to increase the probability of a live birth.

The drafters knew what they were doing when they defined “gestational age” and knew it would likely be challenged. How do we know, see §188.018:

Severability clause. — If any one or more provisions, sections, subsections, sentences, clauses, phrases, or words of this chapter or the application thereof to any person, circumstance, or period of gestational age is found to be unenforceable, unconstitutional, or invalid by a court of competent jurisdiction, the same is hereby declared to be severable and the balance of this chapter shall remain effective notwithstanding such unenforceability, unconstitutionality, or invalidity. The general assembly hereby declares that it would have passed each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, sections, subsections, sentences, clauses, phrases, or words of this chapter, or the application of this chapter to any person, circumstance, or period of gestational age, would be declared unenforceable, unconstitutional, or invalid.

Below would be what the courts, prosecutors and defense attorneys refer to as “jury instructions”, i.e., guidance to jurors when determining the guilt or innocence of a defendant.

EXHIBIT A
VERDICT DIRECTOR CRIMINAL TRIAL OF THE WOMAN

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about August 29, 2022, in the State of Missouri, Jane Doe, with the intent to terminate a pregnancy of Jane Doe, used an IUD or a birth control pill; and

Second, Jane Doe's intention was other than to increase the probability of a live birth or to remove a dead unborn child; and

Third, Jane Doe was not suffering from a medical emergency,

then you will find Jane Doe guilty of performing or inducing an abortion.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find Jane Doe not guilty of performing or inducing an abortion.

As used in this instruction, the term "medical emergency" means a condition which, based on reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the pregnant woman, or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman. The fact that Jane Doe was a victim of [rape] [incest] does not constitute a medical emergency.

EXHIBIT B
VERDICT DIRECTOR CRIMINAL TRIAL OF THE DOCTOR

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about August 29, 2022, in the State of Missouri, Dr. John Smith, with the intent to terminate a pregnancy of Jane Doe, prescribed an IUD or a birth control drug for Jane Doe's use; and

Second, Dr. John Smith's intention was other than to increase the probability of a live birth or to remove a dead unborn child; and

Third, Jane Doe was not suffering from a medical emergency,

then you will find Dr. John Smith guilty of performing or inducing an abortion.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find Dr. John Smith not guilty of performing or inducing an abortion.

As used in this instruction, the term "medical emergency" means a condition which, based on reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the pregnant woman, or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman. The fact that Jane Doe was a victim of [rape] [incest] does not constitute a medical emergency.