

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
27 than 20 weeks after fertilization predominately rests on the assumption
28 that the ability to experience pain depends on the cerebral cortex and

1 requires nerve connections between the thalamus and the cortex.
2 However, recent medical research and analysis, especially since 2007,
3 provides strong evidence for the conclusion that a functioning cortex is
4 not necessary to experience pain;

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

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

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

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

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

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

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

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

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

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

39 (e) "Medical emergency" means a condition that, in reasonable

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

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

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

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

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

35 (b) Except in the case of a medical emergency, a copy of the
36 written documented referral and of the abortion-performing physician's
37 written determination shall be provided to the pregnant woman no less
38 than 30 minutes prior to the initiation of the abortion. The written
39 determination shall be time-stamped at the time it is delivered to the

1 pregnant woman. The medical basis for the determination shall also be
2 reported by the physician as part of the written report made by the
3 physician to the secretary of health and environment under K.S.A. 65-
4 445, and amendments thereto. Such determination shall specify:

5 (1) If the abortion is necessary to preserve the life of the pregnant
6 woman and the medical basis of such determination, including the
7 specific medical condition the physician believes would cause the death
8 of the pregnant woman; or

9 (2) if a continuation of the pregnancy will cause a substantial and
10 irreversible physical impairment of a major bodily function of the
11 pregnant woman and the medical basis of such determination, including
12 the specific medical condition the physician believes would constitute a
13 substantial and irreversible impairment of a major bodily function of
14 the pregnant woman.

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

39 (2) If the physician determines the gestational age of the unborn

1 child is 22 or more weeks, then no abortion of the pain-capable unborn
2 child shall be performed or induced, or attempted to be performed or
3 induced except as provided for in subsection (a). In such event, the
4 physician who performs **or induces** the abortion shall report such
5 determinations, the medical basis and the reasons for such
6 determinations, including the specific medical diagnosis for the
7 determination that an abortion is necessary to preserve the life of the
8 pregnant woman or that a continuation of the pregnancy will cause a
9 substantial and irreversible physical impairment of a major bodily
10 function of the pregnant woman and the name of the referring physician
11 required by subsection (a) in writing to the medical care facility in
12 which the abortion is performed **or induced** for inclusion in the report
13 of the medical care facility to the secretary of health and environment
14 under K.S.A. 65-445, and amendments thereto, or if the abortion is not
15 performed **or induced** in a medical care facility, the physician who
16 performs **or induces** the abortion shall report such determinations, the
17 medical basis and the reasons for such determinations, including the
18 specific medical diagnosis for the determination that an abortion is
19 necessary to preserve the life of the pregnant woman or that a
20 continuation of the pregnancy will cause a substantial and irreversible
21 physical impairment of a major bodily function of the pregnant woman
22 and the name of the referring physician required by subsection (a) in
23 writing to the secretary of health and environment as part of the written
24 report made by the physician to the secretary of health and environment
25 under K.S.A. 65-445, and amendments thereto.

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

28 (d) The secretary of health and environment shall adopt rules and
29 regulations to administer this section. Such rules and regulations shall
30 include:

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

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

35 (3) detailed specifications regarding information that must be
36 provided by a physician in order to comply with the obligation to
37 disclose the medical basis and specific medical diagnosis relied upon in
38 determining gestational age and in determining that an abortion is
39 necessary to preserve the life of the pregnant woman, or that a

1 continuation of the pregnancy will cause a substantial and irreversible
2 physical impairment of a major bodily function of the pregnant woman.

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

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

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

19 (2) Such relief shall include:

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

22 (B) statutory damages equal to three times the cost of the abortion;
23 and

24 (C) reasonable attorney fees.

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

28 (i) If any provision of this section is held to be invalid or
29 unconstitutional, it shall be conclusively presumed that the legislature
30 would have enacted the remainder of this section without such invalid
31 or unconstitutional provision.

32 (j) Upon a first conviction of a violation of this section, a person
33 shall be guilty of a class A person misdemeanor. Upon a second or
34 subsequent conviction of a violation of this section, a person shall be
35 guilty of a severity level 10, person felony.

36 Sec. 4. K.S.A. 65-445 is hereby amended to read as follows: 65-
37 445. (a) Every medical care facility shall keep written records of all
38 pregnancies which are lawfully terminated within such medical care
39 facility and shall annually submit a written report thereon to the

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

8 (b) Each report required by this section shall include the number
9 of pregnancies terminated during the period of time covered by the
10 report, the type of medical facility in which the pregnancy was
11 terminated, information required to be reported under K.S.A. 65-6703
12 and section 2 3, and amendments thereto, if applicable to the pregnancy
13 terminated, and such other information as may be required by the
14 secretary of health and environment, but the report shall not include the
15 names of the persons whose pregnancies were so terminated.

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

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

1 to the person licensed to practice medicine and surgery or medical care
2 facility caused by such violation.

3 (e) For the purpose of maintaining confidentiality as provided by
4 subsections (c) and (d), reports of terminations of pregnancies required
5 by this section shall identify the person or facility submitting such
6 reports only by confidential code number assigned by the secretary of
7 health and environment to such person or facility and the department of
8 health and environment shall maintain such reports only by such
9 number.

10 Sec. 5. K.S.A. 65-445 is hereby repealed.

11 Sec. 6. This act shall take effect and be in force from and after its
12 publication in the statute book.