

SESSION OF 2015

SUPPLEMENTAL NOTE ON SENATE BILL NO. 95

As Amended by Senate Committee on Public
Health and Welfare

Brief*

SB 95 would create the Kansas Unborn Child Protection from Dismemberment Abortion Act (Act). The bill would define relevant terms, establish exceptions for the prohibition on dismemberment abortions, clarify the individuals exempt from liability for involvement in dismemberment abortions, allow for injunctive relief and civil damages, establish who may seek civil damages and what the damages would include, authorize the award of reasonable attorney fees, establish penalties for violation of the Act, specify the conditions under which the court would order the anonymity of a woman upon whom an abortion has been performed or attempted be preserved from public disclosure, clarify no right to abortion nor a right to a particular method of abortion would be created, and include a severability clause. Specific bill details follow.

Definitions

The bill would define several terms, including “abortion” and “dismemberment abortion.” Dismemberment abortion would be defined as an abortion “with the purpose of causing the death of an unborn child, knowingly dismembering a living unborn child and extracting such unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or similar instruments that, through the convergence of two rigid levers, slice, crush, or grasp at a portion of the unborn child’s body in order to cut or rip it off.”

*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>

The bill would establish dismemberment abortion does not include an abortion that uses suction to dismember the body of an unborn child. The bill would clarify a dismemberment abortion includes the use of suction subsequent to a dismemberment abortion to extract fetal parts after the death of the unborn child. “Medical emergency” and “knowingly” also would be defined.

Restrictions on the Performance of a Dismemberment Abortion

The bill would prohibit the performance of or the attempt to perform a dismemberment abortion unless the procedure was necessary to preserve the life of the pregnant woman or a continuation of the pregnancy would cause a substantial and irreversible physical impairment of a major bodily function. A claim or diagnosis the woman would engage in conduct resulting in her death or in substantial and irreversible physical impairment of a major bodily function would not allow for a dismemberment abortion under the Act.

Exemption from Liability

The following persons would be exempt from liability under the Act:

- The woman upon whom an abortion is performed or attempted;
- A nurse, technician, secretary, receptionist, or other employee or agent who is not a physician, but acts under the direction of a physician; and
- A pharmacist or other individual who is not a physician, but who fills a prescription or provides instruments or materials used in an abortion at the direction of or to a physician.

Available Causes of Action and Damages

The Attorney General or any district or county attorney with appropriate jurisdiction would be authorized to bring a cause of action for injunctive relief against a person who performed or attempted to perform a dismemberment abortion in violation of the Act and, if the order was granted, would prohibit the defendant from performing or attempting to perform any dismemberment abortions in violation of the Act.

A cause of action for civil damages would be available to the following persons against a person who performed a dismemberment abortion in violation of the Act (unless the plaintiff is not the woman upon whom the abortion was performed and the pregnancy was a result of the plaintiff's criminal conduct):

- A woman upon whom a dismemberment abortion was performed in violation of the Act;
- The father of the unborn child, who is married to the woman at the time the dismemberment abortion was performed; or
- The parents or custodial guardians of a woman under 18 years of age at the time of the abortion or who died as a result of the abortion.

Damages awarded in a cause of action for civil damages would include money damages for psychological and physical damages caused by a dismemberment abortion, statutory damages equal to three times the cost of the dismemberment abortion, injunctive relief, and reasonable attorney fees under specified conditions.

In causes of action for injunctive relief, in addition to other relief awarded, attorney fees would be awarded to a successful plaintiff or to a successful defendant if the court finds the plaintiff's action was frivolous and brought in bad faith. A woman upon whom a dismemberment abortion was

performed or attempted would not be assessed attorney fees, unless the court found her action was frivolous or brought in bad faith.

Penalties for Violation of Act

A first conviction for a dismemberment abortion performed or attempted in violation of the Act would be a Class A person misdemeanor. A second or subsequent conviction would be a severity level 10, person felony.

Anonymity of Woman Absent Consent to Disclose

In every civil, criminal, or administrative proceeding or action arising out of a violation of the conditions under which an abortion on a viable or pain-capable unborn child, or a partial birth or a dismemberment abortion may be performed, the court would have authority to determine whether to preserve from public disclosure the anonymity of the woman upon whom the unlawful abortion was performed or attempted if the woman did not consent to the disclosure. Upon a ruling the anonymity of the woman should be preserved, the court would be authorized to issue orders to the parties, witnesses, and counsel, direct the record be sealed, and exclude individuals from the courtroom or hearing rooms, as needed, to safeguard her identity from public disclosure.

Orders to preserve the identity of the woman would require accompanying specific written findings explaining the need for anonymity, why the order was essential, the narrow tailoring of the order to accomplish anonymity, and why no reasonable less restrictive alternative existed. Unless a woman upon whom an unlawful abortion was performed or attempted consents to the disclosure of her identity, a cause of action for a violation of the conditions under which an abortion on a viable or pain-capable unborn child, or a partial birth or dismemberment abortion could be performed, brought

by anyone other than a public official, would be required to do so under a pseudonym. The anonymity provisions would not be construed to conceal the identity of the plaintiff or witnesses from the defendant or attorneys for the defendant.

Right to an Abortion not Recognized or Created

The bill would not create or recognize a right to an abortion or to a specific abortion method.

Severability Clause

A holding that a provision or application of the Act was invalid would not affect the validity of the remaining provisions that could be given effect without the invalid provision or application. The provisions of the Act would be held severable.

Background

The bill was introduced by Senator Love and other senators. At the Senate Public Health and Welfare Committee hearing, testimony in support of the bill was provided by Senator Love, representatives of Kansans for Life and the Kansas Catholic Conference, and an obstetrician gynecologist. Testimony provided by proponents described the process of dismemberment abortion. In testimony in support of the bill, the representative of Kansans for Life cited a U.S. Supreme Court ruling that a method of abortion could be banned if other methods were available and stated other abortion methods were available for second-trimester abortion in the state. The proponent further stated abortion by dismemberment is currently the standard for second-trimester abortion in Kansas.

Testimony in opposition of the bill was provided by representatives of Planned Parenthood and the Trust Women Foundation and South Wind Women's Center, an individual

presenting for a neurologist and professor of neurology, and a private individual. The opponents generally stated the bill creates inappropriate interference into the doctor-patient relationship, further limits the physician's ability and judgment when taking care of patients with their own unique set of circumstances, restricts women's ability to access abortion services in the state, is unconstitutional, and its defense will cost Kansas taxpayers. Written testimony in opposition to the bill was provided by a representative of the American Civil Liberties Union of Kansas and a private individual.

The Senate Committee amended the bill to clarify the definition of "dismemberment abortion" includes the limited use of suction for the completion of a dismemberment abortion procedure.

A revised fiscal note was prepared by the Division of the Budget after receipt of new information from the Office of the Attorney General (Office). According to the revised fiscal note, the Office indicates it could incur additional expenditures in the event of legal challenges. The Office indicates there would be constitutional issues involved in defending any action and the agency would likely use the State Solicitor General and associated outside counsel. The Office further notes there also could be additional prosecution costs for the Office, if a criminal action is required to be brought under the bill. The agency estimates the total fiscal effect could be a maximum of \$50,000 in FY 2015, \$100,000 to \$200,000 in FY 2016, and a maximum of \$200,000 in FY 2017.

The Office of Judicial Administration notes the bill could create the potential for filing of cases involving new crimes, civil actions, and injunctive relief. The additional filings would increase the time spent by district court judicial and non-judicial personnel in processing, researching, and hearing cases. The filings also would result in additional revenue from docket fees. However, because it is not possible to predict the number of additional court cases that would arise or how complex or time-consuming they would be, the Office of

Judicial Administration indicates a precise fiscal effect cannot be determined.

The Kansas Sentencing Commission indicates the bill would have no effect on prison admissions or prison beds. The Kansas Department of Health and Environment reports there would be no fiscal effect on the agency.

Any fiscal effect associated with the bill is not reflected in *The FY 2016 Governor's Budget Report*.