

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 594

Introduced by Dierks, 40.

Read first time January 21, 2009

Committee: Judiciary

A BILL

- 1 FOR AN ACT relating to abortion; to adopt the Women's Health
- 2 Protection Act; and to provide severability.
- 3 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 Women's Health Protection Act.

3 Sec. 2. The purpose of the Women's Health Protection
4 Act is to provide additional protection to the life, health, and
5 welfare of pregnant women by requiring a reasonable evaluation of
6 risk factors associated with abortion and to provide an additional
7 civil remedy for failure to comply with the act. The act or any
8 part thereof shall not be construed to either make unlawful an
9 abortion that is otherwise lawful or make lawful an abortion that
10 is otherwise unlawful. Nothing in the act shall be construed as
11 creating or recognizing a right to abortion. Nothing in the act
12 shall be construed as overturning or amending the Assault of an
13 Unborn Child Act, the Homicide of the Unborn Child Act, or sections
14 28-325 to 28-345. Under no circumstances should any validity or
15 invalidity of the act or any part thereof be construed so as to
16 impair the independent scope of the Assault of an Unborn Child Act,
17 the Homicide of the Unborn Child Act, or sections 28-325 to 28-345.
18 No violation of the act shall be construed to provide grounds for
19 criminal prosecution for medical negligence or to place a medical
20 license in jeopardy.

21 Sec. 3. For purposes of the Women's Health Protection
22 Act:

23 (1) Abortion means the use or prescription of any
24 instrument, medicine, drug, or other substance or device which
25 is intentionally designed to terminate the pregnancy of a patient

1 known to be pregnant, with an intention other than to increase the
2 probability of a live birth, preserve the life or health of the
3 child after live birth, or remove a dead unborn child, and which
4 causes the premature termination of the pregnancy;

5 (2) Abortion provider means any physician licensed to
6 practice medicine in this state under the Uniform Credentialing Act
7 who performs abortions, any facility licensed under the Health Care
8 Facility Licensure Act that allows abortions to be performed, or
9 any person or entity that refers patients for abortions during the
10 ordinary course of business more than five times per calendar year;

11 (3) Complications associated with abortion means any
12 adverse physical, psychological, or emotional reaction that is
13 statistically associated with abortion such that there is less than
14 a five percent probability that the results of a study confirming
15 such reaction were due to sampling error;

16 (4) Emergency situation means that condition which will,
17 on the basis of a physician's reasonable clinical judgment, (a)
18 complicate the medical condition of a patient so as to necessitate
19 the immediate abortion of her pregnancy to avert her death or
20 (b) after a twenty-four-hour delay, create a serious risk of
21 substantial impairment of a major bodily function;

22 (5) Negligible risk means a risk that a reasonable
23 patient would consider to be immaterial to a decision to undergo an
24 elective procedure;

25 (6) Patient means any female person;

1 (7) Risk factor associated with abortion means any
2 factor, including any physical, psychological, emotional,
3 demographic, or situational factor for which there is a statistical
4 association with one or more complications associated with abortion
5 such that there is less than a five percent probability that such
6 statistical association is due to sampling error. Such information
7 on risk factors shall have been published not less than twelve
8 months prior to the day pre-abortion screening was provided in
9 any peer-reviewed journals indexed by the United States National
10 Library of Medicine's search services (PubMed or MEDLINE) or in any
11 journal included in the Thomson Reuters Scientific Master Journal
12 List, as such information existed on the day that screening and
13 counseling were provided to the patient; and

14 (8) Self-induced abortion means any abortion or menstrual
15 extraction attempted or completed by a patient on her own body.

16 Sec. 4. In addition to requirements under the common
17 or statutory law of this state, it is an act of malpractice or
18 professional negligence as defined in section 44-2810, for purposes
19 of civil remedy alone, to perform or refer a patient for an
20 abortion, except in the case of an emergency situation, unless all
21 of the following are true:

22 (1) Before the abortion provider refers for or performs
23 an abortion, a physician, psychiatrist, psychologist, mental health
24 practitioner, physician assistant, registered nurse, or social
25 worker licensed under the Uniform Credentialing Act has:

1 (a) Evaluated the patient to identify any compulsion to
2 consent to the abortion;

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

5 (c) Informed the patient, the referring physician, and
6 the performing physician of the results of the evaluation in
7 writing which includes at least a checklist identifying both
8 the positive and negative results of the evaluation for each
9 risk factor associated with abortion and the licensed person's
10 certification that the pregnant patient understands and appreciates
11 the significance of the risk factors associated with abortion
12 discussed and is freely seeking the abortion without compulsion;
13 and

14 (d) Retained a copy of the evaluation in the patient's
15 permanent record; and

16 (2) If any risk factors associated with abortion were
17 identified and the patient was informed of the following in such
18 manner and detail that a reasonable patient would consider material
19 to her decision of undergoing an abortion:

20 (a) Each complication that is associated with each
21 identified risk factor associated with abortion; and

22 (b) Any quantifiable risk rates whenever such relevant
23 data exists.

24 Sec. 5. In addition to whatever remedies are available
25 under the common or statutory laws of this state, the intentional,

1 knowing, or negligent failure to comply with the requirements of
2 the Women's Health Protection Act shall provide a basis for the
3 following damages:

4 (1) Each failure to screen for a risk factor associated
5 with abortion and each failure to inform a patient of complications
6 associated with abortion shall entitle the patient or her survivors
7 to ten thousand dollars for each such failure to screen or inform,
8 plus actual damages and reasonable attorney's fees and costs; and

9 (2) A recovery for the patient for the wrongful death
10 of her unborn child under section 30-809 upon proving by a
11 preponderance of evidence that the abortion provider knew or should
12 have known that the patient's consent was either not fully informed
13 or not fully voluntary pursuant to the act.

14 Sec. 6. Any action for civil remedies based on a failure
15 to comply with the requirements of the Women's Health Protection
16 Act shall be commenced in accordance with section 44-2828.

17 Sec. 7. If an abortion provider performed an abortion on
18 a patient who is a minor or referred a patient who is a minor for
19 an abortion without providing the information required in section
20 4 of this act to the patient's parent or legal guardian, then the
21 abortion provider bears the burden of proving that the patient was
22 capable of independently evaluating the information given to her.

23 Sec. 8. Except in the case of an emergency situation, if
24 a patient is provided with the information required by the Women's
25 Health Protection Act less than twenty-four hours before her

1 scheduled abortion, the abortion provider shall bear the burden of
2 proving that the patient had sufficient reflection time, given her
3 age, maturity, emotional state, and mental capacity, to comprehend
4 and consider such information.

5 Sec. 9. In a civil action involving the Women's Health
6 Protection Act, the following shall apply:

7 (1) In determining the liability of the abortion provider
8 and the validity of the consent of a patient, the failure to comply
9 with the requirements of section 4 of this act shall create a
10 rebuttable presumption that the patient would not have undergone
11 the recommended abortion had section 4 of this act been complied
12 with by the abortion provider;

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

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

25 (4) Any abortion provider advertising services in this

1 state shall be deemed to be transacting business in this state
2 pursuant to section 25-536 and shall be subject to the provisions
3 of the act;

4 (5) The failure to comply with the requirements of
5 section 4 of this act shall create the presumption that the
6 negligence was willful or wanton unless the defendant proves by a
7 preponderance of the evidence that a lesser mental state in fact
8 applied;

9 (6) Any verbal or written waiver of liability for
10 malpractice or professional negligence as defined in section
11 44-2810 shall be void and unenforceable;

12 (7) It shall be an affirmative defense to an allegation
13 of inadequate disclosure under the requirements of section 4 of
14 this act that the defendant omitted the contested information
15 because statistically validated surveys of the general population
16 of patients of reproductive age, conducted within the three years
17 before or after the contested abortion, demonstrate that less than
18 five percent of patients would consider the contested information
19 to be relevant to an abortion decision;

20 (8) In addition to the other remedies available under the
21 common or statutory law of this state, a patient or her survivors
22 shall have a cause of action for reckless endangerment against any
23 person, other than a physician or pharmacist licensed under the
24 Uniform Credentialing Act, who attempts or completes an abortion
25 on the patient or aids or abets the commission of a self-induced

1 abortion. Proof of injury shall not be required to recover an award
2 for wrongful death under this subdivision, and the minimum award
3 for damages under this subdivision shall be eight hundred thousand
4 dollars, plus reasonable costs and attorney's fees; and

5 (9) Each violation of the Women's Health Protection Act
6 shall entitle the patient or her survivors to ten thousand dollars
7 for each failure to screen for a risk factor and for each failure
8 to inform her of complications associated with an identified risk
9 factor plus actual damages and reasonable attorney's fees and
10 costs.

11 Sec. 10. In the event that any portion of the Women's
12 Health Protection Act is enjoined and subsequently upheld, the
13 statute of limitations for filing a civil suit under the provisions
14 of the act shall be tolled during the period for which the
15 injunction is pending and for two years thereafter.

16 Sec. 11. If any section in this act or any part of any
17 section is declared invalid or unconstitutional, the declaration
18 shall not affect the validity or constitutionality of the remaining
19 portions.