

LEGISLATURE OF NEBRASKA  
ONE HUNDRED FOURTH LEGISLATURE  
SECOND SESSION

**LEGISLATIVE BILL 767**

Introduced by Garrett, 3; Craighead, 6; Watermeier, 1.

Read first time January 06, 2016

Committee: Judiciary

1 A BILL FOR AN ACT relating to crimes and offenses; to amend section  
2 28-332, Reissue Revised Statutes of Nebraska, sections 28-325,  
3 28-326, 28-340, and 38-2021, Revised Statutes Cumulative Supplement,  
4 2014, and section 28-101, Revised Statutes Supplement, 2015; to  
5 prohibit dismemberment abortion as prescribed; to define a term; to  
6 provide for a disciplinary proceeding, for civil damages, for a  
7 criminal penalty; and a savings clause; to harmonize provisions; to  
8 provide for severability; and to repeal the original sections.  
9 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 28-101, Revised Statutes Supplement, 2015, is  
2 amended to read:

3 28-101 Sections 28-101 to ~~28-468, 28-470 to~~ 28-1357, 28-1418.01, and  
4 28-1429.03 and sections 4 to 10, 14, and 15 of this act shall be known  
5 and may be cited as the Nebraska Criminal Code.

6 Sec. 2. Section 28-325, Revised Statutes Cumulative Supplement,  
7 2014, is amended to read:

8 28-325 The Legislature hereby finds and declares:

9 (1) That the following provisions were motivated by the legislative  
10 intrusion of the United States Supreme Court by virtue of its decision  
11 removing the protection afforded the unborn. Sections 28-325 to 28-345  
12 and sections 4 to 10, 14, and 15 of this act are in no way to be  
13 construed as legislatively encouraging abortions at any stage of unborn  
14 human development, but are rather an expression of the will of the people  
15 of the State of Nebraska and the members of the Legislature to provide  
16 protection for the life of the unborn child whenever possible;

17 (2) That the members of the Legislature expressly deplore the  
18 destruction of the unborn human lives which has occurred and will occur  
19 in Nebraska as a consequence of the United States Supreme Court's  
20 decision on abortion of January 22, 1973;

21 (3) That it is in the interest of the people of the State of  
22 Nebraska that every precaution be taken to insure the protection of every  
23 viable unborn child being aborted, and every precaution be taken to  
24 provide life-supportive procedures to insure the unborn child its  
25 continued life after its abortion;

26 (4) That currently this state is prevented from providing adequate  
27 legal remedies to protect the life, health, and welfare of pregnant women  
28 and unborn human life;

29 (5) That it is in the interest of the people of the State of  
30 Nebraska to maintain accurate statistical data to aid in providing proper  
31 maternal health regulations and education;

1 (6) That the existing standard of care for preabortion screening and  
2 counseling is not always adequate to protect the health needs of women;

3 (7) That clarifying the minimum standard of care for preabortion  
4 screening and counseling in statute is a practical means of protecting  
5 the well-being of women and may better ensure that abortion doctors are  
6 sufficiently aware of each patient's risk profile so they may give each  
7 patient a well-informed medical opinion regarding her unique case; and

8 (8) That providing right to redress against nonphysicians who  
9 perform illegal abortions or encourage self-abortions is an important  
10 means of protecting women's health.

11 Sec. 3. Section 28-326, Revised Statutes Cumulative Supplement,  
12 2014, is amended to read:

13 28-326 For purposes of sections 28-325 to 28-345 and sections 4 to  
14 10, 14, and 15 of this act, unless the context otherwise requires:

15 (1) Abortion means the use or prescription of any instrument,  
16 medicine, drug, or other substance or device intentionally to terminate  
17 the pregnancy of a woman known to be pregnant with an intention other  
18 than to increase the probability of a live birth, to preserve the life or  
19 health of the child after live birth, or to remove a dead unborn child,  
20 and which causes the premature termination of the pregnancy;

21 (2) Complications associated with abortion means any adverse  
22 physical, psychological, or emotional reaction that is reported in a  
23 peer-reviewed journal to be statistically associated with abortion such  
24 that there is less than a five percent probability ( $P < .05$ ) that the  
25 result is due to chance;

26 (3) Conception means the fecundation of the ovum by the spermatozoa;

27 (4) Dismemberment abortion means, with the purpose of causing the  
28 death of an unborn child, purposely to dismember a living unborn child  
29 and extract him or her one piece at a time from the uterus through use of  
30 clamps, grasping forceps, tongs, scissors, or similar instruments that,  
31 through the convergence of two rigid levers, slice, crush, or grasp a

1 portion of the unborn child's body to cut or rip it off. Dismemberment  
2 abortion does not include an abortion which uses suction to dismember the  
3 body of the unborn child by sucking fetal parts into a collection  
4 container. Dismemberment abortion includes an abortion in which a  
5 dismemberment abortion causes the death of an unborn child but suction is  
6 subsequently used to extract fetal parts after the death of the unborn  
7 child;

8 (5 4) Emergency situation means that condition which, in reasonable  
9 medical judgment on the basis of the physician's good faith clinical  
10 judgment, so complicates the medical condition of the a pregnant woman as  
11 to necessitate the immediate abortion of her pregnancy to avert her death  
12 or to avert for which a delay will create serious risk of substantial and  
13 irreversible physical impairment of a major bodily function, not  
14 including psychological or emotional conditions. No such condition may be  
15 determined to exist if it is based on a claim or diagnosis that the woman  
16 will engage in conduct which she intends to result in her death or in  
17 substantial and irreversible physical impairment of a major bodily  
18 function;

19 (6 5) Hospital means an institution those institutions licensed by  
20 the Department of Health and Human Services pursuant to the Health Care  
21 Facility Licensure Act;

22 (7 6) Negligible risk means a risk that a reasonable person would  
23 consider to be immaterial to a decision to undergo an elective medical  
24 procedure;

25 (8 7) Partial-birth abortion means an abortion procedure in which  
26 the person performing the abortion partially delivers vaginally a living  
27 unborn child before killing the unborn child and completing the delivery.  
28 For purposes of this subdivision, the term partially delivers vaginally a  
29 living unborn child before killing the unborn child means deliberately  
30 and intentionally delivering into the vagina a living unborn child, or a  
31 substantial portion thereof, for the purpose of performing a procedure

1 that the person performing such procedure knows will kill the unborn  
2 child and does kill the unborn child;

3 (~~9~~ 8) Physician means any person licensed to practice medicine in  
4 this state as provided in the Uniform Credentialing Act;

5 (~~10~~ 9) Pregnant means that condition of a woman who has unborn human  
6 life within her as the result of conception;

7 (~~11~~ 10) Probable gestational age of the unborn child means what will  
8 with reasonable probability, in the judgment of the physician, be the  
9 gestational age of the unborn child at the time the abortion is planned  
10 to be performed;

11 (~~12~~ 11) Risk factor associated with abortion means any factor,  
12 including any physical, psychological, emotional, demographic, or  
13 situational factor, for which there is a statistical association with one  
14 or more complications associated with abortion such that there is less  
15 than a five percent probability ( $P < .05$ ) that such statistical  
16 association is due to chance. Such information on risk factors shall have  
17 been published in any peer-reviewed journals indexed by the United States  
18 National Library of Medicine's search services (PubMed or MEDLINE) or in  
19 any journal included in the Thomson Reuters Scientific Master Journal  
20 List not less than twelve months prior to the day preabortion screening  
21 was provided;

22 (~~13~~ 12) Self-induced abortion means any abortion or menstrual  
23 extraction attempted or completed by a pregnant woman on her own body;

24 (~~14~~ 13) Ultrasound means the use of ultrasonic waves for diagnostic  
25 or therapeutic purposes, specifically to monitor an unborn child;

26 (~~15~~ 14) Viability means that stage of human development when the  
27 unborn child is potentially able to live more than merely momentarily  
28 outside the womb of the mother by natural or artificial means; and

29 (~~16~~ 15) Woman means any female human being whether or not she has  
30 reached the age of majority.

31 Sec. 4. No dismemberment abortion shall be performed at any time,

1 either before or after the unborn child has reached viability, except in  
2 an emergency situation.

3       Sec. 5. (1) A physician accused in any proceeding of violating  
4 section 4 of this act may seek a hearing before the Board of Medicine and  
5 Surgery on whether the dismemberment abortion was necessary (a) to  
6 preserve the life of the pregnant woman or (b) because an emergency  
7 situation existed. The board's findings are admissible on that issue at  
8 any trial in which such unlawful conduct is alleged. Upon a motion of the  
9 physician accused, the court shall delay the beginning of the trial for  
10 not more than thirty days to permit such a hearing to take place.

11       (2) No pregnant woman upon whom a dismemberment abortion is  
12 performed or attempted to be performed shall be liable for performing or  
13 attempting to perform a dismemberment abortion. No nurse, technician,  
14 secretary, receptionist, or other employee or agent who is not a  
15 physician but who acts at the direction of a physician, and no pharmacist  
16 or other individual who is not a physician but who fills a prescription  
17 or provides instruments or materials used in a dismemberment abortion at  
18 the direction of or to a physician, shall be liable for performing or  
19 attempting to perform a dismemberment abortion.

20       Sec. 6. (1) A cause of action for injunctive relief against a  
21 physician who has performed or attempted to perform a dismemberment  
22 abortion may be maintained by:

23       (a) A pregnant woman upon whom such dismemberment abortion was  
24 performed or attempted to be performed;

25       (b) A person who is the spouse, parent, or guardian of, or a current  
26 or former physician of, a pregnant woman upon whom such a dismemberment  
27 abortion was performed or attempted to be performed; or

28       (c) A prosecuting attorney with appropriate jurisdiction.

29       (2) The injunction shall prevent the physician from performing or  
30 attempting to perform further dismemberment abortions.

31       Sec. 7. (1) A cause of action for civil damages against a physician

1 who has performed a dismemberment abortion may be maintained by:

2 (a) Any pregnant woman upon whom a dismemberment abortion has been  
3 performed;

4 (b) The father of the unborn child, if married to the pregnant woman  
5 at the time the dismemberment abortion was performed; or

6 (c) If the pregnant woman had not attained the age of eighteen years  
7 at the time of the dismemberment abortion or has died as a result of the  
8 abortion, the maternal grandparents of the unborn child.

9 (2) No damages may be awarded a plaintiff if the pregnancy resulted  
10 from the plaintiff's criminal conduct.

11 (3) Damages awarded in such an action shall include money damages  
12 for all injuries, both psychological and physical, occasioned by the  
13 dismemberment abortion.

14 Sec. 8. (1) If judgment is rendered in favor of the plaintiff in an  
15 action described in section 6 or 7 of this act, the court shall also  
16 render judgment for reasonable attorney's fees in favor of the plaintiff  
17 against the defendant.

18 (2) If judgment is rendered in favor of the defendant in an action  
19 described in section 6 or 7 of this act and the court finds that the  
20 plaintiff's suit was frivolous and brought in bad faith, the court shall  
21 render judgment for reasonable attorney's fees in favor of the defendant  
22 against the plaintiff.

23 (3) No attorney's fees may be assessed against the pregnant woman  
24 upon whom an abortion was performed or attempted to be performed except  
25 in accordance with subsection (2) of this section.

26 Sec. 9. In every civil, criminal, or administrative proceeding or  
27 action brought under sections 4 to 10 of this act, the court shall rule  
28 whether the anonymity of any pregnant woman upon whom a dismemberment  
29 abortion has been performed or attempted to be performed shall be  
30 preserved from public disclosure if she does not give her consent to such  
31 disclosure. The court, upon motion or sua sponte, shall make such a

1 ruling and, upon determining that her anonymity should be preserved,  
2 shall issue orders to the parties, witnesses, and counsel and shall  
3 direct the sealing of the record and exclusion of individuals from  
4 courtrooms or hearing rooms to the extent necessary to preserve her  
5 anonymity. Each such order shall be accompanied by specific written  
6 findings explaining why the anonymity of the woman should be preserved,  
7 why the order is essential to that end, how the order is narrowly  
8 tailored to serve that interest, and why no reasonable less-restrictive  
9 alternative exists. In the absence of written consent of the pregnant  
10 woman upon whom a dismemberment abortion has been performed or attempted  
11 to be performed, anyone other than a public official who brings an action  
12 under section 6 or 7 of this act shall do so under a pseudonym. This  
13 section shall not be construed to conceal the identity of the plaintiff  
14 or of witnesses from the defendant or from attorneys for the defendant.

15       Sec. 10. Nothing in sections 4 to 9 of this act shall be construed  
16 as creating or recognizing a right to abortion, nor a right to a  
17 particular method of abortion.

18       Sec. 11. Section 28-332, Reissue Revised Statutes of Nebraska, is  
19 amended to read:

20       28-332 The intentional and knowing violation of section 28-329,  
21 28-330, or 28-331 or section 4 of this act is a Class IV felony.

22       Sec. 12. Section 28-340, Revised Statutes Cumulative Supplement,  
23 2014, is amended to read:

24       28-340 Any person whose employment or position has been in any way  
25 altered, impaired, or terminated in violation of sections 28-325 to  
26 28-345 and sections 4 to 10 of this act may sue in the district court for  
27 all consequential damages, lost wages, reasonable attorney's fees  
28 incurred, and the cost of litigation.

29       Sec. 13. Section 38-2021, Revised Statutes Cumulative Supplement,  
30 2014, is amended to read:

31       38-2021 Unprofessional conduct means any departure from or failure

1 to conform to the standards of acceptable and prevailing practice of  
2 medicine and surgery or the ethics of the profession, regardless of  
3 whether a person, patient, or entity is injured, or conduct that is  
4 likely to deceive or defraud the public or is detrimental to the public  
5 interest, including, but not limited to:

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

11 (2) Performing an abortion upon a minor without having satisfied the  
12 requirements of sections 71-6901 to 71-6911;

13 (3) The intentional and knowing performance of a partial-birth  
14 abortion as defined in ~~subdivision (7) of~~ section 28-326, unless such  
15 procedure is necessary to save the life of the mother whose life is  
16 endangered by a physical disorder, physical illness, or physical injury,  
17 including a life-endangering physical condition caused by or arising from  
18 the pregnancy itself; ~~and~~

19 (4) Performance by a physician of an abortion in violation of the  
20 Pain-Capable Unborn Child Protection Act; ~~and -~~

21 (5) Performance by a physician of a dismemberment abortion in  
22 violation of section 4 of this act.

23 Sec. 14. If any of the new or amendatory sections of this act are  
24 ever temporarily or permanently restrained or enjoined by judicial order,  
25 the remaining sections of this act shall be enforced as though such  
26 restrained or enjoined sections had not been adopted and whenever such  
27 temporary or permanent restraining order or injunction is stayed or  
28 dissolved or otherwise ceases to have effect such sections shall have  
29 full force and effect.

30 Sec. 15. If any one or more provisions, sections, subsections,  
31 sentences, clauses, phrases, or words of sections 4 to 10 of this act or

1 the application thereof to any person or circumstance is found to be  
2 unconstitutional, the same is hereby declared to be severable and the  
3 balance of sections 4 to 10 of this act shall remain effective  
4 notwithstanding such unconstitutionality. The Legislature hereby declares  
5 that it would have passed sections 4 to 10 of this act, and each  
6 provision, section, subsection, sentence, clause, phrase, or word  
7 thereof, irrespective of the fact that any one or more provisions,  
8 sections, subsections, sentences, clauses, phrases, or words be declared  
9 unconstitutional.

10       Sec. 16.   Original section 28-332, Reissue Revised Statutes of  
11 Nebraska, sections 28-325, 28-326, 28-340, and 38-2021, Revised Statutes  
12 Cumulative Supplement, 2014, and section 28-101, Revised Statutes  
13 Supplement, 2015, are repealed.