

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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March 31, 2004

Opinion No. 04-056

Amendment 9 to Senate Joint Resolution 127

QUESTION

Whether amendment 9 to Senate Joint Resolution 127 ensures that a victim of rape or incest or a woman whose life is in danger will have a right to end that pregnancy?

OPINION

In the opinion of this Office, the language of Amendment 9 does not ensure that a victim of rape or incest or a woman whose life is in danger will have a right to end that pregnancy. We reach this conclusion because the proposed constitutional language used in Amendment 9 to Senate Joint Resolution 127 does not mandate that an abortion be an available option for women in these circumstances. Rather, Amendment 9 merely requires the legislature to “make such provisions for abortion as it determines reasonably necessary,” for women in these circumstances. Theoretically, this language would allow the legislature to determine that abortions for women in these circumstances are not reasonably necessary. This language, therefore, falls sort of ensuring that women in these circumstances will be allowed by the legislature to terminate a pregnancy.

ANALYSIS

Amendment 9 to Senate Joint Resolution 127 rewrites the amendatory language of the resolution and proposes to add the following language to the Tennessee Constitution:

Nothing in this Constitution secures or protects a right to abortion or the funding thereof. The legislature shall have the sole authority to make and shall make such provisions for abortion as it determines reasonably necessary for victims of rape, incest and to save the life of the mother.

When construing a constitutional provision, the courts must give the words used their ordinary and inherent meaning. *Gaskin v. Collins*, 661 S.W.2d 865 (Tenn. 1983). The first sentence of the resolution clearly indicates that the Tennessee Constitution will no longer “secure or protect” the right to an abortion. The second sentence states that only the legislature has the authority to make

provisions for abortion.¹ Furthermore, use of the word “shall” indicates that the legislature must² “make such provisions for abortion as it determines reasonably necessary for victims of rape, incest and to save the life of the mother.” Breaking the sentence down further, the provisions the legislature must make for abortion are those it — the legislature — determines are reasonably necessary. So, the provision expressly gives the legislature the sole, absolute discretion to determine what provisions are “reasonably necessary.”

In the opinion of this Office, the language of Amendment 9 does not ensure that a victim of rape or incest or a woman whose life is in danger will have a right to end that pregnancy. We reach this conclusion because the proposed constitutional language used in Amendment 9 to Senate Joint Resolution 127 does not mandate that an abortion be an available option for women in these circumstances. Rather, Amendment 9 merely requires the legislature to “make such provisions for abortion as it determines reasonably necessary,” for women in these circumstances. Theoretically, this language would allow the legislature to determine that abortions for women in these circumstances are not reasonably necessary. This language, therefore, falls sort of ensuring that women in these circumstances will be allowed by the legislature to terminate a pregnancy.

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¹This follows naturally from the first sentence. If the Constitution does not provide for a right to an abortion, the matter of abortions is left up to the legislature.

²“[W]hen the word “shall” is used in constitutions or statutes it is ordinarily construed as being mandatory and not discretionary.” *Stubbs v. State*, 216 Tenn. 567, 393 S.W.2d 150 (1965).