

SESSION OF 2011

**SUPPLEMENTAL NOTE ON HOUSE
SUBSTITUTE FOR SENATE BILL NO. 35**

As Recommended by House Committee on
Federal and State Affairs

Brief*

House Sub. for SB 35 would enact new statutory restrictions on certain late term abortions. The bill would add new provisions that address the capacity of an unborn child to feel pain.

The bill would define a "pain-capable child" as an unborn child that has reached the gestational age of 22 weeks or more, and would set restrictions and requirements for physicians performing abortions in cases involving a pain-capable unborn child. Except under statutorily defined circumstances permitted for certain abortions, the bill would set criminal severity levels for violations under the bill's provisions that do not conform to the new requirements.

The bill would establish the circumstances and procedures to be followed for exceptions that would allow abortions where a pain-capable child is present, including cases where specific medical conditions would lead the physician to believe the death of a pregnant women might result, or there might be a substantial and irreversible physical impairment of a major bodily function of the pregnant woman.

The Secretary of Health and Environment would be required to adopt rules and regulations to collect details about referrals, record keeping, and reporting requirements for

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

physicians performing such abortions. Medical care facilities would be required to keep specific records about procedures associated with such cases involving pain-capable unborn children, and to submit such data to the Department of Health and Environment.

The bill would conclude that “Nothing in this act shall be construed to repeal any statute dealing with abortion, but shall be considered supplemental to such other statutes.”

Background

SB 35, as passed by the Senate, would have provided certain protections against waiver of attorney-client or work-product privilege. The protections would have included:

- If a waiver is found, it would apply only to information actually disclosed, unless: the waiver was intentional, undisclosed information concerned the same subject matter, and fairness required the disclosed and undisclosed information to be considered together.
- Inadvertent disclosure in a court or agency proceeding would not operate as a waiver if the holder of the privilege took reasonable steps to prevent disclosure and took prompt, reasonable steps to rectify the error.
- Disclosure made in a non-Kansas proceeding would not waive the privilege in a Kansas proceeding if the disclosure would not constitute a waiver under Kansas law or under the law of the jurisdiction where the waiver occurred. Whichever law provides the most protection against waiver would apply.
- A court would be able to order that disclosure in litigation pending before the court does not constitute a waiver.
- Parties would be able to enter into agreements as to the effect of disclosures within the proceeding, although

such agreements would not be binding upon non-parties unless incorporated into a court order.

The bill, as passed by the Senate, also would have provided definitions for “attorney-client privilege” and “work-product protection” and made technical amendments to K.S.A. 60-426 and K.S.A. 60-3003 to ensure consistency in wording.

The House Committee deleted all provisions in SB 35 and inserted the contents of HB 2218, as passed by the House. In addition, the House Committee added the phrase in New Section 1(b) that “,the unborn child reacts to touch. By 20 weeks after fertilization” in the first sentence.

Proponents included Representative Lance Kinzer, three medical physicians, and a representative of Kansans for Life. Written testimony in support of the bill (HB 2218) was provided by representatives of the Kansas Catholic Conference and Concerned Women for America of Kansas.

Opponents included representatives for Planned Parenthood of Kansas and Mid-America, Kansas National Organization for Women, and Trust Women. Written testimony in opposition to the bill was received from five other individuals.

The fiscal note on the original bill indicated that the Board of Healing Arts believed passage of the bill could increase the number of investigations and disciplinary cases assigned to the Board. According to the Board, any increased activity could be absorbed with the agency's budget. No response was available from the Department of Health and Environment when the Division of the Budget prepared the original fiscal note.