

AN EDUCATIONAL UPDATE FROM  
THE SOUTHEAST LAW INSTITUTE™, INC.

**To:** Interested Persons  
**Date:** February 2021  
**From:** A. Eric Johnston  
**Re:** Abortion Issues in the Alabama Courts and in the Legislature for 2021

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The Alabama Human Life Protection Act was passed in the 2019 Regular Session of the Alabama Legislature. It prohibits abortion throughout the entire pregnancy. It is still in litigation, which we expected. The case is pending before Federal Judge Myron Thompson. As is his wont, he is very slow to rule on the case. We know that due to his predilection and to the legal requirement of *stare decisis* (see below), we expect him to hold the law unconstitutional. From there, the case will go the 11<sup>th</sup> Circuit Court of Appeals for review by a panel of judges, who also will be constrained by *stare decisis* to strike down the law. We then hope SCOTUS will grant discretionary review and use the law to reverse *Roe v. Wade*. Our Attorney General's office is doing an excellent job defending that law.

Another case was filed in the Alabama Supreme Court in a somewhat unusual mandamus proceeding. It is based on a 14<sup>th</sup> Amendment allegation that *Roe v. Wade* violates the rights of African-American unborn children. It is unique in its approach. We do not have high expectations that it will accomplish the goal of reversing *Roe*. This challenge does not permit a proper evidentiary record for SCOTUS review.

We were very pleased to see an opinion rendered by the Alabama Supreme Court in the case of *Magers v. Alabama Women's Health Reproductive Alternatives LLC*, last October. It began as a wrongful death action filed by a father over the abortion of his unborn child. The case suffered a number of procedural problems. The importance of it, however, was that a special concurring opinion was written by Justice Mitchell, in which Chief Justice Parker and Justice's Bolin and Wise concurred. Justice Mitchell's opinion agreed with the position of SCOTUS Justice Clarence Thomas and other scholars that *Roe* has no constitutional basis, that it is "grievously wrong for many reasons, but the most fundamental is that its core holding – that the Constitution protects a woman's right to abort her child – finds no support in the text of the 14<sup>th</sup> Amendment." He disassembled *Roe* finally concluding that "the doctrine of *stare decisis* creates no barrier to overturning *Roe*..." Most jurists who have researched the *Roe* decision realize that *stare decisis* is the only thing holding it up. *Stare decisis* is the doctrine that the court bases its later opinions on earlier decisions which are binding precedent. In other words, in 1973, SCOTUS found abortion to be constitutional and is reluctant to go back against that. Of course, the Alabama Human Life Protection Act demonstrates that since *Roe* was decided 48 years ago, that medical science now clearly demonstrates, without question, the humanity of the unborn child.

While Alabama's cases, and cases of other states, are pending for review with hopes of one of them making it to SCOTUS for reversing *Roe*, we must still continue to do those things necessary to protect the unborn child and the mother. There are two types of abortion procedures, *viz.*, surgical and chemical. Chemical abortion is the administration of two drugs at different times to cause an expulsion of the unborn child. It is becoming more popular as the abortion procedure of choice.

Alabama has a statute which requires the medications to be prescribed only by a physician following an actual visit in his office. See Section 26-23E-7, 1975 *Code of Alabama*. The Biden Administration will be pushing an FDA rule that will permit or require the medication to be given by telephone. That will be a conflict with our state law, which will need to be addressed in the future. In the meantime, physicians are prescribing the drugs and because there is a hiatus between the administration of the two drugs, some women change their mind about going through with the abortion. They did not know, however, they would not have to complete the process.

We have assisted the Alabama Pro-Life Coalition in drafting a bill to be introduced by Representative Kerry Rich, which will require physicians to do the following:

- "(1) The woman is informed, by telephone or in person, by the physician who is to perform the abortion, by referring physician, or by an agent by that physician at least 48 hours before the abortion that:
- (A) It may be possible to reverse the intended effects of a chemical abortion utilizing mifepristone if the woman changes her mind but that time is of the essence."

A physician or an agent of the physician shall provide written medical discharge instructions to the pregnant woman that reads as follows:

"Recent developing research has indicated that mifepristone alone is not always effective in ending a pregnancy. It may be possible to avoid, cease, or even to reverse the intended effects of a chemical abortion using mifepristone if the second pill has not been taken. Please consult with a healthcare professional immediately."

The effort to protect unborn life and to enhance the healthcare of the pregnant woman is an ongoing process. We will continue to work toward these goals until someday sanity for the sanctity of unborn life will be restored.