

AMENDMENTS TO LB 1103

Introduced by Judiciary.

1 1. Strike the original sections and insert the following
2 new sections:

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

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

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

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

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

23 (4) Medical emergency means a condition which, in

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

9 (5) Post-fertilization age means the age of the unborn
10 child as calculated from the fertilization of the human ovum;

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

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

18 (8) Probable post-fertilization age of the unborn child
19 means what, in reasonable medical judgment, will with reasonable
20 probability be the post-fertilization age of the unborn child at
21 the time the abortion is planned to be performed;

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

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

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

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

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

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

11 (4) Even before twenty weeks after fertilization, unborn
12 children have been observed to exhibit hormonal stress responses to
13 painful stimuli. Such responses were reduced when pain medication
14 was administered directly to such unborn children; and

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

19 Sec. 4. (1) Except in the case of a medical emergency
20 which prevents compliance with this section, no abortion shall be
21 performed or induced or be attempted to be performed or induced
22 unless the physician performing or inducing it has first made
23 a determination of the probable post-fertilization age of the
24 unborn child or relied upon such a determination made by another
25 physician. In making such a determination, a physician shall
26 make such inquiries of the woman and perform or cause to be
27 performed such medical examinations and tests as a reasonably

1 prudent physician, knowledgeable about the case and the medical
2 conditions involved, would consider necessary to perform in making
3 an accurate diagnosis with respect to post-fertilization age.

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

7 Sec. 5. No person shall perform or induce or attempt
8 to perform or induce an abortion upon a woman when the probable
9 post-fertilization age of the woman's unborn child is twenty or
10 more weeks unless, in reasonable medical judgment: (1) She has
11 a condition which so complicates her medical condition as to
12 necessitate the abortion of her pregnancy to avert her death or
13 to avert serious risk of substantial and irreversible physical
14 impairment of a major bodily function; or (2) it is necessary
15 to preserve the life of an unborn child. No such condition shall
16 be deemed to exist if it is based on a claim or diagnosis
17 that the woman will engage in conduct which would result in her
18 death or in substantial and irreversible physical impairment of
19 a major bodily function. In such a case, the physician shall
20 terminate the pregnancy in the manner which, in reasonable medical
21 judgment, provides the best opportunity for the unborn child to
22 survive, unless, in reasonable medical judgment, termination of the
23 pregnancy in that manner would pose a greater risk either of the
24 death of the pregnant woman or of the substantial and irreversible
25 physical impairment of a major bodily function of the woman than
26 would another available method. No such greater risk shall be
27 deemed to exist if it is based on a claim or diagnosis that the

1 woman will engage in conduct which would result in her death or in
2 substantial and irreversible physical impairment of a major bodily
3 function.

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

9 (a) If a determination of probable post-fertilization age
10 was made, the probable post-fertilization age determined and the
11 method and basis of the determination;

12 (b) If a determination of probable post-fertilization
13 age was not made, the basis of the determination that a medical
14 emergency existed;

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

23 (d) The method used for the abortion and, in the case
24 of an abortion performed when the probable post-fertilization age
25 was determined to be twenty or more weeks, whether the method
26 of abortion used was one that, in reasonable medical judgment,
27 provided the best opportunity for the unborn child to survive.

1 If such a method was not used, the basis of the determination
2 that termination of the pregnancy in that manner would pose a
3 greater risk either of the death of the pregnant woman or of the
4 substantial and irreversible physical impairment of a major bodily
5 function of the woman than would other available methods.

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

17 (3) Any physician who fails to submit a report by the
18 end of thirty days following the due date shall be subject to a
19 late fee of five hundred dollars for each additional thirty-day
20 period or portion of a thirty-day period the report is overdue. Any
21 physician required to report in accordance with the Pain-Capable
22 Unborn Child Protection Act who has not submitted a report, or has
23 submitted only an incomplete report, more than one year following
24 the due date, may, in an action brought in the manner in which
25 actions are brought to enforce the Uniform Credentialing Act
26 pursuant to section 38-1,139, be directed by a court of competent
27 jurisdiction to submit a complete report within a time period

1 stated by court order or be subject to civil contempt. Failure by
2 any physician to conform to any requirement of this section, other
3 than late filing of a report, constitutes unprofessional conduct
4 pursuant to section 38-2021. Failure by any physician to submit
5 a complete report in accordance with a court order constitutes
6 unprofessional conduct pursuant to section 38-2021. Intentional or
7 reckless falsification of any report required under this section is
8 a Class V misdemeanor.

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

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

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

26 (2) A cause of action for injunctive relief against any
27 person who has intentionally violated the act may be maintained by

1 the woman upon whom an abortion was performed or attempted to be
2 performed in violation of the act, any person who is the spouse,
3 parent, sibling, or guardian of, or a current or former licensed
4 health care provider of, the woman upon whom an abortion has been
5 performed or attempted to be performed in violation of this act, by
6 a county attorney with appropriate jurisdiction, or by the Attorney
7 General. The injunction shall prevent the abortion provider from
8 performing further abortions in violation of the act in this state.

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

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

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

20 Sec. 9. In every civil or criminal proceeding or action
21 brought under the Pain-Capable Unborn Child Protection Act the
22 court shall rule whether the anonymity of any woman upon whom
23 an abortion has been performed or attempted shall be preserved
24 from public disclosure if she does not give her consent to such
25 disclosure. The court, upon motion or sua sponte, shall make
26 such a ruling and, upon determining that her anonymity should
27 be preserved, shall issue orders to the parties, witnesses, and

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

15 Sec. 10. If any one or more provision, section,
16 subsection, sentence, clause, phrase, or word of the Pain-Capable
17 Unborn Child Protection Act or the application thereof to any
18 person or circumstance is found to be unconstitutional, the same
19 is hereby declared to be severable and the balance of the act
20 shall remain effective notwithstanding such unconstitutionality.
21 The Legislature hereby declares that it would have passed the
22 act, and each provision, section, subsection, sentence, clause,
23 phrase, or word thereof, irrespective of the fact that any one
24 or more provision, section, subsection, sentence, clause, phrase,
25 or word of the act, or application of the act, would be declared
26 unconstitutional.

27 Sec. 11. Section 28-101, Revised Statutes Supplement,

1 2009, is amended to read:

2 28-101 Sections 28-101 to 28-1356 and sections 1 to 10 of
3 this act shall be known and may be cited as the Nebraska Criminal
4 Code.

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

7 38-2021 Unprofessional conduct means any departure from
8 or failure to conform to the standards of acceptable and prevailing
9 practice of medicine and surgery or the ethics of the profession,
10 regardless of whether a person, patient, or entity is injured, or
11 conduct that is likely to deceive or defraud the public or is
12 detrimental to the public interest, including, but not limited to:

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

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

21 (3) The intentional and knowing performance of a
22 partial-birth abortion as defined in subdivision (9) of section
23 28-326, unless such procedure is necessary to save the life of the
24 mother whose life is endangered by a physical disorder, physical
25 illness, or physical injury, including a life-endangering physical
26 condition caused by or arising from the pregnancy itself; ~~and-~~

27 (4) Performance by a physician of an abortion in

- 1 violation of the Pain-Capable Unborn Child Protection Act.
- 2 Sec. 13. Original section 38-2021, Reissue Revised
- 3 Statutes of Nebraska, and section 28-101, Revised Statutes
- 4 Supplement, 2009, are repealed.