

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

Act 1696 of the Regular Session

1 State of Arkansas

As Engrossed: S2/24/05 H3/28/05

2 85th General Assembly

A Bill

3 Regular Session, 2005

SENATE BILL 74

4
5 By: Senators *Womack, Altes, Baker, Critcher, Faris, Glover, Hendren, Holt, Horn, G. Jeffress, B. Johnson, Laverty, J. Taylor, Trusty, Wilkinson, Wooldridge*

6
7 By: Representatives *D. Creekmore, Harris, Key, Lamoureux, Matayo, Ragland, Rosenbaum, Sample*

8
9
10 **For An Act To Be Entitled**

11 AN ACT TO CREATE THE UNBORN CHILD PAIN AWARENESS
12 AND PREVENTION ACT OF 2005; AND FOR OTHER
13 PURPOSES.

14
15 **Subtitle**

16 THE UNBORN CHILD PAIN AWARENESS AND
17 PREVENTION ACT OF 2005.

18
19
20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

21
22 SECTION 1. Arkansas Code Title 20, Chapter 16, is amended to add an
23 additional subchapter to read as follows:

24 20-16-1101. Title.

25 This subchapter shall be known and may be cited as the "Unborn Child
26 Pain Awareness and Prevention Act".

27
28 20-16-1102. Definitions.

29 As used in this subchapter:

30 (1)(A) "Abortion" means the use or prescription of any
31 instrument, medicine, drug, or other substance or device intentionally to
32 terminate the pregnancy of a female known to be pregnant.

33 (B) However "abortion" does not include the termination of
34 a pregnancy if the termination is intended to:

35 (i) Increase the probability of a live birth;



1 (ii) Preserve the life or health of the child after
2 live birth; or

3 (iii) Remove a dead fetus who died as the result of
4 a spontaneous miscarriage;

5 (2) "Attempt to perform an abortion" means an act or an omission
6 of a statutorily required act that, under the circumstances as the actor
7 believes them to be, constitutes a substantial step in a course of conduct
8 planned to culminate in the termination of a pregnancy in this state;

9 (3) "Gestational age" means the age of the unborn child as
10 calculated from the first day of the last menstrual period of the pregnant
11 woman;

12 (4) "Medical emergency" means any condition that on the basis of
13 the physician's good-faith clinical judgment so complicates the medical
14 condition of a pregnant female that:

15 (A) The immediate abortion of her pregnancy is necessary
16 to prevent her death; or

17 (B) A delay will create a serious risk of substantial and
18 irreversible impairment of a major bodily function of the pregnant female;

19 (5) "Physician" means a person authorized or licensed to
20 practice medicine under the Arkansas Medical Practices Act, §§ 17-95-201 -
21 17-95-207, 17-95-301 - 17-95-305, and 17-95-401 - 17-95-411 and a person
22 authorized to practice osteopathy under § 17-91-101 et seq.;

23 (6) "Probable gestational age" means the age that, with
24 reasonable probability in the judgment of a physician, will be the
25 gestational age of the unborn child at the time the abortion is planned to be
26 performed; and

27 (7) "Unborn child" means a member of the species homo sapiens
28 from fertilization until birth.

29
30 20-16-1103. Unborn-child pain awareness information.

31 Except in the case of a medical emergency:

32 (1) At least twenty-four (24) hours before an abortion is
33 performed on an unborn child whose probable gestation age is twenty (20)
34 weeks or more, the physician performing the abortion or the physician's agent
35 shall inform the pregnant female by telephone or in person:

36 (A) That:

1 (i) She has the right to review the printed
2 materials described in § 20-16-1105; and

3 (ii) These materials are available on a state-
4 sponsored website; and

5 (B) What the website address is.

6 (2) The physician or the physician's agent shall orally inform
7 the pregnant female that:

8 (A) The materials have been provided by the State of
9 Arkansas; and

10 (B) They contain information on pain in relation to the
11 unborn child.

12 (3) If the pregnant female chooses to view the materials other
13 than on the website, the materials shall either:

14 (A) Be given to her at least twenty (24) hours before the
15 abortion; or

16 (B) Mailed to her at least seventy-two (72) hours before
17 the abortion by certified mail, restricted delivery to addressee, so that the
18 postal employee may deliver the mail only to the pregnant female.

19 (4) If provisions are made to record or otherwise register
20 specifically whether the female does or does not choose to have the printed
21 materials given or mailed to her, the information required by this section
22 may be provided by a tape recording.

23 (5) The pregnant female shall certify in writing before the
24 abortion that:

25 (A) The information described in subdivision (1) of this
26 section has been furnished her; and

27 (B) She has been informed of her opportunity to review the
28 printed materials described in § 20-16-1105.

29 (6) Before the abortion is performed, the physician who is to
30 perform the abortion or the physician's agent shall:

31 (A) Obtain a copy of the written certification required
32 under subdivision (5) of this section; and

33 (B) Retain it on file with the female's medical record for
34 at least three (3) years following the date of receipt.

35
36 20-16-1104. Unborn-child pain prevention.

1 (a) Except in the case of a medical emergency, before an abortion is
2 performed on an unborn child whose gestational age is twenty (20) weeks or
3 more, the physician performing the abortion or the physician's agent shall
4 inform the pregnant female:

5 (1) Whether an anesthetic or analgesic would eliminate or
6 alleviate organic pain to the unborn child that could be caused by the
7 particular method of abortion to be employed; and

8 (2) Of the particular medical risks associated with the
9 particular anesthetic or analgesic.

10 (b) After presenting the information required in subsection (a) of
11 this section and with the consent of the pregnant female, the physician shall
12 administer the anesthetic or analgesic.

13
14 20-16-1105. Printed information.

15 (a)(1)(A) Within ninety (90) days after the effective date of this
16 subchapter, the Department of Health shall publish in English and in each
17 language that is the primary language of two percent (2%) or more of the
18 state's population printed materials with the following statement concerning
19 unborn children of twenty (20) weeks gestational age or more:

20 "By twenty (20) weeks gestation, the unborn child has the physical
21 structures necessary to experience pain. There is evidence that by
22 twenty (20) weeks gestation unborn children seek to evade certain
23 stimuli in a manner that in an infant or an adult would be interpreted
24 to be a response to pain. Anesthesia is routinely administered to
25 unborn children who are twenty (20) weeks gestational age or more who
26 undergo prenatal surgery."

27 (B) The materials shall be objective, nonjudgmental, and
28 designed to convey only accurate scientific information about the human fetus
29 at the various gestational ages.

30 (2) The department shall make the materials available on the
31 department's website.

32 (3) The materials referred to in subsection (a) of this section
33 shall be printed in a typeface large enough to be clearly legible.

34 (b)(1) The department's website shall be maintained at a minimum
35 resolution of seventy-two (72) dots per inch.

36 (2) All pictures appearing on the website shall be a minimum of

1 two hundred by three hundred (200 X 300) pixels.

2 (3) All letters on the website shall be presented in a minimum
3 of 11-point font.

4 (4) All information and pictures shall be accessible with an
5 industry standard browser that requires no additional plug-ins.

6 (c) Upon request, the Department of Health shall make available to any
7 person, facility, or hospital at no cost and in appropriate numbers the
8 materials required under this section.

9
10 20-16-1106. Internet website.

11 (a) The Department of Health shall include on its website the
12 information described in § 20-16-1105.

13 (b) No information regarding persons who use the website shall be
14 collected or maintained.

15 (c) The department shall monitor the website on a daily basis to
16 prevent and correct tampering.

17
18 20-16-1107. Procedure in case of medical emergency.

19 If a medical emergency compels a physician to perform an abortion, the
20 physician shall inform the pregnant female before the abortion is performed,
21 if possible, of the medical indications supporting the physician's judgment
22 that:

23 (1) An abortion is necessary to prevent her death; or

24 (2) A twenty-four-hour delay will create a serious risk of
25 substantial and irreversible impairment of a major bodily function of the
26 pregnant female.

27
28 20-16-1108. Reporting.

29 (a) Within ninety (90) days after the effective date of this
30 subchapter, the Department of Health shall prepare a reporting form for
31 physicians containing a reprint of this subchapter and listing:

32 (1)(A) The number of females to whom the physician or an agent
33 of the physician provided the information described in § 20-16-1103(1).

34 (B) Of that number the number provided by telephone and
35 the number provided in person.

36 (C) Of each of the numbers described in subdivisions

1 (a)(1) and (a)(2) of this section, the number provided in the capacity of:

2 (i) A physician who is to perform the abortion; or

3 (ii) An agent of the physician;

4 (2) The number of females who did not avail themselves of the
5 opportunity to obtain a copy other than on the website of the printed
6 information described in § 20-16-1105;

7 (3) The number who, to the best of the reporting physician's
8 information and belief, went on to obtain the abortion;

9 (4) The number of abortions performed by the physician for which
10 information otherwise required to be provided at least twenty-four (24) hours
11 before the abortion was not so provided because an immediate abortion was
12 necessary to prevent the female's death; and

13 (5) The number of abortions for which information otherwise
14 required to be provided at least twenty-four (24) hours before the abortion
15 information was not so provided because a delay would create serious risk of
16 substantial and irreversible impairment of a major bodily function of the
17 pregnant female.

18 (b) The department shall ensure that copies of the reporting forms
19 described in subsection (a) of this section are provided:

20 (1) Within one hundred twenty (120) days after the effective
21 this subchapter, to all physicians licensed to practice in this state;

22 (2) To each physician who subsequently becomes newly licensed to
23 practice in this state, at the same time as official notification to that
24 physician that the physician is so licensed; and

25 (3) By December 1 of each year after the calendar year in which
26 this subchapter becomes effective, to all physicians licensed to practice in
27 this state.

28 (c) By February 28 of each year following a calendar year in any part
29 of which this subchapter was in effect, each physician who provided or whose
30 agent provided information to one (1) or more females in accordance with §
31 20-16-1103 during the previous calendar year shall submit to the department a
32 copy of the form described in subsection (a) of this section with the
33 requested data entered accurately and completely.

34 (d)(1) For each of the items listed in subsection (a) of this section,
35 the department shall issue by June 30 of each year a public report providing
36 statistics compiled by the department on the basis of reports for the

1 previous calendar year submitted in accordance with this section.

2 (2) Each report shall also provide the statistics for all
3 previous calendar years, adjusted to reflect any additional information from
4 late or corrected reports.

5 (3) The department shall ensure that none of the information
6 included in the public reports could reasonably lead to the identification of
7 any individual providing or provided information in accordance with § 20-16-
8 1103(1) or (2).

9 (e) So long as reporting forms are sent to all licensed physicians in
10 the state at least once every year and the report described in this section
11 is issued at least once every year, the department, in order to achieve
12 administrative convenience, fiscal savings, or to reduce the burden of
13 reporting requirements, may:

14 (1) Alter any of the dates established in this section; or

15 (2) Consolidate the forms or reports described in this section
16 with other forms or reports issued by the department.

17 (f)(1) The department shall assess against a physician who fails to
18 submit a report required under this section within thirty (30) days after the
19 due date a fee of five hundred dollars (\$500) for each additional thirty-day
20 period or portion of a thirty-day period during which the report is overdue.

21 (2)(A) If a physician who is required to report under this
22 section has not submitted a report or has submitted an incomplete report more
23 than one (1) year following the due date of the report, the department may
24 bring an action in a court of competent jurisdiction to seek an order
25 requiring the physician to submit a complete report within a period
26 established by the court.

27 (B) Failure of the physician to file the complete report
28 within the court-ordered period is punishable as civil contempt.

29
30 20-16-1109. Penalties.

31 (a) A person who knowingly or recklessly performs or attempts to
32 perform a termination of a pregnancy in violation of this subchapter shall be
33 subject to disciplinary action by the Arkansas State Medical Board.

34 (b) No penalty may be assessed against the woman upon whom the
35 abortion is performed or attempted to be performed.

36 (c) No penalty or civil liability may be assessed for failure to

1 comply with any provision of this subchapter unless the department has made
2 the printed materials available at the time that the physician or the
3 physician's agent is required to inform the woman of her right to review
4 them.

5
6 20-16-1110. Civil remedies.

7 (a) An action seeking actual and punitive damages may be brought
8 against a person who performed an abortion in knowing or reckless violation
9 of this subchapter by:

10 (1) Any person upon whom the abortion was performed;

11 (2) The father of the unborn child who was the subject of the
12 abortion; or

13 (3) A grandparent of the unborn child who was the subject of the
14 abortion.

15 (b) Any female upon whom an abortion has been attempted in violation
16 of this subchapter may bring an action for actual and punitive damages
17 against a person who attempted to perform the abortion in knowing or reckless
18 violation of this subchapter.

19 (c)(1) If the Department of Health fails to issue the public report
20 required under § 20-16-1108, any group of ten (10) or more citizens of this
21 state may seek an injunction in a court of competent jurisdiction against the
22 Director of the Department of Health requiring that a complete report be
23 issued within a period established by the court.

24 (2) Failure of the director to obey an injunction issued under
25 subdivision (c)(1) of this section is punishable as civil contempt.

26 (d)(1) If judgment is rendered in favor of the plaintiff in any action
27 described in this section, the court shall assess a reasonable attorney's fee
28 in favor of the plaintiff against the defendant.

29 (2) If judgment is rendered in favor of the defendant and the
30 court finds that the plaintiff's suit was frivolous and brought in bad faith,
31 the court shall assess a reasonable attorney's fee in favor of the defendant
32 against the plaintiff.

33
34 20-16-1111. Protection of privacy in court proceedings.

35 (a) In every civil or criminal action brought under this subchapter in
36 which any female upon whom an abortion has been performed or attempted has

1 not given her consent to disclosure of her identity, the court shall
2 determine whether the anonymity of the female shall be preserved from public
3 disclosure.

4 (b)(1) The court, upon motion or sua sponte, shall make a ruling on
5 preserving the anonymity of the female.

6 (2) If the court determines that female's anonymity should be
7 preserved, that court shall:

8 (A) Issue appropriate orders to the parties, witnesses,
9 and counsel;

10 (B) Direct the sealing of the record; and

11 (C) Order the exclusion of individuals from courtrooms or
12 hearing rooms to the extent necessary to safeguard the anonymity of the
13 female.

14 (3) Each order issued under subdivisions (b)(1) and (b)(2) of
15 this section shall be accompanied by specific written findings explaining:

16 (A) Why:

17 (i) The anonymity of the female should be preserved
18 from public disclosure;

19 (ii) The order is essential to that end; and

20 (ii) No reasonable less restrictive alternative
21 exists; and

22 (B) How the order is narrowly tailored to preserve the
23 anonymity of the female.

24 (c) In the absence of written consent of the female upon whom an
25 abortion has been performed or attempted, anyone, other than a public
26 official, who brings an action under § 20-16-1110(a) shall do so under a
27 pseudonym.

28 (d) This section may not be construed to conceal the identity of the
29 plaintiff or witnesses from the defendant.

30
31 */s/ Womack, et al*
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34 *APPROVED: 4/05/2005*
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