

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

SECOND SESSION

LEGISLATIVE BILL 1103

FINAL READING

Introduced by Flood, 19; McCoy, 39; Langemeier, 23; Pirsch, 4; Fulton, 29; Coash, 27; Krist, 10; Schilz, 47; Heidemann, 1; Utter, 33; Stuthman, 22; Wallman, 30; Dubas, 34; Sullivan, 41; Fischer, 43; Janssen, 15; Price, 3; Harms, 48; Cornett, 45; Gay, 14; Nordquist, 7; Mello, 5; Lautenbaugh, 18.

Read first time January 21, 2010

Committee: Judiciary

A BILL

1 FOR AN ACT relating to abortion; to amend section 38-2021, Reissue  
2 Revised Statutes of Nebraska, and section 28-101, Revised  
3 Statutes Supplement, 2009; to adopt the Pain-Capable  
4 Unborn Child Protection Act; to provide and change civil  
5 and criminal penalties with respect to abortion; to  
6 harmonize provisions; to provide an operative date;  
7 to provide severability; and to repeal the original  
8 sections.

9 Be it enacted by the people of the State of Nebraska,

1           Section 1. Sections 1 to 10 of this act shall be known  
2 and may be cited as the Pain-Capable Unborn Child Protection Act.

3           Sec. 2. For purposes of the Pain-Capable Unborn Child  
4 Protection Act:

5           (1) Abortion means the use or prescription of any  
6 instrument, medicine, drug, or other substance or device to  
7 terminate the pregnancy of a woman known to be pregnant with  
8 an intention other than to increase the probability of a live  
9 birth, to preserve the life or health of the child after live  
10 birth, or to remove a dead unborn child who died as the result of  
11 natural causes in utero, accidental trauma, or a criminal assault  
12 on the pregnant woman or her unborn child, and which causes the  
13 premature termination of the pregnancy;

14           (2) Attempt to perform or induce an abortion means an  
15 act, or an omission of a statutorily required act, that, under  
16 the circumstances as the actor believes them to be, constitutes a  
17 substantial step in a course of conduct planned to culminate in the  
18 performance or induction of an abortion in this state in violation  
19 of the Pain-Capable Unborn Child Protection Act;

20           (3) Fertilization means the fusion of a human  
21 spermatozoon with a human ovum;

22           (4) Medical emergency means a condition which, in  
23 reasonable medical judgment, so complicates the medical condition  
24 of the pregnant woman as to necessitate the immediate abortion of  
25 her pregnancy to avert her death or for which a delay will create

1 a serious risk of substantial and irreversible physical impairment  
2 of a major bodily function. No condition shall be deemed a medical  
3 emergency if based on a claim or diagnosis that the woman will  
4 engage in conduct which would result in her death or in substantial  
5 and irreversible physical impairment of a major bodily function;

6 (5) Postfertilization age means the age of the unborn  
7 child as calculated from the fertilization of the human ovum;

8 (6) Reasonable medical judgment means a medical judgment  
9 that would be made by a reasonably prudent physician, knowledgeable  
10 about the case and the treatment possibilities with respect to the  
11 medical conditions involved;

12 (7) Physician means any person licensed to practice  
13 medicine and surgery or osteopathic medicine under the Uniform  
14 Credentialing Act;

15 (8) Probable postfertilization age of the unborn child  
16 means what, in reasonable medical judgment, will with reasonable  
17 probability be the postfertilization age of the unborn child at the  
18 time the abortion is planned to be performed;

19 (9) Unborn child or fetus each mean an individual  
20 organism of the species homo sapiens from fertilization until  
21 live birth; and

22 (10) Woman means a female human being whether or not she  
23 has reached the age of majority.

24 Sec. 3. The Legislature makes the following findings:

25 (1) At least by twenty weeks after fertilization there

1 is substantial evidence that an unborn child has the physical  
2 structures necessary to experience pain;

3 (2) There is substantial evidence that, by twenty weeks  
4 after fertilization, unborn children seek to evade certain stimuli  
5 in a manner which in an infant or an adult would be interpreted as  
6 a response to pain;

7 (3) Anesthesia is routinely administered to unborn  
8 children who have developed twenty weeks or more past fertilization  
9 who undergo prenatal surgery;

10 (4) Even before twenty weeks after fertilization, unborn  
11 children have been observed to exhibit hormonal stress responses to  
12 painful stimuli. Such responses were reduced when pain medication  
13 was administered directly to such unborn children; and

14 (5) It is the purpose of the State of Nebraska to assert  
15 a compelling state interest in protecting the lives of unborn  
16 children from the stage at which substantial medical evidence  
17 indicates that they are capable of feeling pain.

18 Sec. 4. (1) Except in the case of a medical emergency  
19 which prevents compliance with this section, no abortion shall be  
20 performed or induced or be attempted to be performed or induced  
21 unless the physician performing or inducing it has first made  
22 a determination of the probable postfertilization age of the  
23 unborn child or relied upon such a determination made by another  
24 physician. In making such a determination, a physician shall  
25 make such inquiries of the woman and perform or cause to be

1 performed such medical examinations and tests as a reasonably  
2 prudent physician, knowledgeable about the case and the medical  
3 conditions involved, would consider necessary to perform in making  
4 an accurate diagnosis with respect to postfertilization age.

5 (2) Failure by any physician to conform to any  
6 requirement of this section constitutes unprofessional conduct  
7 pursuant to section 38-2021.

8 Sec. 5. No person shall perform or induce or attempt  
9 to perform or induce an abortion upon a woman when it has been  
10 determined, by the physician performing or inducing the abortion  
11 or by another physician upon whose determination that physician  
12 relies, that the probable postfertilization age of the woman's  
13 unborn child is twenty or more weeks unless, in reasonable medical  
14 judgment (1) she has a condition which so complicates her medical  
15 condition as to necessitate the abortion of her pregnancy to  
16 avert her death or to avert serious risk of substantial and  
17 irreversible physical impairment of a major bodily function or (2)  
18 it is necessary to preserve the life of an unborn child. No such  
19 condition shall be deemed to exist if it is based on a claim or  
20 diagnosis that the woman will engage in conduct which would result  
21 in her death or in substantial and irreversible physical impairment  
22 of a major bodily function. In such a case, the physician shall  
23 terminate the pregnancy in the manner which, in reasonable medical  
24 judgment, provides the best opportunity for the unborn child to  
25 survive, unless, in reasonable medical judgment, termination of the

1 pregnancy in that manner would pose a greater risk either of the  
2 death of the pregnant woman or of the substantial and irreversible  
3 physical impairment of a major bodily function of the woman than  
4 would another available method. No such greater risk shall be  
5 deemed to exist if it is based on a claim or diagnosis that the  
6 woman will engage in conduct which would result in her death or in  
7 substantial and irreversible physical impairment of a major bodily  
8 function.

9           Sec. 6. (1) Any physician who performs or induces or  
10 attempts to perform or induce an abortion shall report to the  
11 Department of Health and Human Services, on a schedule and  
12 in accordance with forms and rules and regulations adopted and  
13 promulgated by the department:

14           (a) If a determination of probable postfertilization age  
15 was made, the probable postfertilization age determined and the  
16 method and basis of the determination;

17           (b) If a determination of probable postfertilization age  
18 was not made, the basis of the determination that a medical  
19 emergency existed;

20           (c) If the probable postfertilization age was determined  
21 to be twenty or more weeks, the basis of the determination that  
22 the pregnant woman had a condition which so complicated her medical  
23 condition as to necessitate the abortion of her pregnancy to avert  
24 her death or to avert serious risk of substantial and irreversible  
25 physical impairment of a major bodily function, or the basis of

1 the determination that it was necessary to preserve the life of an  
2 unborn child; and

3 (d) The method used for the abortion and, in the case  
4 of an abortion performed when the probable postfertilization age  
5 was determined to be twenty or more weeks, whether the method  
6 of abortion used was one that, in reasonable medical judgment,  
7 provided the best opportunity for the unborn child to survive or,  
8 if such a method was not used, the basis of the determination  
9 that termination of the pregnancy in that manner would pose a  
10 greater risk either of the death of the pregnant woman or of the  
11 substantial and irreversible physical impairment of a major bodily  
12 function of the woman than would other available methods.

13 (2) By June 30 of each year, the department shall issue  
14 a public report providing statistics for the previous calendar  
15 year compiled from all of the reports covering that year submitted  
16 in accordance with this section for each of the items listed  
17 in subsection (1) of this section. Each such report shall also  
18 provide the statistics for all previous calendar years during which  
19 this section was in effect, adjusted to reflect any additional  
20 information from late or corrected reports. The department shall  
21 take care to ensure that none of the information included in the  
22 public reports could reasonably lead to the identification of any  
23 pregnant woman upon whom an abortion was performed.

24 (3) Any physician who fails to submit a report by the  
25 end of thirty days following the due date shall be subject to a

1 late fee of five hundred dollars for each additional thirty-day  
2 period or portion of a thirty-day period the report is overdue. Any  
3 physician required to report in accordance with the Pain-Capable  
4 Unborn Child Protection Act who has not submitted a report, or has  
5 submitted only an incomplete report, more than one year following  
6 the due date, may, in an action brought in the manner in which  
7 actions are brought to enforce the Uniform Credentialing Act  
8 pursuant to section 38-1,139, be directed by a court of competent  
9 jurisdiction to submit a complete report within a time period  
10 stated by court order or be subject to civil contempt. Failure by  
11 any physician to conform to any requirement of this section, other  
12 than late filing of a report, constitutes unprofessional conduct  
13 pursuant to section 38-2021. Failure by any physician to submit  
14 a complete report in accordance with a court order constitutes  
15 unprofessional conduct pursuant to section 38-2021. Intentional or  
16 reckless falsification of any report required under this section is  
17 a Class V misdemeanor.

18 (4) Within ninety days after the operative date of  
19 this act, the department shall adopt and promulgate rules and  
20 regulations to assist in compliance with this section.

21 Sec. 7. Any person who intentionally or recklessly  
22 performs or attempts to perform an abortion in violation of  
23 section 5 of this act is guilty of a Class IV felony. No penalty  
24 shall be assessed against the woman upon whom the abortion is  
25 performed or attempted to be performed.

1           Sec. 8. (1) Any woman upon whom an abortion has been  
 2 performed in violation of the Pain-Capable Unborn Child Protection  
 3 Act or the father of the unborn child who was the subject of  
 4 such an abortion may maintain an action against the person who  
 5 performed the abortion in an intentional or a reckless violation  
 6 of the Pain-Capable Unborn Child Protection Act for actual damages.  
 7 Any woman upon whom an abortion has been attempted in violation  
 8 of the Pain-Capable Unborn Child Protection Act may maintain an  
 9 action against the person who attempted to perform the abortion in  
 10 an intentional or a reckless violation of the Pain-Capable Unborn  
 11 Child Protection Act for actual damages.

12           (2) A cause of action for injunctive relief against any  
 13 person who has intentionally violated the Pain-Capable Unborn Child  
 14 Protection Act may be maintained by the woman upon whom an abortion  
 15 was performed or attempted to be performed in violation of the  
 16 Pain-Capable Unborn Child Protection Act, by any person who is the  
 17 spouse, parent, sibling, or guardian of, or a current or former  
 18 licensed health care provider of, the woman upon whom an abortion  
 19 has been performed or attempted to be performed in violation of  
 20 the Pain-Capable Unborn Child Protection Act, by a county attorney  
 21 with appropriate jurisdiction, or by the Attorney General. The  
 22 injunction shall prevent the abortion provider from performing  
 23 further abortions in violation of the Pain-Capable Unborn Child  
 24 Protection Act in this state.

25           (3) If judgment is rendered in favor of the plaintiff in

1 an action described in this section, the court shall also render  
2 judgment for reasonable attorney's fees in favor of the plaintiff  
3 against the defendant.

4 (4) If judgment is rendered in favor of the defendant and  
5 the court finds that the plaintiff's suit was frivolous and brought  
6 in bad faith, the court shall also render judgment for reasonable  
7 attorney's fees in favor of the defendant against the plaintiff.

8 (5) No damages or attorney's fees may be assessed against  
9 the woman upon whom an abortion was performed or attempted to be  
10 performed except as provided in subsection (4) of this section.

11 Sec. 9. In every civil or criminal proceeding or action  
12 brought under the Pain-Capable Unborn Child Protection Act, the  
13 court shall rule whether the anonymity of any woman upon whom  
14 an abortion has been performed or attempted shall be preserved  
15 from public disclosure if she does not give her consent to such  
16 disclosure. The court, upon motion or sua sponte, shall make  
17 such a ruling and, upon determining that her anonymity should  
18 be preserved, shall issue orders to the parties, witnesses, and  
19 counsel and shall direct the sealing of the record and exclusion  
20 of individuals from courtrooms or hearing rooms to the extent  
21 necessary to safeguard her identity from public disclosure. Each  
22 such order shall be accompanied by specific written findings  
23 explaining why the anonymity of the woman should be preserved from  
24 public disclosure, why the order is essential to that end, how  
25 the order is narrowly tailored to serve that interest, and why

1 no reasonable less restrictive alternative exists. In the absence  
2 of written consent of the woman upon whom an abortion has been  
3 performed or attempted, anyone, other than a public official, who  
4 brings an action under section 8 of this act shall do so under  
5 a pseudonym. This section shall not be construed to conceal the  
6 identity of the plaintiff or of witnesses from the defendant or  
7 from attorneys for the defendant.

8           Sec. 10. If any one or more provisions, sections,  
9 subsections, sentences, clauses, phrases, or words of the  
10 Pain-Capable Unborn Child Protection Act or the application thereof  
11 to any person or circumstance is found to be unconstitutional, the  
12 same is hereby declared to be severable and the balance of the  
13 Pain-Capable Unborn Child Protection Act shall remain effective  
14 notwithstanding such unconstitutionality. The Legislature hereby  
15 declares that it would have passed the Pain-Capable Unborn Child  
16 Protection Act, and each provision, section, subsection, sentence,  
17 clause, phrase, or word thereof, irrespective of the fact that any  
18 one or more provisions, sections, subsections, sentences, clauses,  
19 phrases, or words of the Pain-Capable Unborn Child Protection Act,  
20 or the application of the Pain-Capable Unborn Child Protection Act,  
21 would be declared unconstitutional.

22           Sec. 11. Section 28-101, Revised Statutes Supplement,  
23 2009, is amended to read:

24           28-101 Sections 28-101 to 28-1356 and sections 1 to 10 of  
25 this act shall be known and may be cited as the Nebraska Criminal

1 Code.

2 Sec. 12. Section 38-2021, Reissue Revised Statutes of  
3 Nebraska, is amended to read:

4 38-2021 Unprofessional conduct means any departure from  
5 or failure to conform to the standards of acceptable and prevailing  
6 practice of medicine and surgery or the ethics of the profession,  
7 regardless of whether a person, patient, or entity is injured, or  
8 conduct that is likely to deceive or defraud the public or is  
9 detrimental to the public interest, including, but not limited to:

10 (1) Performance by a physician of an abortion as defined  
11 in subdivision (1) of section 28-326 under circumstances when he  
12 or she will not be available for a period of at least forty-eight  
13 hours for postoperative care unless such postoperative care is  
14 delegated to and accepted by another physician;

15 (2) Performing an abortion upon a minor without having  
16 satisfied the notice requirements of sections 71-6901 to 71-6908;  
17 and

18 (3) The intentional and knowing performance of a  
19 partial-birth abortion as defined in subdivision (9) of section  
20 28-326, unless such procedure is necessary to save the life of the  
21 mother whose life is endangered by a physical disorder, physical  
22 illness, or physical injury, including a life-endangering physical  
23 condition caused by or arising from the pregnancy itself; ~~and-~~

24 (4) Performance by a physician of an abortion in  
25 violation of the Pain-Capable Unborn Child Protection Act.

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1                   Sec. 13. This act becomes operative on October 15, 2010.

2                   Sec. 14. Original section 38-2021, Reissue Revised  
3 Statutes of Nebraska, and section 28-101, Revised Statutes  
4 Supplement, 2009, are repealed.