

House Substitute for SENATE BILL No. 35

By Committee on Federal and State Affairs

3-23

1 AN ACT concerning abortion; relating to restrictions on late term
2 abortions; amending K.S.A. 65-445 and repealing the existing section.

3
4 *Be it enacted by the Legislature of the State of Kansas:*

5 New Section 1. The legislature hereby finds and declares that:

6 (a) Pain receptors (nociceptors) are present throughout the unborn
7 child's entire body by no later than 16 weeks after fertilization and nerves
8 link these receptors to the brain's thalamus and subcortical plate by no
9 later than 20 weeks;

10 (b) by eight weeks after fertilization, the unborn child reacts to touch.
11 By 20 weeks after fertilization, the unborn child reacts to stimuli that
12 would be recognized as painful if applied to an adult human, for example,
13 by recoiling;

14 (c) in the unborn child, application of such painful stimuli is
15 associated with significant increases in stress hormones known as the
16 stress response;

17 (d) subjection to such painful stimuli is associated with long-term
18 harmful neurodevelopmental effects, such as altered pain sensitivity and,
19 possibly, emotional, behavioral and learning disabilities later in life;

20 (e) for the purposes of surgery on unborn children, fetal anesthesia is
21 routinely administered and is associated with a decrease in stress
22 hormones compared to their level when painful stimuli is applied without
23 such anesthesia;

24 (f) the position, asserted by some medical experts, that the unborn
25 child is incapable of experiencing pain until a point later in pregnancy than
26 20 weeks after fertilization predominately rests on the assumption that the
27 ability to experience pain depends on the cerebral cortex and requires
28 nerve connections between the thalamus and the cortex. However, recent
29 medical research and analysis, especially since 2007, provides strong
30 evidence for the conclusion that a functioning cortex is not necessary to
31 experience pain;

32 (g) substantial evidence indicates that children born missing the bulk
33 of the cerebral cortex, those with hydranencephaly, nevertheless
34 experience pain;

35 (h) in adults, stimulation or ablation of the cerebral cortex does not
36 alter pain perception, while stimulation or ablation of the thalamus does;

1 (i) substantial evidence indicates that structures used for pain
2 processing in early development differ from those of adults, using different
3 neural elements available at specific times during development, such as the
4 subcortical plate, to fulfill the role of pain processing;

5 (j) consequently, there is substantial medical evidence that an unborn
6 child is capable of experiencing pain by 20 weeks after fertilization; and

7 (k) it is the purpose of the state to assert a compelling state interest in
8 protecting the lives of unborn children from the stage at which substantial
9 medical evidence indicates that they are capable of feeling pain.

10 New Sec. 2. As used in sections 1 through 3, and amendments
11 thereto:

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

20 (b) "Bodily function" means physical function. The term "bodily
21 function" does not include mental or emotional functions.

22 (c) "Department" means the department of health and environment.

23 (d) "Gestational age" means the time that has elapsed since the first
24 day of the woman's last menstrual period.

25 (e) "Medical emergency" means a condition that, in reasonable
26 medical judgment, so complicates the medical condition of the pregnant
27 woman as to necessitate the immediate abortion of her pregnancy without
28 first determining gestational age to avert her death or for which a delay
29 necessary to determine gestational age will create serious risk of
30 substantial and irreversible physical impairment of a major bodily
31 function. No condition shall be deemed a medical emergency if based on a
32 claim or diagnosis that the woman will engage in conduct which she
33 intends to result in her death or in substantial and irreversible physical
34 impairment of a major bodily function.

35 (f) "Pain-capable unborn child" means an unborn child having
36 reached the gestational age of 22 weeks or more.

37 (g) "Physician" means a person licensed to practice medicine and
38 surgery in this state.

39 (h) "Pregnant" or "pregnancy" means that female reproductive
40 condition of having an unborn child in the mother's body.

41 New Sec. 3. (a) No person shall perform or induce, or attempt to
42 perform or induce an abortion upon a pain-capable unborn child unless
43 such person is a physician and has a documented referral from another

1 physician not legally or financially affiliated with the physician
2 performing or inducing, or attempting to perform or induce the abortion
3 and both physicians provide a written determination, based upon a medical
4 judgment arrived at using and exercising that degree of care, skill and
5 proficiency commonly exercised by the ordinary skillful, careful and
6 prudent physician in the same or similar circumstances and that would be
7 made by a reasonably prudent physician, knowledgeable in the field, and
8 knowledgeable about the case and the treatment possibilities with respect
9 to the conditions involved, that: (1) The abortion is necessary to preserve
10 the life of the pregnant woman; or (2) a continuation of the pregnancy will
11 cause a substantial and irreversible physical impairment of a major bodily
12 function of the pregnant woman. No such condition shall be deemed to
13 exist if it is based on a claim or diagnosis that the woman will engage in
14 conduct which she intends to result in her death or in substantial and
15 irreversible physical impairment of a major bodily function.

16 (b) Except in the case of a medical emergency, a copy of the written
17 documented referral and of the abortion-performing physician's written
18 determination shall be provided to the pregnant woman no less than 30
19 minutes prior to the initiation of the abortion. The written determination
20 shall be time-stamped at the time it is delivered to the pregnant woman.
21 The medical basis for the determination shall also be reported by the
22 physician as part of the written report made by the physician to the
23 secretary of health and environment under K.S.A. 65-445, and
24 amendments thereto. Such determination shall specify:

25 (1) If the abortion is necessary to preserve the life of the pregnant
26 woman and the medical basis of such determination, including the specific
27 medical condition the physician believes would cause the death of the
28 pregnant woman; or

29 (2) if a continuation of the pregnancy will cause a substantial and
30 irreversible physical impairment of a major bodily function of the pregnant
31 woman and the medical basis of such determination, including the specific
32 medical condition the physician believes would constitute a substantial and
33 irreversible impairment of a major bodily function of the pregnant woman.

34 (c) (1) Except in the case of a medical emergency, prior to performing
35 or inducing, or attempting to perform or induce an abortion upon a
36 woman, the physician shall determine the gestational age of the unborn
37 child according to accepted obstetrical and neonatal practice and standards
38 applied by physicians in the same or similar circumstances. In making
39 such a determination, the physician shall make such inquiries of the
40 woman and perform or cause to be performed such medical examinations
41 and tests as a reasonably prudent physician, knowledgeable about the case
42 and medical conditions involved, would consider necessary to perform in
43 making an accurate diagnosis with respect to gestational age. The

1 physician shall document as part of the medical records of the woman the
2 basis for the determination of gestational age. The physician shall report
3 such determinations, the medical basis and the reasons for such
4 determinations in writing to the medical care facility in which the abortion
5 is performed or induced for inclusion in the report of the medical care
6 facility to the secretary of health and environment under K.S.A. 65-445,
7 and amendments thereto, or if the abortion is not performed or induced in
8 a medical care facility, the physician who performs or induces the abortion
9 shall report such determinations, the medical basis and the reasons for
10 such determinations in writing to the secretary of health and environment
11 as part of the written report made by the physician to the secretary of
12 health and environment under K.S.A. 65-445, and amendments thereto.

13 (2) If the physician determines the gestational age of the unborn child
14 is 22 or more weeks, then no abortion of the pain-capable unborn child
15 shall be performed or induced, or attempted to be performed or induced
16 except as provided for in subsection (a). In such event, the physician who
17 performs or induces the abortion shall report such determinations, the
18 medical basis and the reasons for such determinations, including the
19 specific medical diagnosis for the determination that an abortion is
20 necessary to preserve the life of the pregnant woman or that a continuation
21 of the pregnancy will cause a substantial and irreversible physical
22 impairment of a major bodily function of the pregnant woman and the
23 name of the referring physician required by subsection (a) in writing to the
24 medical care facility in which the abortion is performed or induced for
25 inclusion in the report of the medical care facility to the secretary of health
26 and environment under K.S.A. 65-445, and amendments thereto, or if the
27 abortion is not performed or induced in a medical care facility, the
28 physician who performs or induces the abortion shall report such
29 determinations, the medical basis and the reasons for such determinations,
30 including the specific medical diagnosis for the determination that an
31 abortion is necessary to preserve the life of the pregnant woman or that a
32 continuation of the pregnancy will cause a substantial and irreversible
33 physical impairment of a major bodily function of the pregnant woman
34 and the name of the referring physician required by subsection (a) in
35 writing to the secretary of health and environment as part of the written
36 report made by the physician to the secretary of health and environment
37 under K.S.A. 65-445, and amendments thereto.

38 (3) The physician shall retain the medical records required to be kept
39 under this subsection for not less than 10 years.

40 (d) The secretary of health and environment shall adopt rules and
41 regulations to administer this section. Such rules and regulations shall
42 include:

43 (1) A detailed list of the information that must be kept by a physician

1 under this section;

2 (2) the contents of the written reports required under this section; and

3 (3) detailed specifications regarding information that must be
4 provided by a physician in order to comply with the obligation to disclose
5 the medical basis and specific medical diagnosis relied upon in
6 determining gestational age and in determining that an abortion is
7 necessary to preserve the life of the pregnant woman, or that a
8 continuation of the pregnancy will cause a substantial and irreversible
9 physical impairment of a major bodily function of the pregnant woman.

10 (e) A woman upon whom an abortion is performed or induced, or
11 attempted to be performed or induced shall not be prosecuted under this
12 section for a conspiracy to violate this section pursuant to section 34 of
13 chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto.

14 (f) Nothing in this section shall be construed to create a right to an
15 abortion. Notwithstanding any provision of this section, a person shall not
16 perform an abortion that is prohibited by law.

17 (g) (1) A woman upon whom an abortion is performed or induced in
18 violation of this section, the father, if married to the woman at the time of
19 the abortion, and the parents or custodial guardian of the woman, if the
20 woman has not attained the age of 18 years at the time of the abortion,
21 may in a civil action obtain appropriate relief, unless, in a case where the
22 plaintiff is not the woman upon whom the abortion was performed or
23 induced, the pregnancy resulted from the plaintiff's criminal conduct.

24 (2) Such relief shall include:

25 (A) Money damages for all injuries, psychological and physical,
26 occasioned by the violation of this section;

27 (B) statutory damages equal to three times the cost of the abortion;
28 and

29 (C) reasonable attorney fees.

30 (h) The prosecution of violations of this section may be brought by
31 the attorney general or by the district attorney or county attorney for the
32 county where any violation of this section is alleged to have occurred.

33 (i) If any provision of this section is held to be invalid or
34 unconstitutional, it shall be conclusively presumed that the legislature
35 would have enacted the remainder of this section without such invalid or
36 unconstitutional provision.

37 (j) Upon a first conviction of a violation of this section, a person shall
38 be guilty of a class A person misdemeanor. Upon a second or subsequent
39 conviction of a violation of this section, a person shall be guilty of a
40 severity level 10, person felony.

41 Sec. 4. K.S.A. 65-445 is hereby amended to read as follows: 65-445.

42 (a) Every medical care facility shall keep written records of all pregnancies
43 which are lawfully terminated within such medical care facility and shall

1 annually submit a written report thereon to the secretary of health and
2 environment in the manner and form prescribed by the secretary. Every
3 person licensed to practice medicine and surgery shall keep a record of all
4 pregnancies which are lawfully terminated by such person in a location
5 other than a medical care facility and shall annually submit a written report
6 thereon to the secretary of health and environment in the manner and form
7 prescribed by the secretary.

8 (b) Each report required by this section shall include the number of
9 pregnancies terminated during the period of time covered by the report, the
10 type of medical facility in which the pregnancy was terminated,
11 information required to be reported under K.S.A. 65-6703 *and section 3*,
12 and amendments thereto if applicable to the pregnancy terminated, and
13 such other information as may be required by the secretary of health and
14 environment, but the report shall not include the names of the persons
15 whose pregnancies were so terminated.

16 (c) Information obtained by the secretary of health and environment
17 under this section shall be confidential and shall not be disclosed in a
18 manner that would reveal the identity of any person licensed to practice
19 medicine and surgery who submits a report to the secretary under this
20 section or the identity of any medical care facility which submits a report
21 to the secretary under this section, except that such information, including
22 information identifying such persons and facilities may be disclosed to the
23 state board of healing arts upon request of the board for disciplinary action
24 conducted by the board and may be disclosed to the attorney general upon
25 a showing that a reasonable cause exists to believe that a violation of this
26 act has occurred. Any information disclosed to the state board of healing
27 arts or the attorney general pursuant to this subsection shall be used solely
28 for the purposes of a disciplinary action or criminal proceeding. Except as
29 otherwise provided in this subsection, information obtained by the
30 secretary under this section may be used only for statistical purposes and
31 such information shall not be released in a manner which would identify
32 any county or other area of this state in which the termination of the
33 pregnancy occurred. A violation of this subsection (c) is a class A
34 nonperson misdemeanor.

35 (d) In addition to such criminal penalty under subsection (c), any
36 person licensed to practice medicine and surgery or medical care facility
37 whose identity is revealed in violation of this section may bring a civil
38 action against the responsible person or persons for any damages to the
39 person licensed to practice medicine and surgery or medical care facility
40 caused by such violation.

41 (e) For the purpose of maintaining confidentiality as provided by
42 subsections (c) and (d), reports of terminations of pregnancies required by
43 this section shall identify the person or facility submitting such reports

1 only by confidential code number assigned by the secretary of health and
2 environment to such person or facility and the department of health and
3 environment shall maintain such reports only by such number.

4 New Sec. 5. Nothing in this act shall be construed to repeal any
5 statute dealing with abortion, but shall be considered supplemental to such
6 other statutes.

7 Sec. 6. K.S.A. 65-445 is hereby repealed.

8 Sec. 7. This act shall take effect and be in force from and after its
9 publication in the statute book.

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