

E AND R AMENDMENTS TO LB 1103

Introduced by Enrollment and Review Committee: Nordquist, 7,  
Chairperson

1           1. Strike the original sections and all amendments  
2 thereto and insert the following 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 Pain-Capable Unborn Child Protection 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) Postfertilization 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 postfertilization age of the unborn child  
19 means what, in reasonable medical judgment, will with reasonable  
20 probability be the postfertilization age of the unborn child at the  
21 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 postfertilization 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 postfertilization 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 postfertilization 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 to  
15 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 postfertilization age  
10 was made, the probable postfertilization age determined and the  
11 method and basis of the determination;

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

15           (c) If the probable postfertilization 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 postfertilization 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 or,

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 operative 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  
20 such an abortion may maintain an action against the person who  
21 performed the abortion in an intentional or a reckless violation  
22 of the Pain-Capable Unborn Child Protection Act for actual damages.  
23 Any woman upon whom an abortion has been attempted in violation  
24 of the Pain-Capable Unborn Child Protection Act may maintain an  
25 action against the person who attempted to perform the abortion in  
26 an intentional or a reckless violation of the Pain-Capable Unborn  
27 Child Protection Act for actual damages.

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

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

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

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

25           Sec. 9. In every civil or criminal proceeding or action  
26 brought under the Pain-Capable Unborn Child Protection Act, the  
27 court shall rule whether the anonymity of any woman upon whom



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

20           Sec. 10. If any one or more provisions, sections,  
21 subsections, sentences, clauses, phrases, or words of the  
22 Pain-Capable Unborn Child Protection Act or the application thereof  
23 to any person or circumstance is found to be unconstitutional, the  
24 same is hereby declared to be severable and the balance of the  
25 Pain-Capable Unborn Child Protection Act shall remain effective  
26 notwithstanding such unconstitutionality. The Legislature hereby  
27 declares that it would have passed the Pain-Capable Unborn Child

1 Protection Act, and each provision, section, subsection, sentence,  
2 clause, phrase, or word thereof, irrespective of the fact that any  
3 one or more provisions, sections, subsections, sentences, clauses,  
4 phrases, or words of the Pain-Capable Unborn Child Protection Act,  
5 or the application of the Pain-Capable Unborn Child Protection Act,  
6 would be declared unconstitutional.

7           Sec. 11. Section 28-101, Revised Statutes Supplement,  
8 2009, is amended to read:

9           28-101 Sections 28-101 to 28-1356 and sections 1 to 10 of  
10 this act shall be known and may be cited as the Nebraska Criminal  
11 Code.

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

14           38-2021 Unprofessional conduct means any departure from  
15 or failure to conform to the standards of acceptable and prevailing  
16 practice of medicine and surgery or the ethics of the profession,  
17 regardless of whether a person, patient, or entity is injured, or  
18 conduct that is likely to deceive or defraud the public or is  
19 detrimental to the public interest, including, but not limited to:

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

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

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

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

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

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

13          2. On page 1, lines 3 and 4, strike "Abortion Pain  
14 Prevention" and insert "Pain-Capable Unborn Child Protection"; and  
15 in line 6 after the first semicolon insert "to provide an operative  
16 date;".