

Stricken language would be deleted from and underlined language would be added to law as it existed prior to the 82nd General Assembly.

1 State of Arkansas
2 82nd General Assembly
3 Regular Session, 1999
4

As Engrossed: H3/5/99 H3/10/99

A Bill

HOUSE BILL 1360

5 By: Representatives Magnus, Agee, Buchanan, Rodgers, T. Thomas, Bennett, Files, Green, Hendren,
6 Minton, Simon, Bledsoe, Morris, M. Smith, Womack, Parks
7
8

For An Act To Be Entitled

9
10 "AN ACT REQUIRING PHYSICIANS TO COMMUNICATE SUFFICIENT
11 INFORMATION BEFORE TERMINATING PREGNANCIES SO THAT
12 PATIENTS CAN GIVE AN INFORMED CONSENT TO THE
13 PROCEDURE; AND FOR OTHER PURPOSES"
14

Subtitle

15 "REQUIRING PHYSICIANS TO COMMUNICATE
16 SUFFICIENT INFORMATION BEFORE
17 TERMINATING PREGNANCIES SO THAT PATIENTS
18 CAN GIVE AN INFORMED CONSENT TO THE
19 PROCEDURE. "
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22

23 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
24

25 SECTION 1. TITLE. This act shall be known and may be cited as the
26 'Arkansas Informed Consent Act of 1999'.
27

28 SECTION 2. Definitions. As used in this act:

29 (1) 'Abortion' means the use or prescription of any instrument,
30 medicine, drug, or any other substance or device intentionally to terminate
31 the pregnancy of a female known to be pregnant with an intention other than
32 to increase the probability of a live birth, to preserve the life or health
33 of the child after live birth, or to remove a dead fetus;

34 (2) 'Attempt to perform an abortion' means an act, or an omission of a
35 statutorily required act, that, under the circumstances as the actor
36 believes them to be, constitutes a substantial step in a course of conduct

1 planned to culminate in the termination of a pregnancy in Arkansas in
2 violation of this act;

3 (3) 'Department' means the Department of Health;

4 (4) 'Director' means the Director of the Department of Health;

5 (5) 'Gestational age' means the age of the unborn child as calculated
6 from the first day of the last menstrual period of the pregnant female;

7 (6) 'Medical emergency' means any condition which, on the basis of the
8 physician's good faith clinical judgment, so complicates the medical
9 condition of a pregnant female as to necessitate the immediate termination
10 of her pregnancy to avert her death or for which a delay will create
11 serious risk of substantial and irreversible impairment of a major bodily
12 function;

13 (7) 'Physician' means any person licensed to practice medicine in this
14 state; and

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

19
20 SECTION 3. Informed Consent.

21 No abortion shall be performed in this state except with the voluntary
22 and informed consent of the female upon whom the abortion is to be performed.
23 Except in the case of a medical emergency, consent to an abortion is voluntary
24 and informed if and only if:

25 (1) At least twenty-four (24) hours before the abortion, the female is
26 told the following, by telephone or in person, by the physician who is to
27 perform the abortion or by a referring physician:

28 (A) The name of the physician who will perform the abortion;

29 (B) The medical risks associated with the particular abortion
30 procedure to be employed including, when medically accurate, the risks of
31 infection, hemorrhage, breast cancer, danger to subsequent pregnancies, and
32 infertility;

33 (C) The probable gestational age of the unborn child at the time
34 the abortion is be performed; and

35 (D) The medical risks associated with carrying the unborn child to
36 term.

1 (2)(A) The information required by this subsection may be provided by
2 telephone without conducting a physical examination or tests of the female, in
3 which case the information required to be provided may be based on facts
4 supplied the physician by the female and whatever other relevant information
5 is reasonably available to the physician;

6 (B) The information required by this subsection may not be
7 provided by a tape recording, but shall be provided during a consultation in
8 which the physician is able to ask questions of the female and the female is
9 able to ask questions of the physician;

10 (C) If a physical examination, tests, or the availability of other
11 information to the physician subsequently indicate, in the medical judgment of
12 the physician, a revision of the information previously supplied to the
13 female, that revised information may be communicated to the female at any time
14 prior to the performance of the abortion; and

15 (D) Nothing in this section may be construed to preclude provision
16 of required information in a language understood by the female through a
17 translator.

18 (3) At least twenty-four (24) hours before the abortion, the female is
19 informed, by telephone or in person, by the physician who is to perform the
20 abortion, by a referring physician or by an agent of either physician:

21 (A) That medical assistance benefits may be available for prenatal
22 care, childbirth, and neonatal care;

23 (B) That the father is liable to assist in the support of her
24 child, even in instances in which the father has offered to pay for the
25 abortion; and

26 (C)(i) That she has the right to review the printed materials
27 described in Section 4 of this act;

28 (ii) The physician or the physician's agent shall orally
29 inform the female that the materials have been provided by the State of
30 Arkansas and that they describe the unborn child and list agencies that offer
31 alternatives to abortion;

32 (iii) If the female chooses to view the materials, they
33 shall either be given to her at least twenty-four (24) hours before the
34 abortion or mailed to her at least ninety-six (96) hours before the procedure,
35 by certified mail, restricted delivery to addressee, which means that postal
36 employees may only deliver the mail to the addressee; and

1 (iv) The information required by this subsection may be
2 provided by a tape recording if provision is made to record or otherwise
3 register specifically whether the female does or does not choose to review the
4 printed materials.

5 (4) Prior to the termination of the pregnancy, the female certifies in
6 writing that the information described in subsections (1) and (3) of this
7 section has been furnished her and that she has been informed of her
8 opportunity to review the information referred to in subdivision (C) of
9 subsection (3) of this section.

10 (5) Prior to the abortion, the physician who is to perform the procedure
11 or the physician's agent receives a copy of the written certification
12 prescribed by subsection (4) of this section.

13
14 SECTION 4. Printed materials.

15 (a) Within ninety (90) days after the effective date of this act, the
16 department shall cause to be published, in English and in each language which
17 is the primary language of two percent (2%) or more of the state's population,
18 and shall update on an annual basis, the following printed materials in such a
19 way as to ensure that the information is easily comprehensible:

20 (1) Geographically indexed materials designed to inform the female
21 of public and private agencies and services available to assist a female
22 through pregnancy, upon childbirth, and while the child is dependent,
23 including adoption agencies, which shall include a comprehensive list of the
24 agencies available, a description of the services they offer, and a
25 description of the manner, including telephone numbers, in which they might be
26 contacted or, at the option of the department, printed materials including a
27 toll-free twenty-four (24) hour a day telephone number which may be called to
28 obtain, orally, such a list and description of agencies in the locality of the
29 caller and of the services they offer; and

30 (2)(A) Materials designed to inform the female of the probable
31 anatomical and physiological characteristics of the unborn child at two (2)
32 week gestational increments from the time when a female can be known to be
33 pregnant to full term, including any relevant information on the possibility
34 of the unborn child's survival and pictures or drawings representing the
35 development of unborn children at two (2) week gestational increments,
36 provided that those pictures or drawings shall contain the dimensions of the

1 fetus and shall be realistic and appropriate for the stage of pregnancy
2 depicted;

3 (B) The materials shall be objective, nonjudgmental, and
4 designed to convey only accurate scientific information about the unborn child
5 at the various gestational ages; and

6 (C) The material shall also contain objective information
7 describing the methods of termination of pregnancy procedures commonly
8 employed, the medical risks commonly associated with each such procedure, the
9 possible detrimental psychological effects of termination of pregnancy, and
10 the medical and psychological risks commonly associated with carrying a child
11 to term.

12 (b) The materials referred to in subsection (a) of this section shall be
13 printed in a typeface large enough to be clearly legible.

14 (c) The materials required under this section shall be available at no
15 cost from the department upon request and in appropriate numbers to any
16 person, facility, or hospital.

17
18 SECTION 5. Procedure in case of medical emergency.

19 When a medical emergency compels the performance of an abortion, the
20 physician shall inform the female, prior to the abortion if possible, of the
21 medical indications supporting the physician's judgment that an abortion is
22 necessary to avert her death or that a twenty-four (24) hour delay will create
23 serious risk of substantial and irreversible impairment of a major bodily
24 function.

25
26 SECTION 6. Reporting requirements.

27 (a) Within ninety (90) days after the effective date of this act, the
28 department shall prepare a reporting form for physicians containing a reprint
29 of this act and appropriate space for listing the following information:

30 (1)(A) The number of females to whom the physician has provided
31 the information described in subsection (1) of Section 3 of this act;

32 (B) Of that number, the number provided information by
33 telephone and the number provided in person;

34 (C) Of each of those numbers, the number provided
35 information in the capacity of a referring physician and the number provided
36 in the capacity of a physician who is to perform the termination of the

1 pregnancy;

2 (2)(A) The number of females to whom the physician or an agent of
3 the physician provided the information described in subsection (3) of Section
4 3 of this act;

5 (B) Of that number, the number provided information by
6 telephone and number provided in person;

7 (C) Of each of those numbers, the number provided
8 information in the capacity of a referring physician and number provided in
9 the capacity of a physician who is to perform the termination of pregnancy;
10 and

11 (D) Of each of those numbers, the number provided
12 information by the physician and the number provided by an agent of the
13 physician;

14 (3)(A) The number of females who availed themselves of the
15 opportunity to obtain a copy of the printed information described in Section 4
16 of this act and the number who did not; and

17 (B) Of each of those numbers, the number who, to the best of
18 the reporting physician's information and belief, went on to obtain the
19 abortion;

20 (4)(A) The number of abortions performed by the physician in which
21 information otherwise required to be provided at least twenty-four (24) hours
22 before the procedure was not provided because an immediate abortion was
23 necessary to avert the female's death; and

24 (B) The number of abortions in which that information was
25 not provided because a delay would create serious risk of substantial and
26 irreversible impairment of a major bodily function.

27 (b) It shall be the responsibility of physicians to obtain the reporting
28 forms from the department. The department is responsible for ensuring that
29 the reporting forms are available.

30 (c) By February 28 of each year following a calendar year in any part of
31 which this act was in effect, each physician who provided, or whose agent
32 provided, information to one (1) or more females in accordance with Section 3
33 of this act during the previous calendar year shall submit to the department a
34 copy of the form described in subsection (a) of this section, with the
35 requested data entered accurately and completely.

36 (d)(1) Reports that are not submitted within a grace period of thirty

1 (30) days following the due date shall be subject to a late fee of five
2 hundred dollars (\$500) for each additional thirty (30) day period or portion
3 of a thirty (30) day period they are overdue; and

4 (2) Any physician required to report in accordance with this
5 section who has not submitted a report or has submitted only an incomplete
6 report more than one (1) year following the due date, may, in an action
7 brought by the department, be directed by a court of competent jurisdiction to
8 submit a complete report within a period stated by court order or be subject
9 to sanctions for civil contempt.

10 (e)(1) By June 3 of each year, the department shall issue a public
11 report providing statistics for the previous calendar year compiled from all
12 of the reports covering that year submitted in accordance with this section
13 for each of the items listed in subsection (a) of this section;

14 (2) Each such report shall also provide the statistics for all
15 previous calendar years, adjusted to reflect any additional information from
16 late or corrected reports; and

17 (3) The department shall take care to ensure that none of the
18 information included in the public reports could reasonably lead to the
19 identification of any individual provided information in accordance with
20 subsections (1) or (3) of Section 3 of this act.

21 (f) The department may by regulation promulgated in accordance with the
22 Administrative Procedure Act, codified beginning at Arkansas Code 25-15-20,
23 alter the dates established by subsections (b)(3), (c), or (e) of this section
24 or consolidate the forms or reports described in this section with other forms
25 or reports to achieve administrative convenience or fiscal savings or to
26 reduce the burden of reporting requirements, so long as reporting forms are
27 sent to all licensed physicians in this state at least once every year and the
28 report described in subsection (e) is issued at least once every year.

29
30 SECTION 7. Criminal Penalties.

31 (a) Any person who knowingly or recklessly performs or attempts to
32 terminate a pregnancy in violation of this act shall be guilty of a felony.

33 (b) Any physician who knowingly or recklessly submits a false report
34 under subsection (c) of Section 6 of this act shall be guilty of a
35 misdemeanor.

36 (c) No penalty may be assessed against the female upon whom the abortion

1 is performed or attempted to be performed.

2 (d) No penalty or civil liability may be assessed for failure to comply
3 with subdivision (C) of subsection (3) of Section 3 of this act or that
4 portion of subsection (4) of Section 3 of this act requiring a written
5 certification that the female has been informed of her opportunity to review
6 the information referred to in subdivision (C) of subsection (3) of Section 3
7 of this act, unless the department has made the printed materials available at
8 the time the physician or the physician's agent is required to inform the
9 female of her right to review them.

10
11 SECTION 8. Civil Remedies.

12 (a)(1) Any person upon whom a termination of pregnancy has been
13 performed without complying with this act, the father of the unborn child who
14 was the subject of such an abortion or if the female is a minor, then the
15 grandparent of such an unborn child may maintain an action against the person
16 who performed the abortion in knowing or reckless violation of this act for
17 actual and punitive damages.

18 (2) Any person upon whom a termination of pregnancy has been
19 attempted without complying with this act may maintain an action against the
20 person who attempted an abortion in knowing or reckless violation of this
21 article for actual and punitive damages.

22 (b) If the department fails to issue the public report required by
23 subsection (a) of Section 6 of this act any group of ten (10) or more citizens
24 of this state may seek an injunction in a court of competent jurisdiction
25 against the director requiring that a complete report be issued within a
26 period stated by court order. Failure to abide by such an injunction shall
27 subject the director to sanctions for civil contempt.

28 (c)(1) If judgment is rendered in favor of the plaintiff in any action
29 described in this section, the court shall also render judgment for a
30 reasonable attorney's fee in favor of the defendant; and

31 (2) If the court finds that the plaintiff's suit was frivolous and
32 brought in bad faith, the court shall also render judgment for a reasonable
33 attorney's fee in favor of the defendant against the plaintiff.

34
35 SECTION 9. (a) In every civil or criminal proceeding or action brought
36 under this act, the court shall rule whether the anonymity of any female upon

1 whom a termination of pregnancy has been performed or attempted shall be
2 preserved from public disclosure if she does not give her consent to such
3 disclosure.

4 (b) The court, upon motion or sua sponte shall make such a ruling and,
5 upon determining that her anonymity should be preserved, shall issue orders to
6 the parties, witnesses, and counsel and shall direct the sealing of the record
7 and exclusion of individuals from courtrooms or hearing rooms to the extent
8 necessary to safeguard her identity from public disclosure.

9 (c) Each such order shall be accompanied by specific written findings
10 explaining why the anonymity of the female should be preserved from public
11 disclosure, why the order is essential to that end, how the order is narrowly
12 tailored to serve that interest, and why no reasonable less restrictive
13 alternative exists.

14 (d) In the absence of written consent of the female upon whom a
15 termination of pregnancy has been performed or attempted, anyone other than a
16 public official who brings an action under subsection (a) of Section 8 of this
17 act shall do so under a pseudonym.

18 (e) This section shall not be construed to conceal the identity of the
19 plaintiff or of witnesses from the defendant.

20
21 SECTION 10. All provisions of this act of a general and permanent
22 nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas
23 Code Revision Commission shall incorporate the same in the Code.

24
25 SECTION 11. If any provision of this act or the application thereof to
26 any person or circumstance is held invalid, such invalidity shall not affect
27 other provisions or applications of the act which can be given effect without
28 the invalid provision or application, and to this end the provisions of this
29 act are declared to be severable.

30
31 SECTION 12. All laws and parts of laws in conflict with this act are
32 hereby repealed.

33 */s/ Magnus, et al*
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