1-7-1995

Title 76: Criminal Code Chapter 07 Offenses Against the Family - 1995 Replacement Volume

Utah Code Annotated

fees, and the costs of the action reduced by any compensation paid by the defendant to the plaintiff in connection with the pyramid scheme.

(2) The rights, remedies, and penalties provided in this chapter are independent of and supplemental to each other and to any other right, remedy or penalty available in law or equity. Nothing contained in this chapter shall be construed to diminish or abrogate any other right, remedy or penalty.

History: C. 1953, 76-6a-6, enacted by L. 1983, ch. 89, § 1.

Severability Clauses. — Section 2 of Laws 1983, ch. 89 provided: "If any provision of this chapter, or the application of any provision to any person or circumstance, is held invalid, the remainder of this chapter shall not be affected thereby."

CHAPTER 7
OFFENSES AGAINST THE FAMILY

Part 1

Marital Violations

Part 2

Nonsupport and Sale of Children

Part 3

Abortion

PART 1
MARITAL VIOLATIONS

76-7-101. Bigamy — Defense — Testimony.

(1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, he purports to marry another person or cohabits with another person.

(2) Bigamy is a felony of the third degree.

(3) It shall be a defense to bigamy that the accused reasonably believed he and the other person were legally eligible to remarry.

(4) Any person, except the defendant, may be compelled to testify in a prosecution under this section; provided, however, that the evidence given in the prosecution shall not be used against him in any proceeding, civil or criminal, except for perjury in giving the testimony. A person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense concerning which such testimony was given.

History: C. 1953, 76-7-101, enacted by L. 1973, ch. 196, § 76-7-101.

Cross-References. — Polygamous or plural marriages forever prohibited, Utah Const., Art. III, § 1; Art. XXIV, § 2; Enabling Act, § 3.

NOTES TO DECISIONS

ANALYSIS

Defenses.
Intent.

Defenses.

In view of demands made by Enabling Act, § 3, in pursuance of which Constitution of Utah was framed and pledges made in Constitution (Art. III, § 1), respecting offense of polygamy it was not presumed that legislature intended to be less rigorous than sister states in dealing with polygamy, nor were courts of this state more liberal than courts of other states in permitting defenses which under rules of statutory construction appear to have been deliberately excluded. State v. Hendrickson, 67 Utah 15, 245 P. 375, 57 A.L.R. 786 (1926).

Enumeration of defenses to charge of polygamy excluded all others. State v. Hendrickson, 67 Utah 15, 245 P. 375, 57 A.L.R. 786 (1926).

Intent.

Specific intention to commit crime of polygamy was not necessary, so long as marriage relied on as constituting crime was intentionally entered into. State v. Hendrickson, 67 Utah 15, 245 P. 375, 57 A.L.R. 786 (1926).

COLLATERAL REFERENCES

Utah Law Review. — *Potter v. Murray City:* Another Interpretation of Polygamy and the First Amendment, 1986 Utah L. Rev. 345.

Am. Jur. 2d. — 10 Am. Jur. 2d Bigamy § 2.
C.J.S. — 10 C.J.S. Bigamy § 1.
Key Numbers. — Bigamy ⇐ 1.

76-7-102. Incest.

(1) A person is guilty of incest when, under circumstances not amounting to rape, rape of a child or aggravated sexual assault, he has sexual intercourse

with a person whom he knows to be an ancestor, descendant, brother, sister, uncle, aunt, nephew, niece, or first cousin. The relationships referred to herein include blood relationships of the whole or half blood without regard to legitimacy, relationship of parent and child by adoption, and relationship of stepparent and stepchild while the marriage creating the relationship of a stepparent and stepchild exists.

(2) Incest is a felony of the third degree.

History: C. 1953, 76-7-102, enacted by L. 1973, ch. 196, § 76-7-102; 1983, ch. 88, § 31.

NOTES TO DECISIONS

ANALYSIS

Elements of offense.
Indictment or information.
Cited.

Elements of offense.

To constitute crime of incest, there must have been actual contact of sexual organs and penetration, however slight, into female's body; emission was not an element. State v. Warner, 79 Utah 500, 291 P. 307, rev'd on other grounds, 79 Utah 510, 13 P.2d 317 (1932).

Indictment or information.

Allegation in information that defendant had sexual intercourse with his niece, knowing her to be of such relationship, was sufficient to charge incest. State v. James, 32 Utah 152, 89 P. 460 (1907).

Cited in State v. Barela, 779 P.2d 1140 (Utah Ct. App. 1989).

COLLATERAL REFERENCES

C.J.S. — 42 C.J.S. Incest § 3 et seq.
Key Numbers. — Incest ⚭ 2.

76-7-103. Adultery.

(1) A married person commits adultery when he voluntarily has sexual intercourse with a person other than his spouse.

(2) Adultery is a class B misdemeanor.

History: C. 1953, 76-7-103, enacted by L. 1973, ch. 196, § 76-7-103; 1991, ch. 241, § 95.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted "class B" for "class A" in Subsection (2).

Cross-References. — Adultery, ground for divorce, § 30-3-1.

NOTES TO DECISIONS

ANALYSIS

Carnal knowledge.
Corpus delicti.
Corroborative evidence.
Date of offense.
—In general.
—Variance.
Elements of offense.
Evidence.
—Circumstantial evidence.
—Evidence held insufficient.
—Evidence held sufficient.
—Pregnancy.
—Proof of marriage.
—Subsequent association.
Included offenses.
Indictment and information.
—Raising and waiving objections.
Issues.
Persons liable.
Presumptions.
Separate offenses.

Carnal knowledge.

Fact that defendant might have been guilty of adultery for illicit sexual intercourse with married female under age was not defense to

prosecution for carnal knowledge. State v. Huntsman, 115 Utah 283, 204 P.2d 448 (1949).

Corpus delicti.

As to proof of corpus delicti under former statute, see State v. Greene, 38 Utah 389, 115 P. 181 (1910); State v. Odekirk, 56 Utah 272, 190 P. 777 (1920).

Corroborative evidence.

Testimony of physician, who had examined prosecutrix, that she was eight months into pregnancy and that in his opinion conception took place the previous February was competent and properly received as corroborative of testimony of prosecutrix that crime had been committed on or about time relied on for conviction, though it did not fix defendant as participant therein. State v. Thompson, 31 Utah 228, 87 P. 709 (1906).

In prosecution for adultery, confession by defendant of act which related to entirely separate and distinct transaction from which he was tried did not corroborate testimony of prosecutrix. State v. Hansen, 40 Utah 418, 122 P. 375 (1912).

Date of offense.

—In general.

In prosecution for adultery, it was immaterial when criminal act was committed, so long as it was alleged and proved to have been committed prior to filing of information and within period of limitation. State v. Sheffield, 45 Utah 426, 146 P. 306 (1915).

—Variance.

In prosecution for adultery, where information charged offense was committed on February 13, state could introduce proof of adulterous act committed on February 1. State v. Thompson, 31 Utah 228, 87 P. 709 (1906).

Elements of offense.

Emission was not essential to offense of adultery. State v. Warner, 79 Utah 500, 291 P. 307, rev'd on other grounds, 79 Utah 510, 13 P.2d 317 (1932).

Evidence.

—Circumstantial evidence.

Conviction for adultery was possible though no witness testified to seeing act complained of, and defendant made no admission or confession, where crime was established by circumstances from which jury could infer defendant's guilt. State v. Odekirk, 56 Utah 272, 190 P. 777 (1920).

—Evidence held insufficient.

Alleged act of adultery was not shown when evidence was accused's admission, not necessarily of alleged occurrence or one giving court jurisdiction, and other evidence raised mere suspicion or conjecture. State v. Sheffield, 45 Utah 426, 146 P. 306 (1915).

—Evidence held sufficient.

Proof that defendant was married man, and that he was married to woman other than prosecutrix, and further proof that he had sexual intercourse with latter was sufficient to show him guilty of adultery without regard to whether prosecutrix was married or unmarried woman. State v. Greene, 38 Utah 389, 115 P. 181 (1910).

—Pregnancy.

In prosecution for adultery, instruction that jury could consider fact of pregnancy as tending to connect defendant with crime was erroneous. State v. Thompson, 31 Utah 228, 87 P. 709 (1906).

—Proof of marriage.

In prosecution for adultery, where marriage was sought to be established by marriage certificate, or certified copy of record, there should have been something more than mere production of certificate, or copy thereof; there should also have been some evidence showing identity of parties. State v. Thompson, 31 Utah 228, 87 P. 709 (1906).

In prosecution for adultery, marriage could be proven not only by marriage certificate, or certified copy of record, but also by person who performed ceremony, by person who witnessed ceremony, by cohabitation and other circumstances, and by admissions. State v. Thompson, 31 Utah 228, 87 P. 709 (1906); State v. Moore, 36 Utah 521, 105 P. 293, 1912A Ann. Cas. 284 (1909); State v. Greene, 38 Utah 389, 115 P. 181 (1910); State v. Moore, 41 Utah 247, 126 P. 322, 1915C Ann. Cas. 976 (1912); State v. Park, 44 Utah 360, 140 P. 768 (1914).

In prosecution for adultery, where marriage was sought to be established by marriage certificate, or certified copy of record, evidence that real name of parties differed from names stated in marriage certificate was admissible. State v. Thompson, 31 Utah 228, 87 P. 709 (1906).

In prosecution for adultery, court properly admitted into evidence deed signed and acknowledged by defendant and woman, as husband and wife, to show that woman was defendant's wife. State v. Greene, 33 Utah 497, 94 P. 987 (1908), aff'd, 38 Utah 389, 115 P. 181 (1910).

Statement of married woman, charged with adultery, made to sheriff in whose custody she was, in which she stated her name, age, and that she was married, was not in nature of confession and was admissible in evidence. State v. Moore, 36 Utah 521, 105 P. 293, 1912A Ann. Cas. 284 (1909).

In prosecution for adultery, certified copy of marriage record was admissible in evidence without first identifying parties named therein,

but, if no further proof of their identity was produced, marriage of unidentified parties was not legally proven or established. State v. Springer, 40 Utah 471, 121 P. 976 (1912).

In prosecution for adultery, while stricter proof of marriage was required in criminal than in civil cases, evidence given by accomplice of defendant as to place and date of marriage, of living with her husband, as to his absence and return, and as to living with him again, was sufficient to show that accomplice was married woman at time of her adulterous acts with defendant. State v. Stewart, 57 Utah 224, 193 P. 855 (1920).

—Subsequent association.

On prosecution for adultery, evidence of subsequent acts of association, not amounting to crime, was admissible as tending to show probability of guilt of offense charged. State v. Snowden, 23 Utah 318, 65 P. 479 (1901).

Included offenses.

Crime of adultery was not necessarily included in crime of rape and did not constitute lesser degree of that offense. State v. Anderton, 69 Utah 53, 252 P. 280 (1926).

Indictment and information.

In prosecution for adultery, information which charged that defendant, a married man, on February 13, and on diverse other days, and thence continually between February 13 and April 1, committed adultery with unmarried woman, was sufficient; it charged but one offense as against contention that information was objectionable for duplicity. State v. Thompson, 31 Utah 228, 87 P. 709 (1906).

In prosecution of married woman for adultery, information which charged defendant with having feloniously permitted certain named man to have carnal knowledge of her body was not insufficient on ground that defendant was not charged with having done anything, but only with permitting something to be done by another. State v. Moore, 36 Utah 521, 105 P. 293, 1912A Ann. Cas. 284 (1909).

If information charging adultery did not designate place except as "within the county," state could prove it at any time within period named and at any place within county; judgment of acquittal or conviction would bar any other prosecution of defendant for similar act alleged to have been committed within same period and within same jurisdiction; it was otherwise if adulterous act was alleged to have been committed at particularly described place. State v. Sheffield, 45 Utah 426, 146 P. 306 (1915).

—Raising and waiving objections.

Where defense to charge of rape amounted to admission of adultery, defendant convicted of latter could not object to information as duplicitous where he had interposed no special demurrer thereto and had waived preliminary examination as to adultery, by failure to move to quash duplicitous information charging both rape and adultery. State v. Anderton, 69 Utah 53, 252 P. 280 (1926).

Issues.

In prosecution for adultery, whether prosecutrix was first defiled by defendant or some other person was not germane to any issue in case, and was, therefore, wholly immaterial and should have been excluded as prejudicial to defendant. State v. Hansen, 40 Utah 418, 122 P. 375 (1912).

Persons liable.

Crime of adultery did not necessarily involve criminal concurrence of two persons, and may have been committed notwithstanding failure of female to consent or her legal incapacity to do so. State v. Wade, 66 Utah 267, 241 P. 838 (1925).

Presumptions.

In prosecution for adultery, it was presumed that fourteen-year-old prosecutrix was unmarried, in absence of evidence to contrary. State v. Wade, 66 Utah 267, 241 P. 838 (1925).

Separate offenses.

Adultery was not continuous offense, but each act constituted separate offense. State v. Thompson, 31 Utah 228, 87 P. 709 (1906).

COLLATERAL REFERENCES

Brigham Young Law Review. — The State, the Family, and the Constitution: A Case Study in Flawed Bipolar Analysis, 1991 B.Y.U. L. Rev. 489.

Am. Jur. 2d. — 2 Am. Jur. 2d Adultery and Fornication § 3.

C.J.S. — 2 C.J.S. Adultery § 3.

A.L.R. — Validity of statute making adultery and fornication criminal offenses, 41 A.L.R.3d 1338.

Key Numbers. — Adultery ⇦ 1.

76-7-104. Fornication.

(1) Any unmarried person who shall voluntarily engage in sexual intercourse with another is guilty of fornication.

(2) Fornication is a class B misdemeanor.

History: C. 1953, 76-7-104, enacted by L. 1973, ch. 196, § 76-7-104.

COLLATERAL REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d Adultery and Fornication § 6.

C.J.S. — 37 C.J.S. Fornication § 2.

A.L.R. — Validity of statute making adultery and fornication criminal offenses, 41 A.L.R.3d 1338.

Key Numbers. — Criminal Law ⇐ 45.40.

PART 2

NONSUPPORT AND SALE OF CHILDREN

76-7-201. Criminal nonsupport.

(1) A person commits criminal nonsupport if, having a spouse or children under the age of sixteen years, he knowingly and without just cause fails to provide for the support of the spouse or children when either is in needy circumstances.

(2) Except as provided in Subsection (3), criminal nonsupport is a class A misdemeanor.

(3) Criminal nonsupport is a felony of the third degree under the following circumstances:

(a) If the actor has been convicted one or more times of nonsupport, whether in this state or any other state; or

(b) If the actor committed the offense while residing in another state.

(4) For purposes of this section "child" includes a child born out of wedlock whose paternity has been admitted by the actor or has been established in a civil suit.

(5) In a prosecution under this section, it is no defense that the person to be supported received necessary support from a source other than the defendant.

History: C. 1953, 76-7-201, enacted by L. 1973, ch. 196, § 76-7-201; 1974, ch. 32, § 21.

Cross-References. — Power of juvenile court, § 78-3a-1 et seq.

Uniform Reciprocal Enforcement of Support Act, § 77-31-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Defenses.
Duty of father.
—In general.
—Relief from duty to support.
Just cause.
Nonresident.

Defenses.

Under former Penal Code provision on desertion of family it was no defense that destitute

children were relieved by charitable acts of third persons. State v. Bess, 44 Utah 39, 137 P. 829 (1913).

Duty of father.

—In general.

It was duty of father to support his minor children if he was able to do so; and it was criminal offense willfully to fail to support one's minor children under age of sixteen years. Burbidge v. Utah Light & Traction Co., 55 Utah 566, 196 P. 556 (1921); Rockwood v. Rockwood, 65 Utah 261, 236 P. 457 (1925).

—Relief from duty to support.

Court had no right to make final order permanently relieving father of his obligation to support his child, except under the Adoption Statute. Riding v. Riding, 8 Utah 2d 136, 329 P.2d 878 (1958).

Just cause.

Under former § 76-15-1, it must have been shown beyond reasonable doubt that children were in destitute and necessitous circumstances, and father must have willfully neglected and refused, without just cause, to provide for children; if it appeared that current and necessary expenses for himself and children exceeded his earnings, that he had not remained idle when he could have obtained employment, and had not wasted any part of his earnings, he should have been acquitted. State v. Bess, 44 Utah 39, 137 P. 829 (1913).

Defendant who worked, during the charged period, in an apparently operable and operating auto-repair shop licensed under his new wife's name failed to prove just cause for his nonsupport and was therefore criminally liable. State v. Barlow, 851 P.2d 1191 (Utah Ct. App. 1993).

Nonresident.

Husband who was resident of another state could be charged with offense of failure to provide in state in which he had permitted his wife or children to live, or in which his misconduct had induced them to seek refuge. Osborn v. Harris, 115 Utah 204, 203 P.2d 917 (1949).

COLLATERAL REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d Husband and Wife § 329.

A.L.R. — Homicide by withholding food, clothing, or shelter, 61 A.L.R.3d 1207.

Key Numbers. — Husband and Wife ⇐ 303.

76-7-202. Orders for support in criminal nonsupport proceedings.

In any proceeding under Section 76-7-201, the court, before trial, with consent of the defendant, or after conviction, instead of imposing the punishment herein prescribed, may, in its discretion, having regard to the circumstances, financial ability, and earning capacity of the defendant, have power to make an order which shall be subject to change by it from time to time as circumstances may require directing the defendant to pay a sum periodically for a period not to exceed the term of the sentence provided for the offense with which the defendant is charged or of which he is found guilty, as the court may direct, to be used in the support of the dependents involved as hereinafter provided and to release the defendant from custody on probation for a period not to exceed the period of the punishment prescribed, upon his entering a recognizance or with or without security in such sum as the court may direct. The condition of recognizance shall be such that if the defendant shall make personal appearance in court whenever ordered to do so within the period of probation and shall further comply with the terms of the order in any subsequent modifications thereof, then the recognizance shall be in full force and effect. If the court is satisfied by information and due proof under oath that at any time during the period of probation the defendant has violated the terms of the order, it may proceed with the trial of defendant under the original charge or sentence him under the original conviction or enforce the original sentence as the case may be. In the case of forfeiture or recognizance and the enforcement thereof by execution, the sum recovered may, in the discretion of

the court, be paid in whole or in part into the county treasury to be used for the support of the dependents involved.

History: C. 1953, 76-7-202, enacted by L. 1973, ch. 196, § 76-7-202; 1988, ch. 169, § 65.

COLLATERAL REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d Infants § 16.
C.J.S. — 43 C.J.S. Infants § 94.

76-7-203. Sale of child — Felony — Payment of adoption-related expenses.

Any person, while having custody, care, control, or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any child for and in consideration of the payment of money or other thing of value is guilty of a felony of the third degree. However, this section does not prohibit any person, agency, or corporation from paying the actual and reasonable legal expenses, maternity expenses, related medical or hospital, and necessary living expenses of the mother preceding and during confinement as an act of charity, so long as payment is not made for the purpose of inducing the mother, parent, or legal guardian to place the child for adoption, consent to an adoption, or cooperate in the completion of an adoption.

History: C. 1953, 76-7-203, enacted by L. 1973, ch. 196, § 76-7-203; 1990, ch. 245, § 2.

NOTES TO DECISIONS

ANALYSIS

"Act of charity" construed.
Elements.
—Consideration.

"Act of charity" construed.

The purpose of the proviso at the end of this section is to make it clear that payment as an "act of charity" of certain legitimate expenses of the birth mother incident to the birth of a child is not to be treated as the furnishing of consideration for the criminal sale of a child. State v. Verde, 770 P.2d 116 (Utah 1989).

Elements.

—Consideration.

This section makes unlawful both a completed sale of a child and an attempt to sell. Therefore, it was not even necessary to show that defendant actually received certain consideration, so long as there was sufficient evidence that she attempted to engage in a transaction which would have led to her receiving consideration. State v. Verde, 770 P.2d 116 (Utah 1989).

Evidence showing that defendant received approximately $90 worth of health care in consideration of arranging a proposed adoption, that she received $5 for "gas money" from a person seeking an adoption, and that she planned to extract additional "legal" and "medical" fees was sufficient to establish consideration. State v. Verde, 770 P.2d 116 (Utah 1989).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Legislative Enactments — Family Law, 1990 Utah L. Rev. 249.
Brigham Young Law Review. — Artificial Insemination and the Law, 4 B.Y.U. L. Rev. 935 (1982).
C.J.S. — 67 C.J.S. Parent and Child § 15.

76-7-204. Prohibition of surrogate parenthood agreements — Status of child — Basis of custody.

(1) (a) No person, agency, institution, or intermediary may be a party to a contract for profit or gain in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result.

(b) No person, agency, institution, or intermediary may facilitate a contract prohibited by Subsection (1). This section does not apply to medical care provided after conception.

(c) Contracts or agreements entered into in violation of this section are null and void, and unenforceable as contrary to public policy.

(d) A violation of this subsection is a class B misdemeanor.

(2) An agreement which is entered into, without consideration given, in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result, is unenforceable.

(3) (a) In any case arising under Subsection (1) or (2), the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes.

(b) In any custody issue that may arise under Subsection (1) or (2), the court is not bound by any of the terms of the contract or agreement but shall make its custody decision based solely on the best interest of the child.

(4) Nothing in this section prohibits adoptions and adoption services that are in accordance with the laws of this state.

(5) This section applies to contracts or agreements that are entered into after April 24, 1989.

History: C. 1953, 76-7-204, enacted by L. 1989, ch. 140, § 1; 1991, ch. 116, § 1; 1991, ch. 241, § 96.

Amendment Notes. — The 1991 amendment by ch. 116, effective April 29, 1991, deleted Subsections (6) and (7), which provided for the repeal of this section on July 1, 1991, provided for a study of surrogacy and related issues by the Legislative Interim Social Services Committee, and made the section apply retroactively.

The 1991 amendment by ch. 241, effective April 29, 1991, substituted "class B" for "class A" in Subsection (1)(d) and deleted "the effective date of this act" from the end of Subsection (5).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Legislative Enactments — Family Law, 1990 Utah L. Rev. 249.

A.L.R. — Rights and obligations resulting from human artificial insemination, 83 A.L.R.4th 295.

PART 3
ABORTION

76-7-301. Definitions.

As used in this part:

(1) "Abortion" means the intentional termination or attempted termination of human pregnancy after implantation of a fertilized ovum, and

includes all procedures undertaken to kill a live unborn child and includes all procedures undertaken to produce a miscarriage. "Abortion" does not include removal of a dead unborn child.

(2) "Medical emergency" means that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death, or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

(3) "Physician" means a medical doctor licensed to practice medicine and surgery under the Utah Medical Practice Act, a physician in the employment of the government of the United States who is similarly qualified, or an osteopathic physician licensed to practice medicine under the Utah Osteopathic Medicine Licensing Act.

(4) "Hospital" means a general hospital licensed by the Department of Health according to Title 26, Chapter 21, and includes a clinic or other medical facility to the extent that such clinic or other medical facility provides equipment and personnel sufficient in quantity and quality to provide the same degree of safety to the pregnant woman and the unborn child as would be provided for the particular medical procedures undertaken by a general hospital licensed by the Department of Health. It shall be the responsibility of the Department of Health to determine if such clinic or other medical facility so qualifies and to so certify.

History: C. 1953, 76-7-301, enacted by L. 1981, ch. 126, § 56; 1991, ch. 1, § 1; 1991 (1st S.S.), ch. 2, § 2; 1993, ch. 70, § 1.

Repeals and Reenactments. — Laws 1974, ch. 33, §§ 1 to 17 repealed former §§ 76-7-301 to 76-7-317 as enacted by L. 1973, ch. 196, §§ 76-7-301 to 76-7-317, relating to abortion, and reenacted §§ 76-7-301 to 76-7-317.

Laws 1981, ch. 126, § 56 repealed former § 76-7-301 (L. 1974, ch. 33, § 1), listing definitions, and enacted present § 76-7-301.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, inserted "after implantation of a fertilized ovum" near the beginning of Subsection (1) and deleted "state" before "Department" several times in Subsection (3).

The 1991 (1st S.S.) amendment, effective April 29, 1991, in Subsection (1) inserted "intentional," deleted "with an intent other than to produce a live birth or to remove a dead unborn child" before "and includes," and added the second sentence and in Subsection (2) substituted "under the Utah Medical Practice Act" for "in all branches thereof in this state, or" and added the language relating to osteopathic physicians.

The 1993 amendment, effective May 3, 1993, inserted present Subsection (2) and made designation changes.

Compiler's Notes. — Laws 1991 (1st S.S.), ch. 2, which amended this section, provides in § 9: "The provisions of this act supersede any conflicting provisions contained in S.B. 23, Chapter 1, Laws of Utah 1991 [which also amended this section], and H.B. 257, Chapter 288, Laws of Utah 1991."

Cross-References. — Corroboration unnecessary as to testimony of accomplice, § 77-17-7.

NOTES TO DECISIONS

Former abortion laws unconstitutional.

Sections 76-7-302(3), 76-7-303 to 76-7-311, and 76-7-313 to 76-7-319, enacted by Laws 1973, ch. 196, were held unconstitutional by a three-judge federal district court. Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).

COLLATERAL REFERENCES

Utah Law Review. — Utah Legislative Survey — 1974, 1974 Utah L. Rev. 646.

Brigham Young Law Review. — Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship, 1978 B.Y.U. L. Rev. 783.

Funded Adoption: A "Viable" Alternative to Abortion, 1979 B.Y.U. L. Rev. 363.

The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions, 1980 B.Y.U. L. Rev. 811.

Rethinking *Roe v. Wade,* 1985 B.Y.U. L. Rev. 231.

Religiously Based Premises and Laws Restrictive of Liberty, 1986 B.Y.U. L. Rev. 245.

Am. Jur. 2d. — 1 Am. Jur. 2d Abortion and Birth Control § 1.

C.J.S. — 1 C.J.S. Abortion and Birth Control § 1.

A.L.R. — Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 A.L.R.3d 858.

Key Numbers. — Abortion and Birth Control ⇐ 1.

76-7-301.1. Preamble — Findings and policies of Legislature.

(1) It is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Sections 1 and 7, Utah Constitution, which recognize that life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution.

(2) The state of Utah has a compelling interest in the protection of the lives of unborn children.

(3) It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution.

(4) It is also the policy of the Legislature and of the state that, in connection with abortion, a woman's liberty interest, in limited circumstances, may outweigh the unborn child's right to protection. These limited circumstances arise when the abortion is necessary to save the pregnant woman's life or prevent grave damage to her medical health, and when pregnancy occurs as a result of rape or incest. It is further the finding and policy of the Legislature and of the state that a woman may terminate the pregnancy if the unborn child would be born with grave defects.

History: C. 1953, 76-7-301.1, enacted by L. 1991, ch. 1, § 2; 1991, ch. 288, § 1; 1991 (1st S.S.), ch. 2, § 3.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted "grave damage to her medical health" for "life-threatening damage to her physical health" at the end of the second sentence of Subsection (4) and substituted "with grave defects" for "with grave and irremediable physical or mental defects that are incompatible with sustained survival" at the end of the last sentence of Subsection (4).

The 1991 (1st S.S.) amendment, effective April 29, 1991, deleted "liberty and" before "life" and substituted "is" for "are" in the first clause in Subsection (1); in Subsection (2) substituted "protection of the lives of unborn children" for "protection of human life, including that of unborn children, and in the protection of each person's rights under the Utah Constitution, to exercise inalienable rights in accordance with the law"; deleted "and liberty" after "life" in Subsection (3); and deleted the former third sentence in Subsection (4), which read "It is recognized that, in cases of rape or incest, the fact that the woman has been an unwilling participant in the reproductive process may justify the preference of her rights over those of the unborn child."

Compiler's Notes. — Laws 1991 (1st S.S.), ch. 2, which amended this section, provides in § 9: "The provisions of this act supersede any conflicting provisions contained in S.B. 23, Chapter 1, Laws of Utah 1991 [which enacted this section], and H.B. 257, Chapter 288, Laws of Utah 1991 [which amended this section]."

Effective Dates. — Laws 1991, ch. 1 became effective on April 29, 1991, pursuant to Utah Const., Art. VI, Sec. 25.

NOTES TO DECISIONS

Constitutionality.

Prohibiting elective abortions except in certain circumstances determined by the legislature to embody the public policy of the state is a rational way of promoting the interest in potential human life while balancing the interests of the pregnant woman. Because the Act furthers the state interest in a direct and rational manner, it survives an equal protection challenge. Jane L. v. Bangerter, 794 F. Supp. 1528 (D. Utah 1992) (See also Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992), invalidating, on due process grounds, ban on pre-viability abortions).

Recognition of rights in unborn children in Utah's Abortion Act preamble, even though similar to positions of the Church of Jesus Christ of Latter Day Saints on abortion, does not constitute establishment of religion. Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah 1992).

COLLATERAL REFERENCES

Journal of Contemporary Law. — State Constitutions as a Source of Individual Liberties: Expanding Protection for Abortion Funding Under Medicaid, 19 J. Contemp. L. 185 (1993).

76-7-302. Circumstances under which abortion authorized.

(1) An abortion may be performed in this state only by a physician licensed to practice medicine under the Utah Medical Practice Act or an osteopathic physician licensed to practice medicine under the Utah Osteopathic Medicine Licensing Act and, if performed 90 days or more after the commencement of the pregnancy as defined by competent medical practices, it shall be performed in a hospital.

(2) An abortion may be performed in this state only under the following circumstances:

(a) in the professional judgment of the pregnant woman's attending physician, the abortion is necessary to save the pregnant woman's life;

(b) the pregnancy is the result of rape or rape of a child, as defined by Sections 76-5-402 and 76-5-402.1, that was reported to a law enforcement agency prior to the abortion;

(c) the pregnancy is the result of incest, as defined by Subsection 76-5-406(10) or Section 76-7-102, and the incident was reported to a law enforcement agency prior to the abortion;

(d) in the professional judgment of the pregnant woman's attending physician, to prevent grave damage to the pregnant woman's medical health; or

(e) in the professional judgment of the pregnant woman's attending physician, to prevent the birth of a child that would be born with grave defects.

(3) After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in Subsections (2)(a), (d), and (e).

(4) The name of a victim reported pursuant to Subsection (b) or (c) is confidential and may not be revealed by law enforcement or any other party except upon approval of the victim. This subsection does not effect or supersede parental notification requirements otherwise provided by law.

History: C. 1953, 76-7-302, enacted by L. 1974, ch. 33, § 2; 1991, ch. 1, § 3; 1991 (1st S.S.), ch. 2, § 4.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted the present provisions for "An abortion may be performed in this state only under the following circumstances: (1) If performed by a physician; and (2) If performed ninety days or more after the commencement of the pregnancy, it is performed in a hospital; and (3) If performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the abortion is necessary to save the life of the pregnant woman or to prevent serious and permanent damage to her health."

The 1991 (1st S.S.) amendment, effective April 29, 1991, substituted the present provisions in Subsection (2)(a) for "the pregnant woman's attending physician has certified that, in the physician's professional judgement, the abortion is necessary to save her life"; deleted "by the victim" after "reported" in Subsections (2)(b) and (2)(c); inserted the second citation in Subsection (2)(c); and added Subsection (4).

Compiler's Notes. — Section 76-7-317.2, enacted by Laws 1991, ch. 288, § 3, provides: "If Section 76-7-302 as amended by Senate Bill 23 [ch. 1], 1991 Annual General Session, is ever held to be unconstitutional by the United States Supreme Court, Section 76-7-302, as enacted by Chapter 33, Laws of Utah 1974, is reenacted and immediately effective." For text of § 76-7-302 as enacted by L. 1974, ch. 33, see Amendment Notes above.

Laws 1991 (1st S.S.), ch. 2, which amended this section, provides in § 9: "The provisions of this act supersede any conflicting provisions contained in S.B. 23, Chapter 1, Laws of Utah 1991 [which also amended this section], and H.B. 257, Chapter 288, Laws of Utah 1991."

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
—Due process.
—Vagueness.

Constitutionality.

The Equal Protection Clause does not require that the Utah Abortion Act apply equally to all persons. Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah 1992).

The Utah Abortion Act does not violate the Utah Equal Protection Clause by prohibiting elective abortions for the only sex capable of having abortions. Jane L. v. Bangerter, 794 F. Supp. 1528 (D. Utah 1992).

Subsection (3) is not rendered unconstitutional by the invalidation of Subsection (2) because, despite its incorporation of Subsections (2)(a), (d), and (e), a section of a statute may be severed from an invalidated statute if the remaining portions can stand alone and serve a legitimate purpose, as is the case of the post-viability requirements which serve to preserve the life or health of the mother. Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992).

—Due process.

This section, insofar as it relates to previability abortions before 21 weeks gestational age, is an unconstitutional infringement on a woman's liberty interest under the Due Process Clause of the Fourteenth Amendment, as expressed by the United States Supreme Court in *Planned Parenthood v. Casey,* U.S. , 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992).

—Vagueness.

Subsections (2)(a), (d), and (e) of this section were not void for vagueness under Utah Const., Art. I, Secs. 1, 2, 3, 7, 25, and 27 for failing to give adequate notice of the precise nature of the prohibited conduct, even though the statute used arguably vague terms such as "necessary to save the mother's life," "grave danger to the woman's medical health," and "grave defects," since the "professional judgment" of the attending physician constitutes the measure of determining the meaning of these general terms in a particular case. Jane L. v. Bangerter, 794 F. Supp. 1528, 794 F. Supp. 1537 (D. Utah 1992).

COLLATERAL REFERENCES

Brigham Young Law Review. — Mediating the Polar Extremes: A Guide to Post-*Webster* Abortion Policy, 1991 B.Y.U. L. Rev. 403.

A Legal Strategy to Overturn *Roe v. Wade* After *Webster*: Some Lessons from Lincoln, 1991 B.Y.U. L. Rev. 519.

Am. Jur. 2d. — 1 Am. Jur. 2d Abortion and Birth Control § 6 et seq.

C.J.S. — 1 C.J.S. Abortion and Birth Control § 6.

A.L.R. — Medical malpractice in performance of legal abortion, 69 A.L.R.4th 875.

Key Numbers. — Abortion and Birth Control ⇐ .50.

76-7-303. Concurrence of attending physician based on medical judgment.

No abortion may be performed in this state without the concurrence of the attending physician, based on his best medical judgment.

History: C. 1953, 76-7-303, enacted by L. 1974, ch. 33, § 3.

76-7-304. Considerations by physician — Notice to minor's parents or guardian or married woman's husband.

To enable the physician to exercise his best medical judgment, he shall:

(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

(a) her physical, emotional and psychological health and safety,

(b) her age,

(c) her familial situation.

(2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

History: C. 1953, 76-7-304, enacted by L. 1974, ch. 33, § 4.

Cross-References. — Power of female to consent to health care in connection with pregnancy or childbirth regardless of age or marital status, § 78-14-5.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.

Requirement in Subsection (2) that physician contact a minor's parents was constitutional; also, term "if possible" did not give physician any discretion in the matter. H.L. v. Matheson, 604 P.2d 907 (Utah 1979), aff'd, 450 U.S. 398, 101 S. Ct. 1164, 67 L. Ed. 2d 388 (1981).

The parental notification requirement of this section is not an unconstitutional burden on the right to obtain an abortion as applied to minors who are living with and dependent upon their parents, are not emancipated by marriage or otherwise, and who make no claim or showing as to their maturity or as to their relations with their parents; failure of statute to declare a detailed description of what information parents may provide to physicians, or to provide for a mandatory period of delay after the physician notifies the parents, does not render the statute unconstitutional, nor is its constitutionality undermined by fact that pregnant minor who carries her child to term is allowed by Utah statute to consent to medical procedures without formal notice to her parents. H.L. v. Matheson, 450 U.S. 398, 101 S. Ct. 1164, 67 L. Ed. 2d 388 (1981) (two justices joining in separately filed concurring opinion, one justice concurring only in the judgment and three justices dissenting).

—Spousal notification.

Following the United States Supreme Court's decision in *Planned Parenthood v. Casey*, U.S. , 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), the spousal notification requirement of this section is an unconstitutional infringement upon a woman's liberty interest. Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992).

—Standing to challenge.

Plaintiff, an immature minor who did not live in a hostile home environment, lacked standing to challenge the constitutionality of Subsection (2) as an overbroad regulation infringing upon her exercise of the right of privacy, as an invalid regulation of plaintiff's right of privacy without providing exceptions or alternative procedures, or as an interference with or unwarranted regulation of the doctor-patient relationship with no alternate procedure. H.B. v. Wilkinson, 639 F. Supp. 952 (D. Utah 1986).

COLLATERAL REFERENCES

Utah Law Review. — *H. L. v. Matheson* — A Minor Decision About Parental Notice, 1982 Utah L. Rev. 949.

Comment, Husband Notification for Abortion in Utah: A Patronizing Problem, 1986 Utah L. Rev. 609.

Journal of Contemporary Law. — Comment, Utah and Publicly Funded Contraceptive Services: The Struggle to Prevent Minors from Sponging off the Government, 13 J. Contemp. L. 277 (1987).

76-7-305. Informed consent requirements for abortion — 24-hour wait mandatory — Emergency exception.

(1) No abortion may be performed unless a voluntary and informed written consent is first obtained by the attending physician from the woman upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(a) at least 24 hours prior to the abortion, the physician who is to perform the abortion, the referring physician, a registered nurse, nurse practitioner, advanced practice registered nurse, certified nurse midwife, or physician's assistant shall orally inform the woman of:

(i) the nature of the proposed procedure or treatment and of the risks and alternatives to that procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion;

(ii) the probable gestational age of the unborn child at the time the abortion is to be performed; and

(iii) the medical risks associated with carrying her child to term;

(b) the information required to be provided to the pregnant woman under Subsection (a) is also provided by the physician who is to perform the abortion, prior to performance of the abortion, unless the attending or referring physician was the individual providing the information under Subsection (a);

(c) at least 24 hours prior to the abortion the physician who is to perform the abortion, the referring physician, or, as specifically delegated by either of those physicians, a registered nurse, licensed practical nurse, certified nurse-midwife, advanced practice registered nurse, clinical laboratory technologist, psychologist, marriage and family therapist, clinical social worker, or certified social worker has orally informed the pregnant woman that:

(i) the Department of Health publishes printed material that describes the unborn child and lists agencies that offer alternatives to abortion, and that she has a right to review that printed material, which will be provided to her free of charge if she chooses to review it;

(ii) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care, and that more detailed information on the availability of that assistance is contained in the printed materials published by the Department of Health; and

(iii) the father of the unborn child is legally required to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted;

(d) a copy of the printed materials has been provided to the pregnant woman if she chooses to review those materials; and

(e) the pregnant woman has certified in writing, prior to the abortion, that the information required to be provided under Subsections (a), (b), (c), and (d) was provided.

(2) When a medical emergency compels the performance of an abortion, the physician shall inform the woman prior to the abortion, if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function.

(3) Any physician who violates the provisions of this section is guilty of unprofessional conduct as defined in Section 58-12-36, and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with Sections 58-12-26 through 58-12-43, Medical Practice Act.

(4) A physician is not guilty of violating this section, for failure to furnish the information described in Subsection (1), if he can demonstrate by a preponderance of the evidence that he reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.

(5) A physician who complies with the provisions of this section may not be held civilly liable to his patient for failure to obtain informed consent under Section 78-14-5.

History: C. 1953, 76-7-305, enacted by L. 1974, ch. 33, § 5; 1993, ch. 70, § 2.

Compiler's Notes. — Section 58-12-36, cited in Subsection (3), was repealed from the Medical Practice Act, §§ 58-12-36 to 58-12-44, in 1993. For the present definition of "unprofessional conduct," see § 58-1-501.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, rewrote former Subsection (2) as the present second sentence of Subsection (1) and added present Subsections (2) through (5).

NOTES TO DECISIONS

Exception for medical emergency.

The "serious medical emergency" exception of § 76-7-315 applies only to the alternative information requirements of Subsection (2); it has no application to the information and waiting period requirements of Subsection (1). Utah Women's Clinic, Inc. v. Leavitt, 844 F. Supp. 1482 (D. Utah 1994).

COLLATERAL REFERENCES

Utah Law Review. — The 1993 Utah Abortion Act Revision, 1994 Utah L. Rev. 471.

A.L.R. — Mental competency of patient to consent to surgical operation or medical treatment, 25 A.L.R.3d 1439.

Right of minor to have abortion performed without parental consent, 42 A.L.R.3d 1406.

Woman's right to have abortion without consent of, or against objections of, child's father, 62 A.L.R.3d 1097.

76-7-305.5. Consent — Printed materials to be available to patient — Annual report of Department of Health.

(1) In order to insure that the consent to an abortion is truly informed consent, the Department of Health shall publish printed materials, and make those materials available at no cost to any person upon request. The material shall be easily comprehended and shall contain all of the following:

(a) geographically indexed materials designed to inform the woman of public and private services and agencies available to assist her through pregnancy, at childbirth, and while the child is dependent. Those materi-

als shall contain a description of available adoption services, including a comprehensive list of the names, addresses, and telephone numbers of public and private agencies that provide those services, and explanations of possible available financial aid. The information regarding adoption services shall include the fact that private adoption is legal, and that the law permits adoptive parents to pay the costs of prenatal care, childbirth, and neonatal care. The department may, at its option, include printed materials that describe the availability of a toll-free 24-hour telephone number that may be called in order to obtain, orally, the list and description of services and agencies in the locality of the caller;

(b) descriptions of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, accompanied by pictures representing the development of an unborn child at those gestational increments. The descriptions shall include information about brain and heart function and the presence of external members and internal organs during the applicable stages of development. Any pictures used shall contain the dimensions of the fetus and shall be realistic and appropriate for that woman's stage of pregnancy. The materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about an unborn child at the various gestational ages;

(c) objective descriptions of abortion procedures used in current medical practice at the various stages of growth of the unborn child, the medical risks commonly associated with each procedure, including those related to subsequent childbearing, the possible detrimental psychological effects of abortion, and the medical risks associated with carrying a child to term;

(d) any relevant information on the possibility of an unborn child's survival at the two-week gestational increments described in Subsection (b);

(e) information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care;

(f) a statement conveying that it is unlawful for any person to coerce a woman to undergo an abortion;

(g) a statement conveying that any physician who performs an abortion without obtaining the woman's informed consent or without according her a private medical consultation may be liable to her for damages in a civil action at law; and

(h) information regarding the legal responsibility of the father to assist in child support, even in instances where he has agreed to pay for an abortion, including a description of the services available through the Office of Recovery Services within the Department of Human Services, to establish and collect that support.

(2) The material described in Subsection (1) shall be printed in a typeface large enough to be clearly legible.

(3) Every facility in which abortions are performed shall immediately provide the informed consent materials described in Subsection (1) to any patient or potential patient, upon her request.

(4) Prior to the performance of the abortion every facility in which abortions are performed shall notify each patient who seeks an abortion that the informed consent materials described in Subsection (1) are available. This subsection does not apply if the patient's attending or referring physician

certifies in writing that he reasonably believes that provision of the materials to that patient would result in a severely adverse effect on her physical or mental health.

(5) The Department of Health shall compile and report the following information annually, preserving physician and patient anonymity:

(a) the total amount of informed consent material described in Subsection (1) that was distributed;

(b) the number of women who obtained abortions in this state without receiving those materials;

(c) the number of statements signed by attending physicians certifying to his opinion regarding adverse effects on the patient under Subsection (4); and

(d) any other information pertaining to protecting the informed consent of women seeking abortions.

History: C. 1953, 76-7-305.5, enacted by L. 1981, ch. 61, § 1; 1982, ch. 18, § 1; 1985, ch. 42, § 1; 1993, ch. 70, § 3.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, rewrote this section, adding the last two sentences of Subsections (1)(a) and (1)(b) and adding Subsections (1)(d) through (e) and Subsection (2).

Cross-References. — Health care, informed consent, § 78-14-5.

COLLATERAL REFERENCES

Utah Law Review. — Comment, Husband Notification for Abortion in Utah: A Patronizing Problem, 1986 Utah L. Rev. 609.

76-7-306. Physician, hospital employee, or hospital not required to participate in abortion.

(1) A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who states an objection to an abortion or the practice of abortion in general on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any person to participate shall not form the basis of any claim for damages on account of the refusal or for any disciplinary or recriminatory action against such person, nor shall any moral or religious scruples or objections to abortions be the grounds for any discrimination in hiring in this state.

(2) Nothing in this act [part] shall require any private and/or denominational hospital to admit any patient for the purpose of performing an abortion.

History: C. 1953, 76-7-306, enacted by L. 1974, ch. 33, § 6.

COLLATERAL REFERENCES

Brigham Young Law Review. — Accommodation of Conscientious Objection to Abortion: A Case Study of the Nursing Profession, 1982 B.Y.U. L. Rev. 253.

76-7-307. Medical procedure required to save life of unborn child.

If an abortion is performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that which, in the best medical judgment of the physician will give the unborn child the best chance of survival. No medical procedure designed to kill or injure that unborn child may be used unless necessary, in the opinion of the woman's physician, to prevent grave damage to her medical health.

History: C. 1953, 76-7-307, enacted by L. 1974, ch. 33, § 7; 1991 (1st S.S.), ch. 2, § 5.
Amendment Notes. — The 1991 (1st S.S.) amendment, effective April 29, 1991, substituted "that unborn child" for "an unborn child" and "to prevent grave damage to her medical health" for "to save her life or prevent serious and permanent damage to her health" in the second sentence.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Cited.

Constitutionality.
This section is constitutional, for it bears a rational relationship to the legitimate state interest in preservation of viable fetal life. Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992).

Cited in Jane L. v. Bangerter, 794 F. Supp. 1528, 794 F. Supp. 1537 (D. Utah 1992).

76-7-308. Medical skills required to preserve life of unborn child.

Consistent with the purpose of saving the life of the woman or preventing grave damage to the woman's medical health, the physician performing the abortion must use all of his medical skills to attempt to promote, preserve and maintain the life of any unborn child sufficiently developed to have any reasonable possibility of survival outside of the mother's womb.

History: C. 1953, 76-7-308, enacted by L. 1974, ch. 33, § 8; 1991 (1st S.S.), ch. 2, § 6.
Amendment Notes. — The 1991 (1st S.S.) amendment, effective April 29, 1991, substituted "grave" for "serious and permanent" and inserted "medical" in the first phrase.

NOTES TO DECISIONS

Constitutionality.
This section is constitutional, for it bears a rational relationship to the legitimate state interest in preservation of viable fetal life. Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992).

COLLATERAL REFERENCES

A.L.R. — Medical malpractice in performance of legal abortion, 69 A.L.R.4th 875.

76-7-309. Pathologist's report.

Any human tissue removed during an abortion shall be submitted to a pathologist who shall make a report, including, but not limited to whether

there was a pregnancy, and if possible, whether the pregnancy was aborted by evacuating the uterus.

History: C. 1953, 76-7-309, enacted by L. 1974, ch. 33, § 9.

76-7-310. Experimentation with unborn children prohibited — Testing for genetic defects.

Live unborn children may not be used for experimentation, but when advisable, in the best medical judgment of the physician, may be tested for genetic defects.

History: C. 1953, 76-7-310, enacted by L. 1974, ch. 33, § 10.

NOTES TO DECISIONS

Constitutionality.

This section is not unconstitutionally vague; it does not impinge upon constitutionally protected privacy interests; and it is facially valid as a matter of law. Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah 1992).

76-7-311. Selling and buying unborn children prohibited.

Selling, buying, offering to sell and offering to buy unborn children is prohibited.

History: C. 1953, 76-7-311, enacted by L. 1974, ch. 33, § 11.

76-7-312. Intimidation or coercion of person to obtain abortion prohibited.

No person shall intimidate or coerce in any way any person to obtain an abortion.

History: C. 1953, 76-7-312, enacted by L. 1974, ch. 33, § 12.

76-7-313. Physician's report to Department of Health.

In order for the state Department of Health to maintain necessary statistical information and ensure enforcement of the provisions of this part, any physician performing an abortion must obtain and record in writing: the age of the pregnant woman; her marital status and county of residence; the number of previous abortions performed on her; the hospital or other facility where performed; the weight in grams of the unborn child aborted, if it is possible to ascertain; the pathological description of the unborn child; the given menstrual age of the unborn child; the measurements, if possible to ascertain; and the medical procedure used. This information, and a copy of the pathologist's report, as required in Section 76-7-309, together with an affidavit that the required consent was obtained pursuant to Section 76-7-305 and a certificate by the physician that the unborn child was or was not capable of survival

outside of the mother's womb, must be filed by the physician with the state Department of Health within 10 days after the abortion. All information supplied to the state Department of Health shall be confidential and privileged pursuant to Title 26, Chapter 25.

History: C. 1953, 76-7-313, enacted by L. 1981, ch. 126, § 57.

Repeals and Reenactments. — Laws 1981, ch. 126, § 57 repealed former § 76-7-313 (L. 1974, ch. 33, § 13), relating to physician's report to the division of health, and enacted present § 76-7-313.

Cross-References. — Department of Health, § 26-1-4 et seq.

COLLATERAL REFERENCES

Utah Law Review. — Constitutional Law, Substantive Due Process, Abortion, Reasonable Statutory Recordkeeping and Reporting Requirements Upheld, 1976 B.Y.U. L. Rev. 977.

76-7-314. Violations of abortion laws — Classifications.

(1) (a) Any person who intentionally performs an abortion other than authorized by this part is guilty of a felony of the third degree.

(b) Notwithstanding any other provision of law, a woman who seeks to have or obtains an abortion for herself is not criminally liable.

(2) A violation of Section 76-7-307, 76-7-308, 76-7-310, 76-7-311, or 76-7-312 is a felony of the third degree.

(3) A violation of any other provision of this part is a class A misdemeanor.

History: C. 1953, 76-7-314, enacted by L. 1974, ch. 33, § 14; 1991, ch. 1, § 4; 1991 (1st S.S.), ch. 2, § 7.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, in Subsection (1) substituted "part" for "chapter" and "third degree" for "second degree" in the first sentence and added the second and third sentences and in Subsection (3) substituted "part" for "act."

The 1991 (1st S.S.) amendment, effective April 29, 1991, subdivided Subsection (1); in Subsection (1)(a) substituted "intentionally performs" for "performs, procures or supplies the means for" and deleted the former second sentence, which read "For purposes of this subsection a person who procures an abortion does not include"; and substituted the present provisions of Subsection (1)(b) for "a woman who is seeking to have an abortion performed on herself. A woman who is seeking to have an abortion performed on herself is not criminally liable under Section 76-2-202."

Compiler's Notes. — Laws 1991 (1st S.S.), ch. 2, which amended this section, provides in § 9: "The provisions of this act supersede any conflicting provisions contained in S.B. 23, Chapter 1, Laws of Utah 1991 [which also amended this section], and H.B. 257, Chapter 288, Laws of Utah 1991."

Cross-References. — Corroboration unnecessary as to testimony of accomplice, § 77-17-7.

NOTES TO DECISIONS

ANALYSIS

Corroboration.

In abortion prosecution, testimony of mother of prosecutrix that she accompanied prosecutrix to defendant's office and saw him use instrument for purpose of producing abortion was sufficient to corroborate testimony of prosecutrix. State v. Cragun, 85 Utah 149, 38 P.2d 1071 (1934).

Evidence.

—Intent.

For purpose of proving that operation was, in

fact, criminal, and to show intent of accused, state could show that similar operations were performed upon other pregnant women. State v. McCurtain, 52 Utah 63, 172 P. 481 (1918).

Indictment.

Charge in complaint and information that defendant did specified things with intent to procure "miscarriage" of pregnant woman, instead of with intent to procure "abortion," was within terms of former statute. State v. Crook, 16 Utah 212, 51 P. 1091 (1898).

Liability.

Because this section limits liability for an illegal abortion to "any person who intentionally performs an abortion other than authorized by this part . . .," it follows that a woman who seeks or obtains an abortion does not risk criminal prosecution. Jane L. v. Bangerter, 794 F. Supp. 1528, 794 F. Supp. 1537 (D. Utah 1992).

—Accessories.

Because accessorial liability is only predicated upon aiding, encouraging, or soliciting one who engages in conduct that constitutes an offense, counselors, clergy, or doctors who counsel a woman on abortion options are not violating the law. Jane L. v. Bangerter, 794 F. Supp. 1528, 794 F. Supp. 1537 (D. Utah 1992).

If counselors go so far as to solicit a doctor to perform an abortion against the doctor's professional judgment, there may be liability under the Utah accessorial liability statute. Jane L. v. Bangerter, 794 F. Supp. 1528, 794 F. Supp. 1537 (D. Utah 1992).

Operation to save life.

Testimony of expert medical witnesses could be introduced on question of necessity of abortion to save life of deceased pregnant woman. State v. McCoy, 15 Utah 136, 49 P. 420 (1897).

In prosecution for abortion, fact that woman was unmarried and that defendant had illicit sexual intercourse with her was insufficient to show that operation was not necessary to save woman's life. State v. Wells, 35 Utah 400, 100 P. 681, 136 Am. St. R. 1059, 19 Ann. Cas. 631 (1909), overruled on other grounds, State v. Crank, 105 Utah 332, 142 P.2d 178 (1943).

Where woman was healthy and in normal condition, and medicine was administered to her, or operation performed upon her to produce miscarriage, evidence was sufficient to raise inference and to find fact that production of miscarriage was not necessary to save woman's life, or it was sufficient where it was shown that there was nothing in condition of woman to indicate any necessity for procured miscarriage; negative in information did not have to be shown by direct or positive evidence, but could be shown by circumstantial evidence. State v. Wells, 35 Utah 400, 100 P. 681, 136 Am. St. R. 1059, 19 Ann. Cas. 631 (1909), overruled on other grounds, State v. Crank, 105 Utah 332, 142 P.2d 178 (1943).

In abortion prosecution where state proved that abortion was not necessary to save life of prosecutrix, admission of evidence of other abortions committed upon other women was incompetent, irrelevant, and reversible error. State v. Cragun, 85 Utah 149, 38 P.2d 1071 (1934).

Pleading and proof.

In prosecution for abortion, it was essential for state to allege and prove that production of miscarriage was not necessary to save woman's life, and burden of proving such fact was upon state. State v. Wells, 35 Utah 400, 100 P. 681, 136 Am. St. R. 1059, 19 Ann. Cas. 631 (1909), overruled on other grounds, State v. Crank, 105 Utah 332, 142 P.2d 178 (1943).

Pregnancy as element of crime.

Pregnancy was material element of crime of abortion or attempt to commit the crime. Sherman v. McEntire, 111 Utah 348, 179 P.2d 796 (1947).

Procuring abortion.

As generally used and understood in common language, "procuring abortion" meant substantially the same as "procuring miscarriage," and former statutes, when construed together, recognized quoted phrases as having practically same meaning in characterizing crime. State v. Crook, 16 Utah 212, 51 P. 1091 (1898).

COLLATERAL REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d Abortion and Birth Control § 82 et seq.

C.J.S. — 1 C.J.S. Abortion and Birth Control § 10.

A.L.R. — Applicability in criminal proceedings of privilege as to communications between physician and patient, 7 A.L.R.3d 1458.

Key Numbers. — Abortion and Birth Control ⚖ 3.

76-7-315. Exceptions to certain requirements in serious medical emergency.

When due to a serious medical emergency, time does not permit compliance with Section 76-7-302, Subsection 76-7-304(2) or Subsection 76-7-305(2), the provisions of those sections do not apply.

History: C. 1953, 76-7-315, enacted by L. 1974, ch. 33, § 15; 1991, ch. 1, § 5.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted all of the present language following "compliance" for "with Section 76-7-302(2), 76-7-304(2) or 76-7-305(2), the provisions of those sections shall not apply."

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Cited.

Constitutionality.

This section provides the fair warning to physicians required by the due process clause, sets clear guidelines for enforcement officials, and is therefore not void for vagueness. Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992).

There is nothing in this section, as it is applied to § 76-7-305(2), that is unconstitutionally vague. Although the phrase "serious medical emergency" is not defined, a reasonable physician in most cases would be able to determine whether, under the circumstances of the emergency, time would permit him or her to inform the woman as to why the abortion is medically necessary. In summary, the "serious medical emergency" exception of this section applies only to the alternative information requirements of § 76-7-305(2) and has no application to the information and waiting period requirements of § 76-7-305(1). Utah Women's Clinic, Inc. v. Leavitt, 844 F. Supp. 1482 (D. Utah 1994).

Cited in Jane L. v. Bangerter, 794 F. Supp. 1528, 794 F. Supp. 1537 (D. Utah 1992).

76-7-316. Actions not precluded.

Nothing in this act [part] shall preclude any person believing himself aggrieved by another under this act [part], from bringing any other action at common law or other statutory provision.

History: C. 1953 76-7-316, enacted by L. 1974, ch. 33, § 16.

COLLATERAL REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d Abortion and Birth Control § 75 et seq.

A.L.R. — Right of action for injury to or death of woman who consented to illegal abortion, 36 A.L.R.3d 630.

Right to maintain action or to recover damages for death of unborn child, 84 A.L.R.3d 411.

Key Numbers. — Abortion and Birth Control ⇐ 16.

76-7-317. Separability clause.

If any one or more provision, section, subsection, sentence, clause, phrase or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.

History: C. 1953, 76-7-317, enacted by L. 1974, ch. 33, § 17.

COLLATERAL REFERENCES

Utah Law Review. — Utah Legislative Survey — 1974, 1974 Utah L. Rev. 646.

76-7-317.1. Creation of Abortion Litigation Trust Account.

(1) (a) There is created in the General Fund a restricted account known as the Abortion Litigation Trust Account. All money received by the state from private sources for litigation expenses connected with the defense of Senate Bill 23, passed in the 1991 Annual General Session, shall be deposited in that account.

(b) On behalf of the Abortion Litigation Trust Account, the Division of Finance may accept grants, gifts, bequests, or any money made available from any private sources to implement this section.

(2) Money shall be appropriated by the Legislature from the account to the Office of the Attorney General under Title 63, Chapter 38, Budgetary Procedures Act.

(3) The Abortion Litigation Trust Account may be used only for costs, expenses, and attorneys fees connected with the defense of the abortion law identified in Subsection (1).

(4) Any funds remaining in the abortion litigation trust account after final appellate procedures shall revert to the General Fund, to be first used to offset the monies expended by the state in connection with litigation regarding Senate Bill 23.

History: C. 1953, 76-7-317.1, enacted by L. 1991, ch. 288, § 2.

Compiler's Notes. — Senate Bill 23, cited in Subsections (1) and (4), is L. 1991, ch. 1, which enacted § 76-7-301.1 and amended §§ 76-7-301, 76-7-302, 76-7-314, and 76-7-315.

Effective Dates. — Laws 1991, ch. 288 became effective on April 29, 1991, pursuant to Utah Const., Art. VI, Sec. 25.

76-7-317.2. Finding of unconstitutionality — Revival of old law.

If Section 76-7-302 as amended by Senate Bill 23, 1991 Annual General Session, is ever held to be unconstitutional by the United States Supreme Court, Section 76-7-302, as enacted by Chapter 33, Laws of Utah 1974, is reenacted and immediately effective.

History: C. 1953, 76-7-317.2, enacted by L. 1991, ch. 288, § 3.

Effective Dates. — Laws 1991, ch. 288 became effective on April 29, 1991, pursuant to Utah Const., Art. VI, Sec. 25.

76-7-318 to 76-7-320. Repealed.

Repeals. — Sections 76-7-318 to 76-7-320 (C. 1953, 76-7-318 to 76-7-320, enacted by L. 1973, ch. 196, §§ 76-7-318 to 76-7-320), relating to abortion, were repealed by Laws 1974, ch. 33, § 18.

76-7-321. Contraceptive and abortion services — Funds — Minor — Definitions.

As used in this act [Sections 76-7-321 to 76-7-324]:

(1) "Abortion services" means any material, program, plan, or undertaking which seeks to promote abortion, encourages individuals to obtain an abortion, or provides abortions.

(2) "Contraceptive services" means any material, program, plan, or undertaking that is used for instruction on the use of birth control devices and substances, encourages individuals to use birth control methods, or provides birth control devices.

(3) "Funds" means any money, supply, material, building, or project provided by this state or its political subdivisions.

(4) "Minor" means any person under the age of 18 who is not otherwise emancipated, married, or a member of the armed forces of the United States.

History: L. 1981, ch. 123, § 1; 1983, ch. 94, § 1; 1988, ch. 50, § 2.

NOTES TO DECISIONS

Constitutionality.

—Conflict with federal law.

"Senate Bill 3" (codified as §§ 76-7-321 to 76-7-324), which contains a parental consent requirement, while not per se in conflict with federal law, impermissively engrafted an eligibility requirement on Medicaid services in violation of Title XIX of the Social Security Act, and Utah's participation in the Medicaid program brings into play a conflict with federal law which renders S.B. 3 unenforceable by reason of the supremacy clause of the federal constitution. Planned Parenthood Ass'n v. Dandoy, 635 F. Supp. 184 (D. Utah 1986) (decided prior to the 1988 amendment to §§ 76-7-321 to 76-7-324 substituting references to state or political subdivision funds or agencies for references to public funds or agencies).

76-7-322. Public funds for provision of contraceptive or abortion services restricted.

No funds of the state or its political subdivisions shall be used to provide contraceptive or abortion services to an unmarried minor without the prior written consent of the minor's parent or guardian.

History: L. 1981, ch. 123, § 2; 1988, ch. 50, § 3.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
—Conflict with federal law.
Federal funds.
Parental consent.

Constitutionality.

—Conflict with federal law.

"Senate Bill 3" (codified as §§ 76-7-321 to 76-7-324), which contains a parental consent requirement, while not per se in conflict with federal law, impermissively engrafted an eligibility requirement on Medicaid services in violation of Title XIX of the Social Security Act, and Utah's participation in the Medicaid program brings into play a conflict with federal law which renders S.B. 3 unenforceable by reason of the supremacy clause of the federal constitution. Planned Parenthood Ass'n v. Dandoy, 635 F. Supp. 184 (D. Utah 1986) (decided prior to the 1988 amendment to §§ 76-7-321 to 76-7-

324 substituting references to state or political subdivision funds or agencies for references to public funds or agencies).

Federal funds.

Although the health department, in the use of its own funds, is free to apply parental consent requirements as a precondition to receipt by minors of family planning services, it cannot, in the administration of a federal grant, apply such a requirement inconsistently with federal law. Jane Doe v. State Dep't of Health, 776 F.2d 253 (10th Cir. 1985).

Parental consent.

Section 78-14-5, which provides for the recovery of damages from a health care provider for failure to obtain "informed consent," is not a general consent law mandating parental consent for family planning services as well as other kinds of medical care. Planned Parenthood Ass'n v. Dandoy, 635 F. Supp. 184 (D. Utah 1986).

Trial court properly enjoined the future refusal by the state to reimburse providers for family planning services, including contraceptives, given to minors in the absence of proof of parental consent, since the state must make the reimbursements required by federal law so long as it participates in the Medicaid program. Planned Parenthood Ass'n v. Dandoy, 810 F.2d 984 (10th Cir. 1987).

COLLATERAL REFERENCES

Journal of Contemporary Law. — Comment, Utah and Publicly Funded Contraceptive Services: The Struggle to Prevent Minors from Sponging off the Government, 13 J. Contemp. L. 277 (1987).

A.L.R. — Constitutional right of prisoners to abortion services and facilities — federal cases, 90 A.L.R. Fed. 683.

76-7-323. Public funds for support entities providing contraceptive or abortion services restricted.

No agency of the state or its political subdivisions shall approve any application for funds of the state or its political subdivisions to support directly or indirectly, any organization or health care provider that provides contraceptive or abortion services to an unmarried minor without the prior written consent of the minor's parent or guardian. No institution shall be denied state or federal funds under relevant provisions of law on the ground that a person on its staff provides contraceptive or abortion services in that person's private practice outside of such institution.

History: L. 1981, ch. 123, § 3; 1988, ch. 50, § 4.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
—Conflict with federal law.
Parental consent.

Constitutionality.

—Conflict with federal law.

"Senate Bill 3" (codified as §§ 76-7-321 to 76-7-324), which contains a parental consent requirement, while not per se in conflict with federal law, impermissively engrafted an eligibility requirement on Medicaid services in violation of Title XIX of the Social Security Act, and Utah's participation in the Medicaid program brings into play a conflict with federal law which renders S.B. 3 unenforceable by reason of the supremacy clause of the federal constitution. Planned Parenthood Ass'n v. Dandoy, 635 F. Supp. 184 (D. Utah 1986) (decided prior to the 1988 amendment of §§ 76-7-321 to 76-7-324 substituting references to state or political subdivision funds or agencies for references to public funds or agencies).

Parental consent.

Section 78-14-5, which provides for the recovery of damages from a health care provider for failure to obtain "informed consent," is not a general consent law mandating parental consent for family planning services as well as other kinds of medical care. Planned Parent

hood Ass'n v. Dandoy, 635 F. Supp. 184 (D. Utah 1986).

76-7-324. Violation of restrictions on public funds for contraceptive or abortion services as misdemeanor.

Any agent of a state agency or political subdivision, acting alone or in concert with others, who violates Section 76-7-322 or 76-7-323 is guilty of a class B misdemeanor.

History: L. 1981, ch. 123, § 4; 1988, ch. 50, § 5.

Severability Clauses. — Laws 1988, ch. 50, § 6 provided that if any provision of this act, or the application of any provision to any person or circumstances, is held invalid, the remainder of this act is to be given effect without the invalid provision or application.

NOTES TO DECISIONS

Constitutionality.

—Conflict with federal law.

"Senate Bill 3" (codified as §§ 76-7-321 to 76-7-324), which contains a parental consent requirement, while not per se in conflict with federal law, impermissively engrafted an eligibility requirement on Medicaid services in violation of Title XIX of the Social Security Act, and Utah's participation in the Medicaid program brings into play a conflict with federal law which renders S.B. 3 unenforceable by reason of the supremacy clause of the federal constitution. Planned Parenthood Ass'n v. Dandoy, 635 F. Supp. 184 (D. Utah 1986) (decided prior to the 1988 amendment of §§ 76-7-321 to 76-7-324 substituting references to state or political subdivision funds or agencies for references to public funds or agencies).

76-7-325. Notice to parent or guardian of minor requesting contraceptive — Definition of contraceptives — Penalty for violation.

(1) Any person before providing contraceptives to a minor shall notify, whenever possible, the minor's parents or guardian of the service requested to be provided to such minor. Contraceptives shall be defined as appliances (including but not limited to intrauterine devices), drugs, or medicinal preparations intended or having special utility for prevention of conception.

(2) Any person in violation of this section shall be guilty of a class C misdemeanor.

History: C. 1953, 76-7-325, enacted by L. 1983, ch. 94, § 2.

Compiler's Notes. — This section was an unconstitutional infringement upon the right to decide whether to bear or beget children because it failed to provide a procedure whereby a mature minor or a minor who could demonstrate that his or her best interests are contrary to parental notification could obtain contraceptives confidentially; also, it was in conflict with and preempted by federal law. Planned Parenthood Ass'n v. Matheson, 582 F. Supp. 1001 (D. Utah 1983).

COLLATERAL REFERENCES

Utah Law Review. — Utah Legislative Survey — 1983, 1984 Utah L. Rev. 115, 196.

Journal of Contemporary Law. — Comment, Utah and Publicly Funded Contraceptive Services: The Struggle to Prevent Minors from Sponging off the Government, 13 J. Contemp. L. 277 (1987).