

LEGISLATIVE BILL 1103

Approved by the Governor April 13, 2010

Introduced by Flood, 19; McCoy, 39; Langemeier, 23; Pirsch, 4; Fulton, 29; Coash, 27; Krist, 10; Schilz, 47; Heidemann, 1; Utter, 33; Stuthman, 22; Wallman, 30; Dubas, 34; Sullivan, 41; Fischer, 43; Janssen, 15; Price, 3; Harms, 48; Cornett, 45; Gay, 14; Nordquist, 7; Mello, 5; Lautenbaugh, 18.

FOR AN ACT relating to abortion; to amend section 38-2021, Reissue Revised Statutes of Nebraska, and section 28-101, Revised Statutes Supplement, 2009; to adopt the Pain-Capable Unborn Child Protection Act; to provide and change civil and criminal penalties with respect to abortion; to harmonize provisions; to provide an operative date; to provide severability; and to repeal the original sections.

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

Section 1. Sections 1 to 10 of this act shall be known and may be cited as the Pain-Capable Unborn Child Protection Act.

Sec. 2. For purposes of the Pain-Capable Unborn Child Protection Act:

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

(2) Attempt to perform or induce an abortion means an act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion in this state in violation of the Pain-Capable Unborn Child Protection Act;

(3) Fertilization means the fusion of a human spermatozoon with a human ovum;

(4) Medical emergency means a condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function;

(5) Postfertilization age means the age of the unborn child as calculated from the fertilization of the human ovum;

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

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

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

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

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

Sec. 3. The Legislature makes the following findings:

(1) At least by twenty weeks after fertilization there is substantial evidence that an unborn child has the physical structures necessary to experience pain;

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

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

(4) Even before twenty weeks after fertilization, unborn children have been observed to exhibit hormonal stress responses to painful stimuli.

Such responses were reduced when pain medication was administered directly to such unborn children; and

(5) It is the purpose of the State of Nebraska to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

Sec. 4. (1) Except in the case of a medical emergency which prevents compliance with this section, no abortion shall be performed or induced or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination of the probable postfertilization age of the unborn child or relied upon such a determination made by another physician. In making such a determination, a physician shall make such inquiries of the woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to postfertilization age.

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

Sec. 5. No person shall perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined, by the physician performing or inducing the abortion or by another physician upon whose determination that physician relies, that the probable postfertilization age of the woman's unborn child is twenty or more weeks unless, in reasonable medical judgment (1) she has a condition which so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function or (2) it is necessary to preserve the life of an unborn child. No such condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function. In such a case, the physician shall terminate the pregnancy in the manner which, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function of the woman than would another available method. No such greater risk shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

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

(a) If a determination of probable postfertilization age was made, the probable postfertilization age determined and the method and basis of the determination;

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

(c) If the probable postfertilization age was determined to be twenty or more weeks, the basis of the determination that the pregnant woman had a condition which so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, or the basis of the determination that it was necessary to preserve the life of an unborn child; and

(d) The method used for the abortion and, in the case of an abortion performed when the probable postfertilization age was determined to be twenty or more weeks, whether the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive or, if such a method was not used, the basis of the determination that termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function of the woman than would other available methods.

(2) By June 30 of each year, the department shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection (1) of this section. Each such report shall also provide the statistics for all previous calendar years during which this section was in effect, adjusted to reflect any additional information from late or corrected reports. The department shall take care

to ensure that none of the information included in the public reports could reasonably lead to the identification of any pregnant woman upon whom an abortion was performed.

(3) Any physician who fails to submit a report by the end of thirty days following the due date shall be subject to a late fee of five hundred dollars for each additional thirty-day period or portion of a thirty-day period the report is overdue. Any physician required to report in accordance with the Pain-Capable Unborn Child Protection Act who has not submitted a report, or has submitted only an incomplete report, more than one year following the due date, may, in an action brought in the manner in which actions are brought to enforce the Uniform Credentialing Act pursuant to section 38-1,139, be directed by a court of competent jurisdiction to submit a complete report within a time period stated by court order or be subject to civil contempt. Failure by any physician to conform to any requirement of this section, other than late filing of a report, constitutes unprofessional conduct pursuant to section 38-2021. Failure by any physician to submit a complete report in accordance with a court order constitutes unprofessional conduct pursuant to section 38-2021. Intentional or reckless falsification of any report required under this section is a Class V misdemeanor.

(4) Within ninety days after the operative date of this act, the department shall adopt and promulgate rules and regulations to assist in compliance with this section.

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

Sec. 8. (1) Any woman upon whom an abortion has been performed in violation of the Pain-Capable Unborn Child Protection Act or the father of the unborn child who was the subject of such an abortion may maintain an action against the person who performed the abortion in an intentional or a reckless violation of the Pain-Capable Unborn Child Protection Act for actual damages. Any woman upon whom an abortion has been attempted in violation of the Pain-Capable Unborn Child Protection Act may maintain an action against the person who attempted to perform the abortion in an intentional or a reckless violation of the Pain-Capable Unborn Child Protection Act for actual damages.

(2) A cause of action for injunctive relief against any person who has intentionally violated the Pain-Capable Unborn Child Protection Act may be maintained by the woman upon whom an abortion was performed or attempted to be performed in violation of the Pain-Capable Unborn Child Protection Act, by any person who is the spouse, parent, sibling, or guardian of, or a current or former licensed health care provider of, the woman upon whom an abortion has been performed or attempted to be performed in violation of the Pain-Capable Unborn Child Protection Act, by a county attorney with appropriate jurisdiction, or by the Attorney General. The injunction shall prevent the abortion provider from performing further abortions in violation of the Pain-Capable Unborn Child Protection Act in this state.

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

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

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

Sec. 9. In every civil or criminal proceeding or action brought under the Pain-Capable Unborn Child Protection Act, the court shall rule whether the anonymity of any woman upon whom an abortion has been performed or attempted shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion or sua sponte, shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or attempted, anyone, other than a public official, who brings an action under section 8 of this act shall do so under

a pseudonym. This section shall not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

Sec. 10. If any one or more provisions, sections, subsections, sentences, clauses, phrases, or words of the Pain-Capable Unborn Child Protection Act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of the Pain-Capable Unborn Child Protection Act shall remain effective notwithstanding such unconstitutionality. The Legislature hereby declares that it would have passed the Pain-Capable Unborn Child Protection Act, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, sections, subsections, sentences, clauses, phrases, or words of the Pain-Capable Unborn Child Protection Act, or the application of the Pain-Capable Unborn Child Protection Act, would be declared unconstitutional.

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

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

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

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

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

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

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

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

Sec. 13. This act becomes operative on October 15, 2010.

Sec. 14. Original section 38-2021, Reissue Revised Statutes of Nebraska, and section 28-101, Revised Statutes Supplement, 2009, are repealed.