

POLITICS & GOVERNMENT MARCH 18, 2016 4:11 PM

Judge denies Bevin's request to close Lexington abortion clinic

HIGHLIGHTS

Fayette Circuit Judge Ernesto Scorsone finds clinic falls within standard of private doctor's office

Clinic will reopen next week, attorney says

Government officials will appeal decision, spokeswoman says



Hearing on fate of Lexington abortion clinic 2:46



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The state asks for a temporary injunction to close a Lexington abortion clinic operating with a license.

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A judge has denied a request by Gov. Matt Bevin's administration to temporarily close a Lexington abortion clinic that the state claims

is operating illegally.

Fayette Circuit Judge Ernesto Scorsone ruled Friday against the state's request for an injunction to close EMW Women's Clinic on Burt Road. He said the Cabinet for Health and Family Services failed to present adequate evidence during a hearing Wednesday that it will eventually prevail in the lawsuit or that allowing the clinic to remain open as the lawsuit proceeds would cause "irreparable injury."

"In addition to the evidence indicating that EMW is operating legally and in conformity with the most important regulations of a licensed abortion facility, closing the clinic is against the public interest," Scorsone wrote. "EMW is the only physician's office that routinely provides abortion services in the Eastern half of the state, and both parties agree that a right to an abortion during the first trimester of pregnancy is constitutionally protected. Closing EMW would have a severe, adverse impact on the women in the Eastern part of the state."

The state sued the clinic two weeks ago, alleging that it lacked a required state license. The clinic stopped performing abortions on March 9 pending a judge's ruling.

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Scott White, an attorney representing the clinic, said it would reopen next week.

"We are obviously very pleased with the court's decision," White said. "As we said from Day 1,

this clinic has operated lawfully and appropriately in providing this service to women in this part of the state. The clinic looks forward to opening next week, and our hope is the cabinet will accept this decree and not waste any more effort and money on an argument that clearly has no weight.”

Bevin spokeswoman Jessica Ditto said the administration would take the case to the Kentucky Court of Appeals as soon as possible.

“The evidence at the hearing overwhelmingly showed that EMW-Lexington, which performed over 400 abortions in 2015 alone, is an abortion facility that is required to be licensed under Kentucky law,” she said. “The defendant failed to meet its heavy burden of proving that it is entitled to an exemption from licensure as a ‘physician’s office.’ The proof was clear that EMW is not a physician’s office in that it admittedly does nothing but abortions.”

At issue is whether the clinic can operate as an unlicensed doctor’s office that performs abortions, as it has for many years, or whether it is a full abortion clinic that requires state licensing.

At the Wednesday hearing, clinic owner Ernest Marshall said the clinic used to do more regular gynecological health care, and is open to doing more, but he said that since his partner died a few years ago, the clinic’s primary work is abortions.

On Feb. 17, state inspectors with the Cabinet for Health and Family Services visited the clinic, where they reported that employees told them the clinic only performs abortions. Inspectors also found dirty conditions and expired medicine.

Marshall — an obstetrician-gynecologist in good standing with the Kentucky Board of Medical Licensure who also owns the EMW Women’s Surgical Center in Louisville — said during a hearing Wednesday that he received a legal opinion from a lawyer many years ago that he did not need a license.

His surgical center in Louisville is the only fully licensed abortion provider in Kentucky.

“We’ve always operated as a doctor’s office” in Lexington, Marshall explained on the stand. “The facility is only 2,500 square feet and we only do very small cases under local anesthesia, things that could be done in a doctor’s office.”

The Lexington clinic does only first-term abortions using surgical procedure and medical inducement.

Under Kentucky law, physicians’ offices that perform a variety of services do not have to be separately licensed to perform abortions. Abortion clinics are also required to have agreements with a local hospital and an ambulance service. The EMW clinic now has both, though the state said the clinic did not have an agreement with an ambulance service at the time of its inspection.

Steve Pitt, Gov. Matt Bevin’s general counsel, told Scorsone it was clear that the clinic performed only abortions and thus must be licensed by the state.

“It’s very clear that EMW of Lexington is an abortion facility,” he said. “If this is not the sort of abortion facility the General Assembly intended to be regulated and licensed, I can’t imagine what is.”

But Scorsone said evidence indicates that the clinic operates as a private doctor’s office, despite the fact that abortions are done there.

“The uncontroverted testimony presented at the hearing is that it is within the standard of care to perform first trimester abortions in a doctor’s office and that these procedures are less dangerous than others routinely performed in an office setting,” Scorsone wrote. “The procedures used do not require sedation or the services of an anesthesiologist, factors that indicate EMW is a private physician’s office exempt from the licensing requirements for ambulatory surgical centers.”

According to state records, the EMW clinic in Lexington performed 411 abortions in 2015.

In total, 3,187 abortions were done in Kentucky last year, said Paul Royce, Vital Statistics director, who testified on behalf of the Cabinet for Health and Family Services. The EMW surgical center in Louisville did 2,773 abortions in 2015, he said.

At the end of his ruling, Scorsone noted that he was sure the EMW clinic would immediately address any cleanliness issues found by inspectors.

“Whether it is a doctor’s office, surgical center, or hospital, these are matters that any health care provider should seek to address right away,” he wrote.

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