


Reproductive and Maternal Care in an Ever-Changing Legal Landscape

Brad Nitschke
Associate General Counsel
Parkland Health
Dallas, TX

1

A few preliminary matters...

- Charged, dynamic topic.
 - Law in this presentation is current as of April 3, 2023.
 - Good, reasonable lawyers can disagree (especially in the absence of case law to clarify inartful drafting).
 - JD ≠ RN/MD. If you're practicing in this space, qualified clinical partners are essential.
 - Ethics without the credit: "A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent." Tex. Disc. R. Prof'l. Cond. 1.02(c).
 - This is an informational presentation, not legal advice. Any opinions expressed are mine alone and should not be attributed to Parkland Health.
- 

2

So much change, so little time

Roe-2021

- D&E Ban
- Complications Reporting
- Parental Consent - Judicial Bypass
- Informed Consent
- 3rd Trimester AB Ban
- Hospital District Ban
- Loads of documentation

September 2021

- Senate Bill 8 (civil):
- Pre-AB, check FCA
 - No FCA → post-*Roe* regulatory scheme applies
 - FCA → no AB
 - 'Medical emergency' exception
 - No express exception for fetal condition
 - Private plaintiffs may sue to enforce

December 2021

- Senate Bill 4 (criminal):
- Bans "abortion-inducing drugs" after 49 days LMP
 - 'Medical emergency' exception
 - Additional documentation
 - In-person physician exam
 - Limits distribution of AB-inducing drugs
 - Expands AB complication reporting

Summer 2022

- Dobbs*
- No federal constitutional right to AB
- Texas statutes:
- Pre-*Roe* ban (criminal)
 - "Trigger Law" (criminal)

Post-*Dobbs* Litigation

- EMTALA Guidance
- Abortion funds' challenge to extra-territorial enforcement of TX abortion laws
- FDA approval of Mifepristone
- Consent for Title X contraception

Pre-*Roe* Texas Abortion Ban

- **Pre-*Roe* Ban: Tex. Rev. Civ. Stat. arts. 4512.1-.6**
 - Abortion: "the life of the fetus or embryo shall be destroyed in the woman's womb or ... a premature birth thereof be caused."
 - Prohibits attempting to or procuring an abortion, or "furnishing the means ... knowing the purpose intended."
 - Exception: "procured or attempted **by medical advice for the purpose of saving the life of the mother.**"
 - ***McCorvey v. Hill* (5th Cir. 2004):** Statute impliedly overruled. "There is no way to enforce both sets of laws; the current regulations are intended to form a comprehensive scheme—not an addendum to the criminal statutes struck down in *Roe*."
 - ***But see Texas v. Becerra* (N.D. Tex. 2022):** "Texas's pre-*Roe* statutes remain on the books, too. In Texas, when the Supreme Court overruled *Roe*, these laws once again became enforceable." SCOTX stayed injunction against enforcement and "that is good enough for the Court's purposes."



Current Texas Abortion Laws

Abortion is:

- Using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant.
- Unborn child: “an individual living [human] from fertilization until birth...”
- Fertilization: “the point in time when a male human sperm penetrates the zona pellucida of a female human ovum.”

Abortion isn't:

- Act done with the intent to save the life or preserve the health of an unborn child.
- Act done with intent to remove a dead, unborn child whose death was caused by spontaneous abortion.
- Act done with intent to remove an ectopic pregnancy (“implantation of a fertilized egg or embryo outside of the uterus”).

Tex. Health & Safety Code § 245.002

5

Current Texas Abortion Ban

- Chapter 170A, Texas Health & Safety Code: “Trigger Law”
 - Effective 30 days after judgment in SCOTUS decision overruling *Roe* (i.e., *Dobbs*)
 - “A person may not knowingly perform, induce, or attempt an abortion”
 - Unless
 - Performed by a licensed physician; **and**
 - Performed in manner that, in exercise of reasonable medical judgment, provides best opportunity for unborn child to survive (unless > risk of mother’s death or + harm); **and**
 - “In the exercise of reasonable medical judgment, the pregnant female ... has a **life-threatening** physical condition [caused or made worse by] pregnancy that [1] **places [her] at risk of death** or [2] poses a **serious risk of substantial impairment of a major bodily function**” without the abortion.
 - Life-threatening + serious risk of substantial impairment?



6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Reproductive and Maternal Care in an Ever-Changing Legal Landscape

Also available as part of the eCourse

[2023 Health Law eConference](#)

First appeared as part of the conference materials for the
34th Annual Health Law Conference session

"Reproductive and Maternal Care in an Ever-Changing Legal Landscape"