

LEGISLATIVE BILL 23

Approved by the Governor June 9, 1997

Introduced by Maurstad, 30; Bruning, 3; Vrtiska, 1; Hartnett, 45; Jones, 43; Preister, 5; Schrock, 38; Robak, 22; Tyson, 19; D. Pedersen, 39; Witek, 31; Stuhr, 24; Hilgert, 7; Jensen, 20; Wehrbein, 2; Dierks, 40; Elmer, 44; Schmitt, 41; D. Pederson, 42; Robinson, 16; Bromm, 23; Brashear, 4; Crosby, 29; Hudkins, 21; Engel, 17; C. Peterson, 35; Coordsen, 32; McKenzie, 34

AN ACT relating to abortions; to amend sections 28-325, 28-340, 71-148, 71-155, and 71-171.02, Reissue Revised Statutes of Nebraska, and section 28-326, Revised Statutes Supplement, 1996; to prohibit partial-birth abortions; to provide a penalty; to provide for professional license suspension and revocation; to harmonize provisions; to provide severability; to repeal the original sections; and to declare an emergency.

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

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

28-325. The Legislature hereby finds and declares:

(1) That the following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-325 to 28-345 and section 3 of this act are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but are rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible;

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

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

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

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

Sec. 2. Section 28-326, Revised Statutes Supplement, 1996, is amended to read:

28-326. For purposes of sections 28-325 to 28-345 and section 3 of this act, unless the context otherwise requires:

(1) Abortion ~~shall mean~~ means the use or prescription of any instrument, medicine, drug, or other substance or device intentionally 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, and which causes the premature termination of the pregnancy;

(2) Hospital ~~shall mean~~ means those institutions licensed by the Department of Health and Human Services Regulation and Licensure pursuant to sections 71-2017 to 71-2029;

(3) Physician ~~shall mean~~ means any person licensed to practice medicine in this state as provided in sections 71-102 to 71-110;

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

(5) Conception ~~shall mean~~ means the fecundation of the ovum by the spermatozoa;

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

(7) Emergency situation ~~shall mean~~ means that condition which, on the basis of the physician's good faith clinical judgment, so complicates the

medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial impairment of a major bodily function; and

(8) Probable gestational age of the unborn child shall mean means what will with reasonable probability, in the judgment of the physician, be the gestational age of the unborn child at the time the abortion is planned to be performed; and

(9) Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

Sec. 3. (1) No partial-birth abortion shall be performed in this state, 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.

(2) The intentional and knowing performance of an unlawful partial-birth abortion in violation of subsection (1) of this section is a Class III felony.

(3) No woman upon whom an unlawful partial-birth abortion is performed shall be prosecuted under this section or for conspiracy to violate this section.

(4) The intentional and knowing performance of an unlawful partial-birth abortion shall result in the automatic suspension and revocation of an attending physician's license to practice medicine in Nebraska by the Director of Regulation and Licensure pursuant to sections 71-147 to 71-161.20.

(5) Upon the filing of criminal charges under this section by the Attorney General or a county attorney, the Attorney General shall also file a petition to suspend and revoke the attending physician's license to practice medicine pursuant to section 71-150. A hearing on such administrative petition shall be set in accordance with section 71-153. At such hearing, the attending physician shall have the opportunity to present evidence that the physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. A defendant against whom criminal charges are brought under this section may bring a motion to delay the beginning of the trial until after the entry of an order by the Director of Regulation and Licensure pursuant to section 71-155. The findings of the Director of Regulation and Licensure as to whether the attending physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, shall be admissible in the criminal proceedings brought pursuant to this section.

Sec. 4. Section 28-340, Reissue Revised Statutes of Nebraska, is amended to read:

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

Sec. 5. Section 71-148, Reissue Revised Statutes of Nebraska, is amended to read:

71-148. For purposes of section 71-147, unprofessional conduct shall mean means any departure from or failure to conform to the standards of acceptable and prevailing practice of a profession or occupation or the ethics of the profession or occupation, 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) Solicitation of professional patronage by agents or persons, popularly known as cappers or steerers, or profiting by the acts of those representing themselves to be agents of the licensee, certificate holder, or registrant;

(2) Receipt of fees on the assurance that a manifestly incurable disease can be permanently cured;

(3) Division of fees, or agreeing to split or divide the fees, received for professional services with any person for bringing or referring a

patient;

(4) Obtaining any fee for professional services by fraud, deceit, or misrepresentation, including, but not limited to, falsification of third-party claim documents;

(5) Cheating on or attempting to subvert the licensing or certification examination;

(6) Assisting in the care or treatment of a patient without the consent of such patient or his or her legal representative;

(7) Use of any letters, words, or terms, either as a prefix, affix, or suffix, on stationery, in advertisements, or otherwise, indicating that such person is entitled to practice a system or mode of healing for which he or she is not licensed, certified, or registered;

(8) Performing, procuring, or aiding and abetting in the performance or procurement of a criminal abortion;

(9) Willful betrayal of a professional secret except as otherwise provided by law;

(10) Making use of any advertising statements of a character tending to deceive or mislead the public;

(11) Advertising professional superiority or the performance of professional services in a superior manner;

(12) Advertising to guarantee any professional service or to perform any operations painlessly;

(13) 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;

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

(15) 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;

~~(15)~~ (16) The providing by a massage therapist of sexual stimulation as part of massage therapy;

~~(16)~~ (17) Violating an assurance of compliance entered into under section 71-171.02;

~~(17)~~ (18) Commission of any act of sexual abuse, misconduct, or exploitation related to the practice of the profession or occupation of the applicant, licensee, certificate holder, or registrant;

~~(18)~~ (19) Failure to keep and maintain adequate records of treatment or service;

~~(19)~~ (20) Prescribing, administering, distributing, dispensing, giving, or selling any controlled substance or other drug recognized as addictive or dangerous for other than a medically accepted therapeutic purpose;

~~(20)~~ (21) Prescribing any controlled substance to oneself or, except in the case of a medical emergency, to one's spouse or child; and

~~(21)~~ (22) Such other acts as may be defined in rules and regulations adopted and promulgated by the board of examiners in the profession of the applicant, licensee, certificate holder, or registrant with the approval of the department.

Nothing in this section shall be construed to exclude determination of additional conduct that is unprofessional by adjudication in individual contested cases.

Sec. 6. Section 71-155, Reissue Revised Statutes of Nebraska, is amended to read:

71-155. The proceeding under section 71-150 shall be summary in its nature and triable as an equity action and shall be heard by the Director of Regulation and Licensure or by a hearing officer designated by the director under rules and regulations of the department. Affidavits may be received in evidence in the discretion of the director or hearing officer. The department shall have the power to administer oaths, to subpoena witnesses and compel their attendance, and to issue subpoenas duces tecum and require the production of books, accounts, and documents in the same manner and to the same extent as the district courts of the state. Depositions may be used by either party. Upon the completion of any hearing held under this section, the director shall, if the petition is brought with respect to subdivision (15) of section 71-148, make findings as to whether the licensee's conduct was necessary to save the life of a mother whose life was 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 shall have the authority through entry of an order to exercise in his or her discretion any or all of the following powers, irrespective of the petition:

(1) Issue a censure or reprimand against the licensee, certificate holder, or registrant;

(2) Suspend judgment;

(3) Place the licensee, certificate holder, or registrant on probation;

(4) Place a limitation or limitations on the license, certificate, or registration and upon the right of the licensee, certificate holder, or registrant to practice the profession to such extent, scope, or type of practice, for such time, and under such conditions as are found necessary and proper;

(5) Impose a civil penalty not to exceed ten thousand dollars. The amount of the penalty shall be based on the severity of the violation;

(6) Enter an order of suspension of the license, certificate, or registration;

(7) Enter an order of revocation of the license, certificate, or registration; and

(8) Dismiss the action.

If the director determines that guilt has been established, the director may, at his or her discretion, consult with the board of examiners for the profession involved concerning sanctions to be imposed or terms and conditions of the sanctions. When the director consults with a board of examiners, the licensee or certificate holder shall be provided with a copy of the director's request, the recommendation of the board of examiners, and an opportunity to respond in such manner as the director determines.

The licensee, certificate holder, or registrant shall not engage in the practice of a profession after a license, certificate, or registration to practice such profession is revoked or during the time for which it is suspended. If a license, certificate, or registration is suspended, the suspension shall be for a definite period of time to be set by the director. The director may provide that the license, certificate, or registration shall be automatically reinstated upon expiration of such period, reinstated if the terms and conditions as set by the director are satisfied, or reinstated subject to probation or limitations or conditions upon the practice of the licensee, certificate holder, or registrant. If such license, certificate, or registration is revoked, such revocation shall be for all times, except that at any time after the expiration of two years, application may be made for reinstatement pursuant to section 71-161.04.

Sec. 7. Section 71-171.02, Reissue Revised Statutes of Nebraska, is amended to read:

71-171.02. Upon referral of a matter under section 71-171.01 by the Attorney General, the board of examiners may:

(1) Send to the licensee, certificate holder, or registrant a letter of concern, approved by the Attorney General, which includes a statement of the statute, rule, or regulation in question and a statement advising the licensee, certificate holder, or registrant of the conduct that would violate such statute, rule, or regulation. Such letter shall be signed by the board and shall become a part of the public record of the licensee, certificate holder, or registrant;

(2) Advise the Attorney General on the content of an agreement to serve as the basis of an assurance of compliance. The Attorney General may contact the licensee, certificate holder, or registrant to reach, by voluntary agreement, an assurance of compliance. The assurance shall include a statement of the statute, rule, or regulation in question, a description of the conduct that would violate such statute, rule, or regulation, the assurance of the licensee, certificate holder, or registrant that he or she will not engage in such conduct, and acknowledgment by the licensee, certificate holder, or registrant that violation of the assurance constitutes unprofessional conduct as provided by subdivision (16) (17) of section 71-148. Such assurance shall be signed by the licensee, certificate holder, or registrant and shall become a part of the public record of the licensee, certificate holder, or registrant. The licensee, certificate holder, or registrant shall not be required to admit to any violation of the law and the assurance shall not be construed as such an admission; or

(3) Recommend that the Attorney General file a petition under section 71-150.

Sec. 8. If any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.

Sec. 9. Original sections 28-325, 28-340, 71-148, 71-155, and 71-171.02, Reissue Revised Statutes of Nebraska, and section 28-326, Revised Statutes Supplement, 1996, are repealed.

Sec. 10. Since an emergency exists, this act takes effect when passed and approved according to law.