

AMENDMENTS TO LB 594

Introduced by Judiciary.

1 1. Strike the original sections and insert the following
2 new sections:

3 Section 1. Section 28-325, Reissue Revised Statutes of
4 Nebraska, is amended to read:

5 28-325 The Legislature hereby finds and declares:

6 (1) That the following provisions were motivated by
7 the legislative intrusion of the United States Supreme Court by
8 virtue of its decision removing the protection afforded the unborn.
9 Sections 28-325 to 28-345 and sections 4 to 10 of this act are in
10 no way to be construed as legislatively encouraging abortions at
11 any stage of unborn human development, but are rather an expression
12 of the will of the people of the State of Nebraska and the members
13 of the Legislature to provide protection for the life of the unborn
14 child whenever possible;

15 (2) That the members of the Legislature expressly deplore
16 the destruction of the unborn human lives which has and will occur
17 in Nebraska as a consequence of the United States Supreme Court's
18 decision on abortion of January 22, 1973;

19 (3) That it is in the interest of the people of the State
20 of Nebraska that every precaution be taken to insure the protection
21 of every viable unborn child being aborted, and every precaution
22 be taken to provide life-supportive procedures to insure the unborn
23 child its continued life after its abortion;

1 (4) That currently this state is prevented from providing
2 adequate legal remedies to protect the life, health, and welfare of
3 pregnant women and unborn human life; ~~and~~

4 (5) That it is in the interest of the people of the
5 State of Nebraska to maintain accurate statistical data to aid in
6 providing proper maternal health regulations and education;i-

7 (6) That the existing standard of care for preabortion
8 screening and counseling is not always adequate to protect the
9 health needs of women;

10 (7) That clarifying the minimum standard of care for
11 preabortion screening and counseling in statute is a practical
12 means of protecting the well-being of women and may better ensure
13 that abortion doctors are sufficiently aware of each patient's
14 risk profile so they may give each patient a well-informed medical
15 opinion regarding her unique case; and

16 (8) That providing right to redress against nonphysicians
17 who perform illegal abortions or encourage self-abortions is an
18 important means of protecting women's health.

19 Sec. 2. Section 28-326, Revised Statutes Supplement,
20 2009, is amended to read:

21 28-326 For purposes of sections 28-325 to 28-345 and
22 sections 4 to 10 of this act, unless the context otherwise
23 requires:

24 (1) Abortion means the use or prescription of any
25 instrument, medicine, drug, or other substance or device
26 intentionally to terminate the pregnancy of a woman known to be
27 pregnant with an intention other than to increase the probability

1 of a live birth, to preserve the life or health of the child after
2 live birth, or to remove a dead unborn child, and which causes the
3 premature termination of the pregnancy;

4 (2) Complications associated with abortion means any
5 adverse physical, psychological, or emotional reaction that is
6 reported in a peer-reviewed journal to be statistically associated
7 with abortion such that there is less than a five percent
8 probability (P < .05) that the result is due to chance;

9 (3) Conception means the fecundation of the ovum by the
10 spermatozoa;

11 (4) Emergency situation means that condition which, on
12 the basis of the physician's good faith clinical judgment, so
13 complicates the medical condition of a pregnant woman as to
14 necessitate the immediate abortion of her pregnancy to avert her
15 death or for which a delay will create serious risk of substantial
16 impairment of a major bodily function;

17 ~~(2)~~ (5) Hospital means those institutions licensed by the
18 Department of Health and Human Services pursuant to the Health Care
19 Facility Licensure Act;

20 (6) Negligible risk means a risk that a reasonable person
21 would consider to be immaterial to a decision to undergo an
22 elective medical procedure;

23 (7) Partial-birth abortion means an abortion procedure
24 in which the person performing the abortion partially delivers
25 vaginally a living unborn child before killing the unborn child and
26 completing the delivery. For purposes of this subdivision, the term
27 partially delivers vaginally a living unborn child before killing

1 the unborn child means deliberately and intentionally delivering
2 into the vagina a living unborn child, or a substantial portion
3 thereof, for the purpose of performing a procedure that the person
4 performing such procedure knows will kill the unborn child and does
5 kill the unborn child;

6 ~~(3)~~ (8) Physician means any person licensed to practice
7 medicine in this state as provided in the Uniform Credentialing
8 Act;

9 ~~(4)~~ (9) Pregnant means that condition of a woman who has
10 unborn human life within her as the result of conception;

11 ~~(5)~~ Conception means the fecundation of the ovum by the
12 spermatozoa;

13 (10) Probable gestational age of the unborn child means
14 what will with reasonable probability, in the judgment of the
15 physician, be the gestational age of the unborn child at the time
16 the abortion is planned to be performed;

17 (11) Risk factor associated with abortion means
18 any factor, including any physical, psychological, emotional,
19 demographic, or situational factor for which there is a statistical
20 association with one or more complications associated with abortion
21 such that there is less than a five percent probability ($P <$
22 .05) that such statistical association is due to chance. Such
23 information on risk factors shall have been published in any
24 peer-reviewed journals indexed by the United States National
25 Library of Medicine's search services (PubMed or MEDLINE) or in any
26 journal included in the Thomson Reuters Scientific Master Journal
27 List not less than twelve months prior to the day pre-abortion

1 screening was provided;

2 (12) Self-induced abortion means any abortion or
3 menstrual extraction attempted or completed by a pregnant woman on
4 her own body;

5 (13) Ultrasound means the use of ultrasonic waves for
6 diagnostic or therapeutic purposes, specifically to monitor an
7 unborn child;

8 ~~(6)~~ (14) Viability means that stage of human development
9 when the unborn child is potentially able to live more than merely
10 momentarily outside the womb of the mother by natural or artificial
11 means; and

12 ~~(7)~~ Emergency situation means that condition which, on
13 the basis of the physician's good faith clinical judgment, so
14 complicates the medical condition of a pregnant woman as to
15 necessitate the immediate abortion of her pregnancy to avert her
16 death or for which a delay will create serious risk of substantial
17 impairment of a major bodily function;

18 ~~(8)~~ Probable gestational age of the unborn child means
19 what will with reasonable probability, in the judgment of the
20 physician, be the gestational age of the unborn child at the time
21 the abortion is planned to be performed;

22 ~~(9)~~ Partial-birth abortion means an abortion procedure
23 in which the person performing the abortion partially delivers
24 vaginally a living unborn child before killing the unborn child and
25 completing the delivery. For purposes of this subdivision, the term
26 partially delivers vaginally a living unborn child before killing
27 the unborn child means deliberately and intentionally delivering

1 into the vagina a living unborn child, or a substantial portion
2 thereof, for the purpose of performing a procedure that the person
3 performing such procedure knows will kill the unborn child and does
4 kill the unborn child;

5 ~~(10)~~ (15) Woman means any female human being whether or
6 not she has reached the age of majority, and

7 ~~(11)~~ Ultrasound means the use of ultrasonic waves for
8 diagnostic or therapeutic purposes, specifically to monitor an
9 unborn child.

10 Sec. 3. Section 28-327, Revised Statutes Supplement,
11 2009, is amended to read:

12 28-327 No abortion shall be performed except with the
13 voluntary and informed consent of the woman upon whom the abortion
14 is to be performed. Except in the case of an emergency situation,
15 consent to an abortion is voluntary and informed only if:

16 (1) The woman is told the following by the physician who
17 is to perform the abortion, by the referring physician, or by a
18 physician assistant or registered nurse licensed under the Uniform
19 Credentialing Act who is an agent of either physician, at least
20 twenty-four hours before the abortion:

21 (a) The particular medical risks associated with the
22 particular abortion procedure to be employed including, when
23 medically accurate, the risks of infection, hemorrhage, perforated
24 uterus, danger to subsequent pregnancies, and infertility;

25 (b) The probable gestational age of the unborn child at
26 the time the abortion is to be performed;

27 (c) The medical risks associated with carrying her child

1 to term; and

2 (d) That she cannot be forced or required by anyone to
3 have an abortion and is free to withhold or withdraw her consent
4 for an abortion.

5 The person providing the information specified in this
6 subdivision to the person upon whom the abortion is to be
7 performed shall be deemed qualified to so advise and provide
8 such information only if, at a minimum, he or she has had
9 training in each of the following subjects: Sexual and reproductive
10 health; abortion technology; contraceptive technology; short-term
11 counseling skills; community resources and referral; and informed
12 consent. The physician or the physician's agent may provide this
13 information by telephone without conducting a physical examination
14 or tests of the patient, in which case the information required
15 to be supplied may be based on facts supplied by the patient and
16 whatever other relevant information is reasonably available to the
17 physician or the physician's agent;

18 (2) The woman is informed by telephone or in person, by
19 the physician who is to perform the abortion, by the referring
20 physician, or by an agent of either physician, at least twenty-four
21 hours before the abortion:

22 (a) The name of the physician who will perform the
23 abortion;

24 (b) That medical assistance benefits may be available for
25 prenatal care, childbirth, and neonatal care;

26 (c) That the father is liable to assist in the support of
27 her child, even in instances in which the father has offered to pay

1 for the abortion;

2 (d) That she has the right to review the printed
3 materials described in section 28-327.01. The physician or his
4 or her agent shall orally inform the woman that the materials
5 have been provided by the Department of Health and Human Services
6 and that they describe the unborn child and list agencies which
7 offer alternatives to abortion. If the woman chooses to review the
8 materials, they shall either be given to her at least twenty-four
9 hours before the abortion or mailed to her at least seventy-two
10 hours before the abortion by certified mail, restricted delivery
11 to addressee, which means the postal employee can only deliver
12 the mail to the addressee. The physician and his or her agent
13 may disassociate themselves from the materials and may comment or
14 refrain from commenting on them as they choose; and

15 (e) That she has the right to request a comprehensive
16 list, compiled by the Department of Health and Human Services,
17 of health care providers, facilities, and clinics that offer to
18 have ultrasounds performed by a person at least as qualified
19 as a registered nurse licensed under the Uniform Credentialing
20 Act, including and specifying those that offer to perform
21 such ultrasounds free of charge. The list shall be arranged
22 geographically and shall include the name, address, hours of
23 operation, and telephone number of each entity. If requested by
24 the woman, the physician who is to perform the abortion, the
25 referring physician, or his or her agent shall provide such a list
26 as compiled by the department;

27 (3) If an ultrasound is used prior to the performance

1 of an abortion, the physician who is to perform the abortion,
2 the referring physician, or a physician assistant or registered
3 nurse licensed under the Uniform Credentialing Act who is an agent
4 of either physician, or any qualified agent of either physician,
5 shall:

6 (a) Perform an ultrasound of the woman's unborn child
7 of a quality consistent with standard medical practice in the
8 community at least one hour prior to the performance of the
9 abortion;

10 (b) Simultaneously display the ultrasound images so that
11 the woman may choose to view the ultrasound images or not view the
12 ultrasound images. The woman shall be informed that the ultrasound
13 images will be displayed so that she is able to view them. Nothing
14 in this subdivision shall be construed to require the woman to view
15 the displayed ultrasound images; and

16 (c) If the woman requests information about the displayed
17 ultrasound image, her questions shall be answered. If she requests
18 a detailed, simultaneous, medical description of the ultrasound
19 image, one shall be provided that includes the dimensions of the
20 unborn child, the presence of cardiac activity, if present and
21 viewable, and the presence of external members and internal organs,
22 if present and viewable;

23 (4) At least one hour prior to the performance of an
24 abortion, a physician, psychiatrist, psychologist, mental health
25 practitioner, physician assistant, registered nurse, or social
26 worker licensed under the Uniform Credentialing Act has:

27 (a) Evaluated the pregnant woman to identify if the

1 pregnant woman had the perception of feeling pressured or coerced
2 into seeking or consenting to an abortion;

3 (b) Evaluated the pregnant woman to identify the presence
4 of any risk factors associated with abortion;

5 (c) Informed the pregnant woman and the physician who
6 is to perform the abortion of the results of the evaluation in
7 writing. The written evaluation shall include, at a minimum, a
8 checklist identifying both the positive and negative results of the
9 evaluation for each risk factor associated with abortion and both
10 the licensed person's written certification and the woman's written
11 certification that the pregnant woman was informed of the risk
12 factors associated with abortion as discussed; and

13 (d) Retained a copy of the written evaluation results in
14 the pregnant woman's permanent record;

15 (5) If any risk factors associated with abortion were
16 identified, the pregnant woman was informed of the following in
17 such manner and detail that a reasonable person would consider
18 material to a decision of undergoing an elective medical procedure:

19 (a) Each complication associated with each identified
20 risk factor; and

21 (b) Any quantifiable risk rates whenever such relevant
22 data exists;

23 (6) The physician performing the abortion has formed a
24 reasonable medical judgment, documented in the permanent record,
25 that:

26 (a) The preponderance of statistically validated medical
27 studies demonstrates that the physical, psychological, and familial

1 risks associated with abortion for patients with risk factors
2 similar to the patient's risk factors are negligible risks;

3 (b) Continuance of the pregnancy would involve risk of
4 injury to the physical or mental health of the pregnant woman
5 greater than if the pregnancy were terminated by induced abortion;
6 or

7 (c) Continuance of the pregnancy would involve less risk
8 of injury to the physical or mental health of the pregnant woman
9 than if the pregnancy were terminated by an induced abortion;

10 ~~(4)~~ (7) The woman certifies in writing, prior to the
11 abortion, that:

12 (a) The information described in subdivisions (1) and
13 (2) (a), (b), and (c) of this section has been furnished her;

14 (b) She has been informed of her right to review the
15 information referred to in subdivision (2) (d) of this section; and

16 (c) The requirements of subdivision (3) of this section
17 have been performed if an ultrasound is performed prior to the
18 performance of the abortion; and

19 ~~(5)~~ (8) Prior to the performance of the abortion,
20 the physician who is to perform the abortion or his or her
21 agent receives a copy of the written certification prescribed by
22 subdivision ~~(4)~~ (7) of this section. The physician or his or her
23 agent shall retain a copy of the signed certification form in the
24 woman's medical record.

25 Sec. 4. Any waiver of the evaluations and notices
26 provided for in subdivision (4) of section 28-327 is void and
27 unenforceable.

1 Sec. 5. In addition to whatever remedies are available
2 under the common or statutory laws of this state, the intentional,
3 knowing, or negligent failure to comply with the requirements of
4 section 28-327 shall provide a basis for the following damages:

5 (1) The award of reasonable costs and attorney's fees;
6 and

7 (2) A recovery for the pregnant woman for the wrongful
8 death of her unborn child under section 30-809 upon proving by
9 a preponderance of evidence that the physician knew or should
10 have known that the pregnant woman's consent was either not fully
11 informed or not fully voluntary pursuant to section 28-327.

12 Sec. 6. Any action for civil remedies based on a
13 failure to comply with the requirements of section 28-327 shall be
14 commenced in accordance with section 25-222 or 44-2828.

15 Sec. 7. If a physician performed an abortion on a
16 pregnant woman who is a minor without providing the information
17 required in section 28-327 to the pregnant woman's parent or legal
18 guardian, then the physician bears the burden of proving that
19 the pregnant woman was capable of independently evaluating the
20 information given to her.

21 Sec. 8. Except in the case of an emergency situation,
22 if a pregnant woman is provided with the information required by
23 section 28-327 less than twenty-four hours before her scheduled
24 abortion, the physician shall bear the burden of proving that
25 the pregnant woman had sufficient reflection time, given her age,
26 maturity, emotional state, and mental capacity, to comprehend and
27 consider such information.

1 Sec. 9. In a civil action involving section 28-327, the
2 following shall apply:

3 (1) In determining the liability of the physician and the
4 validity of the consent of a pregnant woman, the failure to comply
5 with the requirements of section 28-327 shall create a rebuttable
6 presumption that the pregnant woman would not have undergone the
7 recommended abortion had section 28-327 been complied with by the
8 physician;

9 (2) The absence of physical injury shall not preclude
10 an award of noneconomic damages including pain, suffering,
11 inconvenience, mental suffering, emotional distress, psychological
12 trauma, loss of society or companionship, loss of consortium,
13 injury to reputation, or humiliation associated with the abortion;

14 (3) The fact that a physician does not perform elective
15 abortions or has not performed elective abortions in the past
16 shall not automatically disqualify such physician from being an
17 expert witness. A licensed obstetrician or family practitioner
18 who regularly assists pregnant women in resolving medical matters
19 related to pregnancy may be qualified to testify as an expert
20 on the screening, counseling, management, and treatment of
21 pregnancies;

22 (4) Any physician advertising services in this state
23 shall be deemed to be transacting business in this state pursuant
24 to section 25-536 and shall be subject to the provisions of section
25 28-327;

26 (5) It shall be an affirmative defense to an allegation
27 of inadequate disclosure under the requirements of section 28-327

1 that the defendant omitted the contested information because
2 statistically validated surveys of the general population of women
3 of reproductive age, conducted within the three years before or
4 after the contested abortion, demonstrate that less than five
5 percent of women would consider the contested information to be
6 relevant to an abortion decision; and

7 (6) In addition to the other remedies available under the
8 common or statutory law of this state, a woman or her survivors
9 shall have a cause of action for reckless endangerment against any
10 person, other than a physician or pharmacist licensed under the
11 Uniform Credentialing Act, who attempts or completes an abortion
12 on the pregnant woman or aids or abets the commission of a
13 self-induced abortion. Proof of injury shall not be required to
14 recover an award, including reasonable costs and attorney's fees,
15 for wrongful death under this subdivision.

16 Sec. 10. (1) In the event that any portion of section
17 28-327 is enjoined and subsequently upheld, the statute of
18 limitations for filing a civil suit under section 28-327 shall
19 be tolled during the period for which the injunction is pending and
20 for two years thereafter.

21 (2) Nothing in section 28-327 shall be construed as
22 defining a standard of care for any medical procedure other than an
23 induced abortion.

24 (3) A violation of subdivision (4), (5), or (6) of
25 section 28-327 shall not provide grounds for any criminal action or
26 disciplinary action against or revocation of a license to practice
27 medicine and surgery pursuant to the Uniform Credentialing Act.

1 Sec. 11. Section 28-340, Reissue Revised Statutes of
2 Nebraska, is amended to read:

3 28-340 Any person whose employment or position has been
4 in any way altered, impaired, or terminated in violation of
5 sections 28-325 to 28-345 and sections 4 to 10 of this act may sue
6 in the district court for all consequential damages, lost wages,
7 reasonable attorney's fees incurred, and the cost of litigation.

8 Sec. 12. Section 38-2021, Reissue Revised Statutes of
9 Nebraska, is amended to read:

10 38-2021 Unprofessional conduct means any departure from
11 or failure to conform to the standards of acceptable and prevailing
12 practice of medicine and surgery or the ethics of the profession,
13 regardless of whether a person, patient, or entity is injured, or
14 conduct that is likely to deceive or defraud the public or is
15 detrimental to the public interest, including, but not limited to:

16 (1) Performance by a physician of an abortion as defined
17 in subdivision (1) of section 28-326 under circumstances when he
18 or she will not be available for a period of at least forty-eight
19 hours for postoperative care unless such postoperative care is
20 delegated to and accepted by another physician;

21 (2) Performing an abortion upon a minor without having
22 satisfied the notice requirements of sections 71-6901 to 71-6908;
23 and

24 (3) The intentional and knowing performance of a
25 partial-birth abortion as defined in subdivision ~~(9)~~ (7) of section
26 28-326, unless such procedure is necessary to save the life of the
27 mother whose life is endangered by a physical disorder, physical

1 illness, or physical injury, including a life-endangering physical
2 condition caused by or arising from the pregnancy itself.

3 Sec. 13. If any section in this act or any part of any
4 section is declared invalid or unconstitutional, the declaration
5 shall not affect the validity or constitutionality of the remaining
6 portions.

7 Sec. 14. Original sections 28-325, 28-340, and 38-2021,
8 Reissue Revised Statutes of Nebraska, and sections 28-326 and
9 28-327, Revised Statutes Supplement, 2009, are repealed.