

LEGISLATURE OF NEBRASKA
ONE HUNDRED FOURTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 767

Introduced by Garrett, 3; Craighead, 6; Watermeier, 1.

Read first time January 06, 2016

Committee: Judiciary

1 A BILL FOR AN ACT relating to crimes and offenses; to amend section
2 28-332, Reissue Revised Statutes of Nebraska, sections 28-325,
3 28-326, 28-340, and 38-2021, Revised Statutes Cumulative Supplement,
4 2014, and section 28-101, Revised Statutes Supplement, 2015; to
5 prohibit dismemberment abortion as prescribed; to define a term; to
6 provide for a disciplinary proceeding, for civil damages, for a
7 criminal penalty; and a savings clause; to harmonize provisions; to
8 provide for severability; and to repeal the original sections.
9 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 28-101, Revised Statutes Supplement, 2015, is
2 amended to read:

3 28-101 Sections 28-101 to ~~28-468, 28-470 to~~ 28-1357, 28-1418.01, and
4 28-1429.03 and sections 4 to 10, 14, and 15 of this act shall be known
5 and may be cited as the Nebraska Criminal Code.

6 Sec. 2. Section 28-325, Revised Statutes Cumulative Supplement,
7 2014, is amended to read:

8 28-325 The Legislature hereby finds and declares:

9 (1) That the following provisions were motivated by the legislative
10 intrusion of the United States Supreme Court by virtue of its decision
11 removing the protection afforded the unborn. Sections 28-325 to 28-345
12 and sections 4 to 10, 14, and 15 of this act are in no way to be
13 construed as legislatively encouraging abortions at any stage of unborn
14 human development, but are rather an expression of the will of the people
15 of the State of Nebraska and the members of the Legislature to provide
16 protection for the life of the unborn child whenever possible;

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

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

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

29 (5) That it is in the interest of the people of the State of
30 Nebraska to maintain accurate statistical data to aid in providing proper
31 maternal health regulations and education;

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

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

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

11 Sec. 3. Section 28-326, Revised Statutes Cumulative Supplement,
12 2014, is amended to read:

13 28-326 For purposes of sections 28-325 to 28-345 and sections 4 to
14 10, 14, and 15 of this act, unless the context otherwise requires:

15 (1) Abortion means the use or prescription of any instrument,
16 medicine, drug, or other substance or device intentionally to terminate
17 the pregnancy of a woman known to be pregnant with an intention other
18 than to increase the probability of a live birth, to preserve the life or
19 health of the child after live birth, or to remove a dead unborn child,
20 and which causes the premature termination of the pregnancy;

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

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

27 (4) Dismemberment abortion means, with the purpose of causing the
28 death of an unborn child, purposely to dismember a living unborn child
29 and extract him or her one piece at a time from the uterus through use of
30 clamps, grasping forceps, tongs, scissors, or similar instruments that,
31 through the convergence of two rigid levers, slice, crush, or grasp a

1 portion of the unborn child's body to cut or rip it off. Dismemberment
2 abortion does not include an abortion which uses suction to dismember the
3 body of the unborn child by sucking fetal parts into a collection
4 container. Dismemberment abortion includes an abortion in which a
5 dismemberment abortion causes the death of an unborn child but suction is
6 subsequently used to extract fetal parts after the death of the unborn
7 child;

8 (5 4) Emergency situation means that condition which, in reasonable
9 medical judgment on the basis of the physician's good faith clinical
10 judgment, so complicates the medical condition of the a pregnant woman as
11 to necessitate the immediate abortion of her pregnancy to avert her death
12 or to avert for which a delay will create serious risk of substantial and
13 irreversible physical impairment of a major bodily function, not
14 including psychological or emotional conditions. No such condition may be
15 determined to exist if it is based on a claim or diagnosis that the woman
16 will engage in conduct which she intends to result in her death or in
17 substantial and irreversible physical impairment of a major bodily
18 function;

19 (6 5) Hospital means an institution those institutions licensed by
20 the Department of Health and Human Services pursuant to the Health Care
21 Facility Licensure Act;

22 (7 6) Negligible risk means a risk that a reasonable person would
23 consider to be immaterial to a decision to undergo an elective medical
24 procedure;

25 (8 7) Partial-birth abortion means an abortion procedure in which
26 the person performing the abortion partially delivers vaginally a living
27 unborn child before killing the unborn child and completing the delivery.
28 For purposes of this subdivision, the term partially delivers vaginally a
29 living unborn child before killing the unborn child means deliberately
30 and intentionally delivering into the vagina a living unborn child, or a
31 substantial portion thereof, for the purpose of performing a procedure

1 that the person performing such procedure knows will kill the unborn
2 child and does kill the unborn child;

3 (~~9~~ 8) Physician means any person licensed to practice medicine in
4 this state as provided in the Uniform Credentialing Act;

5 (~~10~~ 9) Pregnant means that condition of a woman who has unborn human
6 life within her as the result of conception;

7 (~~11~~ 10) Probable gestational age of the unborn child means what will
8 with reasonable probability, in the judgment of the physician, be the
9 gestational age of the unborn child at the time the abortion is planned
10 to be performed;

11 (~~12~~ 11) Risk factor associated with abortion means any factor,
12 including any physical, psychological, emotional, demographic, or
13 situational factor, for which there is a statistical association with one
14 or more complications associated with abortion such that there is less
15 than a five percent probability ($P < .05$) that such statistical
16 association is due to chance. Such information on risk factors shall have
17 been published in any peer-reviewed journals indexed by the United States
18 National Library of Medicine's search services (PubMed or MEDLINE) or in
19 any journal included in the Thomson Reuters Scientific Master Journal
20 List not less than twelve months prior to the day preabortion screening
21 was provided;

22 (~~13~~ 12) Self-induced abortion means any abortion or menstrual
23 extraction attempted or completed by a pregnant woman on her own body;

24 (~~14~~ 13) Ultrasound means the use of ultrasonic waves for diagnostic
25 or therapeutic purposes, specifically to monitor an unborn child;

26 (~~15~~ 14) Viability means that stage of human development when the
27 unborn child is potentially able to live more than merely momentarily
28 outside the womb of the mother by natural or artificial means; and

29 (~~16~~ 15) Woman means any female human being whether or not she has
30 reached the age of majority.

31 Sec. 4. No dismemberment abortion shall be performed at any time,

1 either before or after the unborn child has reached viability, except in
2 an emergency situation.

3 Sec. 5. (1) A physician accused in any proceeding of violating
4 section 4 of this act may seek a hearing before the Board of Medicine and
5 Surgery on whether the dismemberment abortion was necessary (a) to
6 preserve the life of the pregnant woman or (b) because an emergency
7 situation existed. The board's findings are admissible on that issue at
8 any trial in which such unlawful conduct is alleged. Upon a motion of the
9 physician accused, the court shall delay the beginning of the trial for
10 not more than thirty days to permit such a hearing to take place.

11 (2) No pregnant woman upon whom a dismemberment abortion is
12 performed or attempted to be performed shall be liable for performing or
13 attempting to perform a dismemberment abortion. No nurse, technician,
14 secretary, receptionist, or other employee or agent who is not a
15 physician but who acts at the direction of a physician, and no pharmacist
16 or other individual who is not a physician but who fills a prescription
17 or provides instruments or materials used in a dismemberment abortion at
18 the direction of or to a physician, shall be liable for performing or
19 attempting to perform a dismemberment abortion.

20 Sec. 6. (1) A cause of action for injunctive relief against a
21 physician who has performed or attempted to perform a dismemberment
22 abortion may be maintained by:

23 (a) A pregnant woman upon whom such dismemberment abortion was
24 performed or attempted to be performed;

25 (b) A person who is the spouse, parent, or guardian of, or a current
26 or former physician of, a pregnant woman upon whom such a dismemberment
27 abortion was performed or attempted to be performed; or

28 (c) A prosecuting attorney with appropriate jurisdiction.

29 (2) The injunction shall prevent the physician from performing or
30 attempting to perform further dismemberment abortions.

31 Sec. 7. (1) A cause of action for civil damages against a physician

1 who has performed a dismemberment abortion may be maintained by:

2 (a) Any pregnant woman upon whom a dismemberment abortion has been
3 performed;

4 (b) The father of the unborn child, if married to the pregnant woman
5 at the time the dismemberment abortion was performed; or

6 (c) If the pregnant woman had not attained the age of eighteen years
7 at the time of the dismemberment abortion or has died as a result of the
8 abortion, the maternal grandparents of the unborn child.

9 (2) No damages may be awarded a plaintiff if the pregnancy resulted
10 from the plaintiff's criminal conduct.

11 (3) Damages awarded in such an action shall include money damages
12 for all injuries, both psychological and physical, occasioned by the
13 dismemberment abortion.

14 Sec. 8. (1) If judgment is rendered in favor of the plaintiff in an
15 action described in section 6 or 7 of this act, the court shall also
16 render judgment for reasonable attorney's fees in favor of the plaintiff
17 against the defendant.

18 (2) If judgment is rendered in favor of the defendant in an action
19 described in section 6 or 7 of this act and the court finds that the
20 plaintiff's suit was frivolous and brought in bad faith, the court shall
21 render judgment for reasonable attorney's fees in favor of the defendant
22 against the plaintiff.

23 (3) No attorney's fees may be assessed against the pregnant woman
24 upon whom an abortion was performed or attempted to be performed except
25 in accordance with subsection (2) of this section.

26 Sec. 9. In every civil, criminal, or administrative proceeding or
27 action brought under sections 4 to 10 of this act, the court shall rule
28 whether the anonymity of any pregnant woman upon whom a dismemberment
29 abortion has been performed or attempted to be performed shall be
30 preserved from public disclosure if she does not give her consent to such
31 disclosure. The court, upon motion or sua sponte, shall make such a

1 ruling and, upon determining that her anonymity should be preserved,
2 shall issue orders to the parties, witnesses, and counsel and shall
3 direct the sealing of the record and exclusion of individuals from
4 courtrooms or hearing rooms to the extent necessary to preserve her
5 anonymity. Each such order shall be accompanied by specific written
6 findings explaining why the anonymity of the woman should be preserved,
7 why the order is essential to that end, how the order is narrowly
8 tailored to serve that interest, and why no reasonable less-restrictive
9 alternative exists. In the absence of written consent of the pregnant
10 woman upon whom a dismemberment abortion has been performed or attempted
11 to be performed, anyone other than a public official who brings an action
12 under section 6 or 7 of this act shall do so under a pseudonym. This
13 section shall not be construed to conceal the identity of the plaintiff
14 or of witnesses from the defendant or from attorneys for the defendant.

15 Sec. 10. Nothing in sections 4 to 9 of this act shall be construed
16 as creating or recognizing a right to abortion, nor a right to a
17 particular method of abortion.

18 Sec. 11. Section 28-332, Reissue Revised Statutes of Nebraska, is
19 amended to read:

20 28-332 The intentional and knowing violation of section 28-329,
21 28-330, or 28-331 or section 4 of this act is a Class IV felony.

22 Sec. 12. Section 28-340, Revised Statutes Cumulative Supplement,
23 2014, is amended to read:

24 28-340 Any person whose employment or position has been in any way
25 altered, impaired, or terminated in violation of sections 28-325 to
26 28-345 and sections 4 to 10 of this act may sue in the district court for
27 all consequential damages, lost wages, reasonable attorney's fees
28 incurred, and the cost of litigation.

29 Sec. 13. Section 38-2021, Revised Statutes Cumulative Supplement,
30 2014, is amended to read:

31 38-2021 Unprofessional conduct means any departure from or failure

1 to conform to the standards of acceptable and prevailing practice of
2 medicine and surgery or the ethics of the profession, regardless of
3 whether a person, patient, or entity is injured, or conduct that is
4 likely to deceive or defraud the public or is detrimental to the public
5 interest, including, but not limited to:

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

11 (2) Performing an abortion upon a minor without having satisfied the
12 requirements of sections 71-6901 to 71-6911;

13 (3) The intentional and knowing performance of a partial-birth
14 abortion as defined in ~~subdivision (7) of~~ section 28-326, unless such
15 procedure is necessary to save the life of the mother whose life is
16 endangered by a physical disorder, physical illness, or physical injury,
17 including a life-endangering physical condition caused by or arising from
18 the pregnancy itself; ~~and~~

19 (4) Performance by a physician of an abortion in violation of the
20 Pain-Capable Unborn Child Protection Act; and -

21 (5) Performance by a physician of a dismemberment abortion in
22 violation of section 4 of this act.

23 Sec. 14. If any of the new or amendatory sections of this act are
24 ever temporarily or permanently restrained or enjoined by judicial order,
25 the remaining sections of this act shall be enforced as though such
26 restrained or enjoined sections had not been adopted and whenever such
27 temporary or permanent restraining order or injunction is stayed or
28 dissolved or otherwise ceases to have effect such sections shall have
29 full force and effect.

30 Sec. 15. If any one or more provisions, sections, subsections,
31 sentences, clauses, phrases, or words of sections 4 to 10 of this act or

1 the application thereof to any person or circumstance is found to be
2 unconstitutional, the same is hereby declared to be severable and the
3 balance of sections 4 to 10 of this act shall remain effective
4 notwithstanding such unconstitutionality. The Legislature hereby declares
5 that it would have passed sections 4 to 10 of this act, and each
6 provision, section, subsection, sentence, clause, phrase, or word
7 thereof, irrespective of the fact that any one or more provisions,
8 sections, subsections, sentences, clauses, phrases, or words be declared
9 unconstitutional.

10 Sec. 16. Original section 28-332, Reissue Revised Statutes of
11 Nebraska, sections 28-325, 28-326, 28-340, and 38-2021, Revised Statutes
12 Cumulative Supplement, 2014, and section 28-101, Revised Statutes
13 Supplement, 2015, are repealed.