

[As Amended by Senate Committee of the Whole]

[As Amended by House Committee of the Whole]

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, Kleebe, 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 section.

3

4 *Be it enacted by the Legislature of the State of Kansas:*

5 New Section 1. The legislature hereby finds and declares that:

6 (a) Pain receptors (nociceptors) are present throughout the unborn
7 child's entire body by no later than 16 weeks after fertilization and nerves
8 link these receptors to the brain's thalamus and subcortical plate by no
9 later than 20 weeks;

10 (b) by eight weeks after fertilization], ***the unborn child reacts to***
11 ***touch. By 20 weeks after fertilization]***, the unborn child reacts to stimuli
12 that would be recognized as painful if applied to an adult human, for
13 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 and,
19 possibly, emotional, behavioral and learning disabilities later in life;

20 (e) for the purposes of surgery on unborn children, fetal anesthesia is
21 routinely administered and is associated with a decrease in stress
22 hormones compared to their level when painful stimuli is applied without
23 such anesthesia;

24 (f) the position, asserted by some medical experts, that the unborn
25 child is incapable of experiencing pain until a point later in pregnancy than
26 20 weeks after fertilization predominately rests on the assumption that the
27 ability to experience pain depends on the cerebral cortex and requires

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

5 (g) substantial evidence indicates that children born missing the bulk
6 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 does;

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

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

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

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

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

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

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

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

34 (e) "Medical emergency" means a condition that, in reasonable
35 medical judgment, so complicates the medical condition of the pregnant
36 woman as to necessitate the immediate abortion of her pregnancy without
37 first determining gestational age to avert her death or for which a delay
38 necessary to determine gestational age will create serious risk of
39 substantial and irreversible physical impairment of a major bodily
40 function. No condition shall be deemed a medical emergency if based on a
41 claim or diagnosis that the woman will engage in conduct which would
42 result in her death or in substantial and irreversible physical impairment of
43 a major bodily function.

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

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

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

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

25 (b) Except in the case of a medical emergency, a copy of the written
26 documented referral and of the abortion-performing physician's written
27 determination shall be provided to the pregnant woman no less than 30
28 minutes prior to the initiation of the abortion. The written determination
29 shall be time-stamped at the time it is delivered to the pregnant woman.
30 The medical basis for the determination shall also be reported by the
31 physician as part of the written report made by the physician to the
32 secretary of health and environment under K.S.A. 65-445, and
33 amendments thereto. Such determination shall specify:

34 (1) If the abortion is necessary to preserve the life of the pregnant
35 woman and the medical basis of such determination, including the specific
36 medical condition the physician believes would cause the death of the
37 pregnant woman; or

38 (2) if a continuation of the pregnancy will cause a substantial and
39 irreversible physical impairment of a major bodily function of the pregnant
40 woman and the medical basis of such determination, including the specific
41 medical condition the physician believes would constitute a substantial and
42 irreversible impairment of a major bodily function of the pregnant woman.

43 (c) (1) Except in the case of a medical emergency, prior to performing

1 or inducing, or attempting to perform or induce an abortion upon a
2 woman, the physician shall determine the gestational age of the unborn
3 child according to accepted obstetrical and neonatal practice and standards
4 applied by physicians in the same or similar circumstances. In making
5 such a determination, the physician shall make such inquiries of the
6 woman and perform or cause to be performed such medical examinations
7 and tests as a reasonably prudent physician, knowledgeable about the case
8 and medical conditions involved, would consider necessary to perform in
9 making an accurate diagnosis with respect to gestational age. The
10 physician shall document as part of the medical records of the woman the
11 basis for the determination of gestational age. The physician shall report
12 such determinations, the medical basis and the reasons for such
13 determinations in writing to the medical care facility in which the abortion
14 is performed **or induced** for inclusion in the report of the medical care
15 facility to the secretary of health and environment under K.S.A. 65-445,
16 and amendments thereto, or if the abortion is not performed **or induced** in
17 a medical care facility, the physician who performs **or induces** the
18 abortion shall report such determinations, the medical basis and the
19 reasons for such determinations in writing to the secretary of health and
20 environment as part of the written report made by the physician to the
21 secretary of health and environment under K.S.A. 65-445, and
22 amendments thereto.

23 (2) If the physician determines the gestational age of the unborn child
24 is 22 or more weeks, then no abortion of the pain-capable unborn child
25 shall be performed or induced, or attempted to be performed or induced
26 except as provided for in subsection (a). In such event, the physician who
27 performs **or induces** the abortion shall report such determinations, the
28 medical basis and the reasons for such determinations, including the
29 specific medical diagnosis for the determination that an abortion is
30 necessary to preserve the life of the pregnant woman or that a continuation
31 of the pregnancy will cause a substantial and irreversible physical
32 impairment of a major bodily function of the pregnant woman and the
33 name of the referring physician required by subsection (a) in writing to the
34 medical care facility in which the abortion is performed **or induced** for
35 inclusion in the report of the medical care facility to the secretary of health
36 and environment under K.S.A. 65-445, and amendments thereto, or if the
37 abortion is not performed **or induced** in a medical care facility, the
38 physician who performs **or induces** the abortion shall report such
39 determinations, the medical basis and the reasons for such determinations,
40 including the specific medical diagnosis for the determination that an
41 abortion is necessary to preserve the life of the pregnant woman or that a
42 continuation of the pregnancy will cause a substantial and irreversible
43 physical impairment of a major bodily function of the pregnant woman

1 and the name of the referring physician required by subsection (a) in
2 writing to the secretary of health and environment as part of the written
3 report made by the physician to the secretary of health and environment
4 under K.S.A. 65-445, and amendments thereto.

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

7 (d) The secretary of health and environment shall adopt rules and
8 regulations to administer this section. Such rules and regulations shall
9 include:

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

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

13 (3) detailed specifications regarding information that must be
14 provided by a physician in order to comply with the obligation to disclose
15 the medical basis and specific medical diagnosis relied upon in
16 determining gestational age and in determining that an abortion is
17 necessary to preserve the life of the pregnant woman, or that a
18 continuation of the pregnancy will cause a substantial and irreversible
19 physical impairment of a major bodily function of the pregnant woman.

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

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

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

34 (2) Such relief shall include:

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

37 (B) statutory damages equal to three times the cost of the abortion;
38 and

39 (C) reasonable attorney fees.

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

43 (i) If any provision of this section is held to be invalid or

1 unconstitutional, it shall be conclusively presumed that the legislature
2 would have enacted the remainder of this section without such invalid or
3 unconstitutional provision.

4 (j) Upon a first conviction of a violation of this section, a person shall
5 be guilty of a class A person misdemeanor. Upon a second or subsequent
6 conviction of a violation of this section, a person shall be guilty of a
7 severity level 10, person felony.

8 Sec. 4. K.S.A. 65-445 is hereby amended to read as follows: 65-445.

9 (a) Every medical care facility shall keep written records of all pregnancies
10 which are lawfully terminated within such medical care facility and shall
11 annually submit a written report thereon to the secretary of health and
12 environment in the manner and form prescribed by the secretary. Every
13 person licensed to practice medicine and surgery shall keep a record of all
14 pregnancies which are lawfully terminated by such person in a location
15 other than a medical care facility and shall annually submit a written report
16 thereon to the secretary of health and environment in the manner and form
17 prescribed by the secretary.

18 (b) Each report required by this section shall include the number of
19 pregnancies terminated during the period of time covered by the report, the
20 type of medical facility in which the pregnancy was terminated,
21 information required to be reported under K.S.A. 65-6703 *and section 23*,
22 and amendments thereto, if applicable to the pregnancy terminated, and
23 such other information as may be required by the secretary of health and
24 environment, but the report shall not include the names of the persons
25 whose pregnancies were so terminated.

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

1 nonperson misdemeanor.

2 (d) In addition to such criminal penalty under subsection (c), any
3 person licensed to practice medicine and surgery or medical care facility
4 whose identity is revealed in violation of this section may bring a civil
5 action against the responsible person or persons for any damages to the
6 person licensed to practice medicine and surgery or medical care facility
7 caused by such violation.

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

14 **[New Sec. 5. Nothing in this act shall be construed to repeal any**
15 **statute dealing with abortion, but shall be considered supplemental to**
16 **such other statutes.]**

17 ~~Sec.-5: [6.]~~ K.S.A. 65-445 is hereby repealed.

18 ~~Sec.-6: [7.]~~ This act shall take effect and be in force from and after its
19 publication in the statute book.