

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 2011

HOUSE BILL No. 2218

By Representatives Kinzer, Arpke, Billinger, Boman, Brown, Brunk, Calloway, DeGraaf, Donohoe, Fund, Garber, Goico, Goodman, Gregory, Grosserode, Hedke, Henry, Hermanson, Hildabrand, Hoffman, M. Holmes, Howell, Kiegerl, Kleeb, Knox, Landwehr, Mast, McLeland, Meigs, Mesa, Montgomery, O'Brien, O'Hara, Otto, Patton, Peck, Rhoades, Rubin, Ryckman, Scapa, Schwab, Siegfried, Smith, Suellentrop, Vickrey, Weber, Wetta and B. Wolf

2-8

1 AN ACT concerning abortion; relating to restrictions on late term
2 abortions; amending K.S.A. 65-445 and repealing the existing
3 section.
4

5 *Be it enacted by the Legislature of the State of Kansas:*

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

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

11 (b) by eight weeks after fertilization, the unborn child reacts to
12 stimuli that would be recognized as painful if applied to an adult
13 human, for example, 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
19 and, possibly, emotional, behavioral and learning disabilities later in
20 life;

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

25 (f) the position, asserted by some medical experts, that the unborn
26 child is incapable of experiencing pain until a point later in pregnancy

1 than 20 weeks after fertilization predominately rests on the assumption
2 that the ability to experience pain depends on the cerebral cortex and
3 requires nerve connections between the thalamus and the cortex.
4 However, recent medical research and analysis, especially since 2007,
5 provides strong evidence for the conclusion that a functioning cortex is
6 not necessary to experience pain;

7 (g) substantial evidence indicates that children born missing the
8 bulk of the cerebral cortex, those with hydranencephaly, nevertheless
9 experience pain;

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

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

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

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

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

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

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

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

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

41 (e) "Medical emergency" means a condition that, in reasonable
42 medical judgment, so complicates the medical condition of the
43 pregnant woman as to necessitate the immediate abortion of her

1 pregnancy without first determining gestational age to avert her death
2 or for which a delay necessary to determine gestational age will create
3 serious risk of substantial and irreversible physical impairment of a
4 major bodily function. No condition shall be deemed a medical
5 emergency if based on a claim or diagnosis that the woman will engage
6 in conduct which would result in her death or in substantial and
7 irreversible physical impairment of a major bodily function.

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

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

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

14 New Sec. 3. (a) No person shall perform or induce, or attempt to
15 perform or induce an abortion upon a pain-capable unborn child unless
16 such person is a physician and has a documented referral from another
17 physician not legally or financially affiliated with the physician
18 performing or inducing, or attempting to perform or induce the abortion
19 and both physicians provide a written determination, based upon a
20 medical judgment arrived at using and exercising that degree of care,
21 skill and proficiency commonly exercised by the ordinary skillful,
22 careful and prudent physician in the same or similar circumstances and
23 that would be made by a reasonably prudent physician, knowledgeable
24 in the field, and knowledgeable about the case and the treatment
25 possibilities with respect to the conditions involved, that: (1) The
26 abortion is necessary to preserve the life of the pregnant woman; or (2)
27 a continuation of the pregnancy will cause a substantial and irreversible
28 physical impairment of a major bodily function of the pregnant woman.
29 No such condition shall be deemed to exist if it is based on a claim or
30 diagnosis that the woman will engage in conduct which would result in
31 her death or in substantial and irreversible physical impairment of a
32 major bodily function.

33 (b) Except in the case of a medical emergency, a copy of the
34 written documented referral and of the abortion-performing physician's
35 written determination shall be provided to the pregnant woman no less
36 than 30 minutes prior to the initiation of the abortion. The written
37 determination shall be time-stamped at the time it is delivered to the
38 pregnant woman. The medical basis for the determination shall also be
39 reported by the physician as part of the written report made by the
40 physician to the secretary of health and environment under K.S.A. 65-
41 445, and amendments thereto. Such determination shall specify:

42 (1) If the abortion is necessary to preserve the life of the pregnant
43 woman and the medical basis of such determination, including the

1 specific medical condition the physician believes would cause the death
2 of the pregnant woman; or

3 (2) if a continuation of the pregnancy will cause a substantial and
4 irreversible physical impairment of a major bodily function of the
5 pregnant woman and the medical basis of such determination, including
6 the specific medical condition the physician believes would constitute a
7 substantial and irreversible impairment of a major bodily function of
8 the pregnant woman.

9 (c) (1) Except in the case of a medical emergency, prior to
10 performing or inducing, or attempting to perform or induce an abortion
11 upon a woman, the physician shall determine the gestational age of the
12 unborn child according to accepted obstetrical and neonatal practice
13 and standards applied by physicians in the same or similar
14 circumstances. In making such a determination, the physician shall
15 make such inquiries of the woman and perform or cause to be
16 performed such medical examinations and tests as a reasonably prudent
17 physician, knowledgeable about the case and medical conditions
18 involved, would consider necessary to perform in making an accurate
19 diagnosis with respect to gestational age. The physician shall document
20 as part of the medical records of the woman the basis for the
21 determination of gestational age. The physician shall report such
22 determinations, the medical basis and the reasons for such
23 determinations in writing to the medical care facility in which the
24 abortion is performed **or induced** for inclusion in the report of the
25 medical care facility to the secretary of health and environment under
26 K.S.A. 65-445, and amendments thereto, or if the abortion is not
27 performed **or induced** in a medical care facility, the physician who
28 performs **or induces** the abortion shall report such determinations, the
29 medical basis and the reasons for such determinations in writing to the
30 secretary of health and environment as part of the written report made
31 by the physician to the secretary of health and environment under
32 K.S.A. 65-445, and amendments thereto.

33 (2) If the physician determines the gestational age of the unborn
34 child is 22 or more weeks, then no abortion of the pain-capable unborn
35 child shall be performed or induced, or attempted to be performed or
36 induced except as provided for in subsection (a). In such event, the
37 physician who performs **or induces** the abortion shall report such
38 determinations, the medical basis and the reasons for such
39 determinations, including the specific medical diagnosis for the
40 determination that an abortion is necessary to preserve the life of the
41 pregnant woman or that a continuation of the pregnancy will cause a
42 substantial and irreversible physical impairment of a major bodily
43 function of the pregnant woman and the name of the referring physician

1 required by subsection (a) in writing to the medical care facility in
2 which the abortion is performed **or induced** for inclusion in the report
3 of the medical care facility to the secretary of health and environment
4 under K.S.A. 65-445, and amendments thereto, or if the abortion is not
5 performed **or induced** in a medical care facility, the physician who
6 performs **or induces** the abortion shall report such determinations, the
7 medical basis and the reasons for such determinations, including the
8 specific medical diagnosis for the determination that an abortion is
9 necessary to preserve the life of the pregnant woman or that a
10 continuation of the pregnancy will cause a substantial and irreversible
11 physical impairment of a major bodily function of the pregnant woman
12 and the name of the referring physician required by subsection (a) in
13 writing to the secretary of health and environment as part of the written
14 report made by the physician to the secretary of health and environment
15 under K.S.A. 65-445, and amendments thereto.

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

18 (d) The secretary of health and environment shall adopt rules and
19 regulations to administer this section. Such rules and regulations shall
20 include:

21 (1) A detailed list of the information that must be kept by a
22 physician under this section;

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

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

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

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

40 (g) (1) A woman upon whom an abortion is performed **or induced**
41 in violation of this section, the father, if married to the woman at the
42 time of the abortion, and the parents or custodial guardian of the
43 woman, if the woman has not attained the age of 18 years at the time of

1 the abortion, may in a civil action obtain appropriate relief, unless, in a
2 case where the plaintiff is not the woman upon whom the abortion was
3 performed **or induced**, the pregnancy resulted from the plaintiff's
4 criminal conduct.

5 (2) Such relief shall include:

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

8 (B) statutory damages equal to three times the cost of the abortion;
9 and

10 (C) reasonable attorney fees.

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

14 (i) If any provision of this section is held to be invalid or
15 unconstitutional, it shall be conclusively presumed that the legislature
16 would have enacted the remainder of this section without such invalid
17 or unconstitutional provision.

18 (j) Upon a first conviction of a violation of this section, a person
19 shall be guilty of a class A person misdemeanor. Upon a second or
20 subsequent conviction of a violation of this section, a person shall be
21 guilty of a severity level 10, person felony.

22 Sec. 4. K.S.A. 65-445 is hereby amended to read as follows: 65-
23 445. (a) Every medical care facility shall keep written records of all
24 pregnancies which are lawfully terminated within such medical care
25 facility and shall annually submit a written report thereon to the
26 secretary of health and environment in the manner and form prescribed
27 by the secretary. Every person licensed to practice medicine and
28 surgery shall keep a record of all pregnancies which are lawfully
29 terminated by such person in a location other than a medical care
30 facility and shall annually submit a written report thereon to the
31 secretary of health and environment in the manner and form prescribed
32 by the secretary.

33 (b) Each report required by this section shall include the number
34 of pregnancies terminated during the period of time covered by the
35 report, the type of medical facility in which the pregnancy was
36 terminated, information required to be reported under K.S.A. 65-6703
37 and section ~~2~~ 3, and amendments thereto, if applicable to the pregnancy
38 terminated, and such other information as may be required by the
39 secretary of health and environment, but the report shall not include the
40 names of the persons whose pregnancies were so terminated.

41 (c) Information obtained by the secretary of health and
42 environment under this section shall be confidential and shall not be
43 disclosed in a manner that would reveal the identity of any person

1 licensed to practice medicine and surgery who submits a report to the
 2 secretary under this section or the identity of any medical care facility
 3 which submits a report to the secretary under this section, except that
 4 such information, including information identifying such persons and
 5 facilities may be disclosed to the state board of healing arts upon
 6 request of the board for disciplinary action conducted by the board and
 7 may be disclosed to the attorney general upon a showing that a
 8 reasonable cause exists to believe that a violation of this act has
 9 occurred. Any information disclosed to the state board of healing arts or
 10 the attorney general pursuant to this subsection shall be used solely for
 11 the purposes of a disciplinary action or criminal proceeding. Except as
 12 otherwise provided in this subsection, information obtained by the
 13 secretary under this section may be used only for statistical purposes
 14 and such information shall not be released in a manner which would
 15 identify any county or other area of this state in which the termination
 16 of the pregnancy occurred. A violation of this subsection (c) is a class A
 17 nonperson misdemeanor.

18 (d) In addition to such criminal penalty under subsection (c), any
 19 person licensed to practice medicine and surgery or medical care
 20 facility whose identity is revealed in violation of this section may bring
 21 a civil action against the responsible person or persons for any damages
 22 to the person licensed to practice medicine and surgery or medical care
 23 facility caused by such violation.

24 (e) For the purpose of maintaining confidentiality as provided by
 25 subsections (c) and (d), reports of terminations of pregnancies required
 26 by this section shall identify the person or facility submitting such
 27 reports only by confidential code number assigned by the secretary of
 28 health and environment to such person or facility and the department of
 29 health and environment shall maintain such reports only by such
 30 number.

31 **[New Sec. 5.]**[Nothing in this act shall be construed to repeal
 32 **any statute dealing with abortion, but shall be considered**
 33 **supplemental to such other statutes.]**

34 ~~Sec.-5. [6.]~~ K.S.A. 65-445 is hereby repealed.

35 ~~Sec.-6. [7.]~~ This act shall take effect and be in force from and after
 36 its publication in the statute book