

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

SECOND SESSION

LEGISLATIVE BILL 1103

Introduced by Flood, 19.

Read first time January 21, 2010

Committee: Judiciary

A BILL

1 FOR AN ACT relating to abortion; to amend section 38-2021,
2 Reissue Revised Statutes of Nebraska, and section 28-101,
3 Revised Statutes Supplement, 2009; to adopt the Abortion
4 Pain Prevention Act; to provide and change civil and
5 criminal penalties with respect to abortion; to harmonize
6 provisions; to provide severability; and to repeal the
7 original sections.

8 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 10 of this act shall be known
2 and may be cited as the Abortion Pain Prevention Act.

3 Sec. 2. For purposes of the Abortion Pain Prevention Act:

4 (1) Abortion means the use or prescription of any
5 instrument, medicine, drug, or any other substance or device
6 to terminate the pregnancy of a woman known to be pregnant with an
7 intention other than to increase the probability of a live birth,
8 to preserve the life or health of the child after live birth, or to
9 remove a dead unborn child who died as the result of natural causes
10 in utero, accidental trauma, or a criminal assault on the pregnant
11 woman or her unborn child;

12 (2) Attempt to perform or induce an abortion means an
13 act, or an omission of a statutorily required act, that, under
14 the circumstances as the actor believes them to be, constitutes a
15 substantial step in a course of conduct planned to culminate in the
16 performance or induction of an abortion in this state in violation
17 of the act;

18 (3) Gestational age means the age of the unborn child as
19 calculated from the fertilization of the human ovum;

20 (4) Fertilization means the fusion of a human
21 spermatozoon with a human ovum;

22 (5) Medical emergency means a condition which, in
23 reasonable medical judgment, so complicates the medical condition
24 of the pregnant woman as to necessitate the immediate abortion of
25 her pregnancy to avert her death or for which a delay will create

1 serious risk of substantial and irreversible physical impairment of
2 a major bodily function. No condition shall be deemed a medical
3 emergency if based on a claim or diagnosis that the woman will
4 engage in conduct which would result in her death or in substantial
5 and irreversible physical impairment of a major bodily function;

6 (6) Reasonable medical judgment means a medical judgment
7 that would be made by a reasonably prudent physician, knowledgeable
8 about the case and the treatment possibilities with respect to the
9 medical conditions involved;

10 (7) Physician means any person licensed to practice
11 medicine and surgery or osteopathic medicine under the Uniform
12 Credentialing Act;

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

17 (9) Unborn child or fetus each mean an individual
18 organism of the species homo sapiens from fertilization until
19 live birth; and

20 (10) Woman means a female human being whether or not she
21 has reached the age of majority.

22 Sec. 3. The Legislature makes the following findings:

23 (1) At least by twenty weeks after fertilization, an
24 unborn child has the physical structures necessary to experience
25 pain;

1 (2) There is substantial evidence that, by twenty weeks
2 after fertilization, unborn children seek to evade certain stimuli
3 in a manner which in an infant or an adult would be interpreted as
4 a response to pain;

5 (3) Anesthesia is routinely administered to unborn
6 children who have developed twenty weeks or more past fertilization
7 who undergo prenatal surgery;

8 (4) There is substantial evidence that abortion methods
9 used at and after twenty weeks would cause substantial pain to an
10 unborn child;

11 (5) Expert testimony confirms that an unborn child is
12 capable of experiencing substantial pain even if the pregnant woman
13 herself has received local analgesic or general anesthesia; and

14 (6) There is a valid state interest in reducing or
15 preventing events in which pain is inflicted on sentient and
16 nonsentient creatures. Examples of laws that serve this interest
17 are laws governing the use of laboratory animals, laws requiring
18 pain-free methods of slaughtering livestock, and laws regarding
19 hunting methods on federal lands.

20 Sec. 4. (1) Except in the case of a medical emergency
21 which prevents compliance with this section, no abortion shall
22 be performed or induced or be attempted to be performed
23 or induced unless the referring physician or the physician
24 performing or inducing it has first made a determination of the
25 probable gestational age of the unborn child. In making such a

1 determination, the physician shall make such inquiries of the woman
2 and perform or cause to be performed such medical examinations
3 and tests as a reasonably prudent physician, knowledgeable about
4 the case and the medical conditions involved, would consider
5 necessary to perform in making an accurate diagnosis with respect
6 to gestational age.

7 (2) Failure by any physician to conform to any
8 requirement of this section constitutes unprofessional conduct
9 pursuant to section 38-2021.

10 Sec. 5. No person shall perform or induce or attempt
11 to perform or induce an abortion upon a woman when the probable
12 gestational age of the woman's unborn child is twenty or more
13 weeks unless, in reasonable medical judgment, she has a condition
14 which so complicates her medical condition as to necessitate the
15 abortion of her pregnancy to avert her death or to avert serious
16 risk of substantial and irreversible physical impairment of a major
17 bodily function. No such condition shall be deemed to exist if
18 it is based on a claim or diagnosis that the woman will engage
19 in conduct which would result in her death or in substantial and
20 irreversible physical impairment of a major bodily function. In
21 such a case, the physician shall terminate the pregnancy in the
22 manner which, in reasonable medical judgment, provides the best
23 opportunity for the unborn child to survive, unless, in reasonable
24 medical judgment, termination of the pregnancy in that manner would
25 pose a greater risk either of the death of the pregnant woman or

1 of the substantial and irreversible physical impairment of a major
2 bodily function of the woman than would other available methods.

3 Sec. 6. (1) Any physician who performs or induces or
4 attempts to perform or induce an abortion shall report to the
5 Department of Health and Human Services, on a schedule and
6 in accordance with forms and rules and regulations adopted and
7 promulgated by the department:

8 (a) If a determination of probable gestational age was
9 made, the probable gestational age determined and the method and
10 basis of the determination;

11 (b) If a determination of probable gestational age was
12 not made, the basis of the determination that a medical emergency
13 existed;

14 (c) If the probable gestational age was determined to
15 be twenty or more weeks, the basis of the determination that the
16 pregnant woman had a condition which so complicated her medical
17 condition as to necessitate the abortion of her pregnancy to avert
18 her death or to avert serious risk of substantial and irreversible
19 physical impairment of a major bodily function; and

20 (d) The method used for the abortion and, in the case
21 of an abortion performed when the probable gestational age was
22 determined to be twenty or more weeks, whether the method of
23 abortion used was one that, in reasonable medical judgment,
24 provided the best opportunity for the unborn child to survive.
25 If no abortion was performed, the basis of the determination

1 that termination of the pregnancy in that manner would pose a
2 greater risk either of the death of the pregnant woman or of the
3 substantial and irreversible physical impairment of a major bodily
4 function of the woman than would other available methods.

5 (2) Any physician who performs or induces or attempts to
6 perform or induce an abortion of an unborn child whose probable
7 gestational age is twenty weeks or more shall report each such
8 abortion performed, the specific medical condition of the woman,
9 and the basis for the diagnosis with respect to the condition of
10 the woman on forms provided by the department.

11 (3) By June 30 of each year, the department shall issue
12 a public report providing statistics for the previous calendar
13 year compiled from all of the reports covering that year submitted
14 in accordance with this section for each of the items listed in
15 subsection (1) of this section. Each such report shall also provide
16 the statistics for all previous calendar years, adjusted to reflect
17 any additional information from late or corrected reports. The
18 department shall take care to ensure that none of the information
19 included in the public reports could reasonably lead to the
20 identification of any pregnant woman upon whom an abortion was
21 performed.

22 (4) Any physician who fails to submit a report by the
23 end of thirty days following the due date shall be subject to a
24 late fee of five hundred dollars for each additional thirty-day
25 period or portion of a thirty-day period the report is overdue. Any

1 physician required to report in accordance with the Abortion Pain
2 Prevention Act who has not submitted a report, or has submitted
3 only an incomplete report, more than one year following the
4 due date, may, in an action brought pursuant to the Medicine
5 and Surgery Practice Act, be directed by a court of competent
6 jurisdiction to submit a complete report within a time period
7 stated by court order or be subject to civil contempt. Failure by
8 any physician to conform to any requirement of this section, other
9 than late filing of a report, constitutes unprofessional conduct
10 pursuant to section 38-2021. Failure by any physician to submit
11 a complete report in accordance with a court order constitutes
12 unprofessional conduct pursuant to section 38-2021. Intentional,
13 knowing, or reckless falsification of any report required under
14 this section is a Class V misdemeanor.

15 (5) Within ninety days after the effective date of
16 this act, the department shall adopt and promulgate rules and
17 regulations to assist in compliance with this section.

18 Sec. 7. Any person who intentionally, knowingly, or
19 recklessly performs or attempts to perform an abortion in violation
20 of section 5 of this act is guilty of a Class IV felony. No penalty
21 shall be assessed against the woman upon whom the abortion is
22 performed or attempted to be performed.

23 Sec. 8. (1) Any woman upon whom an abortion has been
24 performed in violation of the Abortion Pain Prevention Act, the
25 father of the unborn child who was the subject of such an abortion,

1 or the grandparent of such an unborn child may maintain an action
2 against the person who performed the abortion in knowing or
3 reckless violation of the act for actual damages. Any woman upon
4 whom an abortion has been attempted in violation of the act may
5 maintain an action against the person who attempted to perform the
6 abortion in knowing or reckless violation of the act for actual
7 damages.

8 (2) A cause of action for injunctive relief against any
9 person who has knowingly violated the act may be maintained by
10 the woman upon whom an abortion was performed or attempted to be
11 performed in violation of the act, any person who is the spouse,
12 parent, sibling, or guardian of, or a current or former licensed
13 health care provider of, the woman upon whom an abortion has been
14 performed or attempted to be performed in violation of this act, by
15 a county attorney with appropriate jurisdiction, or by the Attorney
16 General. The injunction shall prevent the abortion provider from
17 performing further abortions in violation of the act in this state.

18 (3) If judgment is rendered in favor of the plaintiff in
19 an action described in this section, the court shall also render
20 judgment for reasonable attorney's fees in favor of the plaintiff
21 against the defendant.

22 (4) If judgment is rendered in favor of the defendant and
23 the court finds that the plaintiff's suit was frivolous and brought
24 in bad faith, the court shall also render judgment for reasonable
25 attorney's fees in favor of the defendant against the plaintiff.

1 (5) No damages or attorney's fees may be assessed against
2 the woman upon whom an abortion was performed or attempted to be
3 performed, except as provided in subsection (4) of this section.

4 Sec. 9. In every civil or criminal proceeding or action
5 brought under the Abortion Pain Prevention Act the court shall rule
6 whether the anonymity of any woman upon whom an abortion has been
7 performed or attempted shall be preserved from public disclosure
8 if she does not give her consent to such disclosure. The court,
9 upon motion or sua sponte, shall make such a ruling and, upon
10 determining that her anonymity should be preserved, shall issue
11 orders to the parties, witnesses, and counsel and shall direct the
12 sealing of the record and exclusion of individuals from courtrooms
13 or hearing rooms to the extent necessary to safeguard her identity
14 from public disclosure. Each such order shall be accompanied by
15 specific written findings explaining why the anonymity of the
16 woman should be preserved from public disclosure, why the order is
17 essential to that end, how the order is narrowly tailored to serve
18 that interest, and why no reasonable less restrictive alternative
19 exists. In the absence of written consent of the woman upon whom
20 an abortion has been performed or attempted, anyone, other than a
21 public official, who brings an action under section 7 of this act
22 shall do so under a pseudonym. This section shall not be construed
23 to conceal the identity of the plaintiff or of witnesses from the
24 defendant or from attorneys for the defendant.

25 Sec. 10. If any one or more provision, section,

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

11 Sec. 11. Section 28-101, Revised Statutes Supplement,
12 2009, is amended to read:

13 28-101 Sections 28-101 to 28-1356 and sections 1 to 10 of
14 this act shall be known and may be cited as the Nebraska Criminal
15 Code.

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

18 38-2021 Unprofessional conduct means any departure from
19 or failure to conform to the standards of acceptable and prevailing
20 practice of medicine and surgery or the ethics of the profession,
21 regardless of whether a person, patient, or entity is injured, or
22 conduct that is likely to deceive or defraud the public or is
23 detrimental to the public interest, including, but not limited to:

24 (1) Performance by a physician of an abortion as defined
25 in subdivision (1) of section 28-326 under circumstances when he

1 or she will not be available for a period of at least forty-eight
2 hours for postoperative care unless such postoperative care is
3 delegated to and accepted by another physician;

4 (2) Performing an abortion upon a minor without having
5 satisfied the notice requirements of sections 71-6901 to 71-6908;
6 ~~and~~

7 (3) The intentional and knowing performance of a
8 partial-birth abortion as defined in subdivision (9) of section
9 28-326, unless such procedure is necessary to save the life of the
10 mother whose life is endangered by a physical disorder, physical
11 illness, or physical injury, including a life-endangering physical
12 condition caused by or arising from the pregnancy itself; ~~and-~~

13 (4) Performance by a physician of an abortion in
14 violation of the Abortion Pain Prevention Act. If the violation is
15 of section 4 of this act or of subsection (4) of section 6 of this
16 act, the physician's license shall be suspended for at least three
17 months but not more than eighteen months.

18 Sec. 13. Original section 38-2021, Reissue Revised
19 Statutes of Nebraska, and section 28-101, Revised Statutes
20 Supplement, 2009, are repealed.