

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.

1 State of Arkansas
2 85th General Assembly
3 Regular Session, 2005

A Bill

SENATE BILL 74

4
5 By: Senator Womack
6
7

For An Act To Be Entitled

8
9 AN ACT TO CREATE THE UNBORN CHILD PAIN AWARENESS
10 AND PREVENTION ACT OF 2005; AND FOR OTHER
11 PURPOSES.
12

Subtitle

13
14 THE UNBORN CHILD PAIN AWARENESS AND
15 PREVENTION ACT OF 2005.
16
17

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

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

22 20-16-1101. Title.

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

26 20-16-1102. Definitions.

27 As used in this subchapter:

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

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

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

34 (ii) Preserve the life or health of the child after
35 live birth; or

36 (iii) Remove a dead fetus who died as the result of



1 a spontaneous miscarriage;

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

6 (3) "Medical emergency" means any condition that on the basis of
 7 the physician's good-faith clinical judgment so complicates the medical
 8 condition of a pregnant female that:

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

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

13 (4) "Physician" means a person authorized or licensed to
 14 practice medicine under the Arkansas Medical Practices Act, §§ 17-95-201 -
 15 17-95-207, 17-95-301 - 17-95-305, and 17-95-401 - 17-95-411 and a person
 16 authorized to practice osteopathy under § 17-91-101 et seq.;

17 (5) "Probable gestational age" means the age that, with
 18 reasonable probability in the judgment of a physician, will be the
 19 gestational age of the unborn child at the time the abortion is planned to be
 20 performed; and

21 (6) "Unborn child" means a member of the species homo sapiens
 22 from fertilization until birth.

23
 24 20-16-1103. Unborn-child pain awareness information.

25 Except in the case of a medical emergency:

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

30 (A) That:

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

33 (ii) These materials are available on a state-
 34 sponsored website; and

35 (B) What the website address is.

36 (2) The physician or the physician's agent shall orally inform

1 the pregnant female that:

2 (A) The materials have been provided by the State of
3 Arkansas; and

4 (B) They contain information on pain in relation to the
5 unborn child.

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

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

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

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

17 (5) The pregnant female shall certify in writing before the
18 abortion that:

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

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

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

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

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

29
30 20-16-1104. Unborn-child pain prevention.

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

35 (1) Whether an anesthetic or analgesic would eliminate or
36 alleviate organic pain to the unborn child that could be caused by the

1 particular method of abortion to be employed; and

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

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

7
8 20-16-1105. Printed information.

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

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

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

24 (2) The department shall make the materials available on the
25 department's website.

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

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

30 (2) All pictures appearing on the website shall be a minimum of
31 two hundred by three hundred (200 X 300) pixels.

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

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

36 (c) Upon request, the Department of Health shall make available to any

1 person, facility, or hospital at no cost and in appropriate numbers the
2 materials required under this section.

3
4 20-16-1106. Internet website.

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

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

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

11
12 20-16-1107. Procedure in case of medical emergency.

13 If a medical emergency compels a physician to perform an abortion, the
14 physician shall inform the pregnant female before the abortion is performed,
15 if possible, of the medical indications supporting the physician's judgment
16 that:

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

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

21
22 20-16-1108. Reporting.

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

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

28 (B) Of that number the number provided by telephone and
29 the number provided in person.

30 (C) Of each of the numbers described in subdivisions
31 (a)(1) and (a)(2) of this section, the number provided in the capacity of:

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

33 (ii) An agent of the physician;

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

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

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

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

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

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

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

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

22 (c) By February 28 of each year following a calendar year in any part
23 of which this subchapter was in effect, each physician who provided or whose
24 agent provided information to one (1) or more females in accordance with §
25 20-16-1103 during the previous calendar year shall submit to the department a
26 copy of the form described in subsection (a) of this section with the
27 requested data entered accurately and completely.

28 (d)(1) For each of the items listed in subsection (a) of this section,
29 the department shall issue by June 30 of each year a public report providing
30 statistics compiled by the department on the basis of reports for the
31 previous calendar year submitted in accordance with this section.

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

35 (3) The department shall ensure that none of the information
36 included in the public reports could reasonably lead to the identification of

1 any individual providing or provided information in accordance with § 20-16-
2 1103(1) or (2).

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

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

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

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

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

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

23
24 20-16-1109. Criminal penalties.

25 (a) Any person who knowingly or recklessly performs or attempts to
26 perform an abortion in violation of this subchapter shall be guilty of a
27 Class D felony.

28 (b) Any physician who knowingly or recklessly submits a false report
29 under § 20-16-1106 shall be guilty of a Class A misdemeanor.

30 (c) No penalty may be assessed against a female upon whom an abortion
31 is performed or attempted.

32 (d) No penalty or civil liability may be assessed for failure to
33 comply with § 20-16-1103 requiring a written certification that the female
34 has been informed of her opportunity to review the information referred to in
35 § 20-16-1103 unless the Department of Health has made the printed materials
36 available at the time the physician or the physician's agent is required to

1 inform the female of her right to review them.

2
3 20-16-1110. Civil remedies.

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

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

8 (2) The father of the unborn child who was the subject of the
9 abortion; or

10 (3) A grandparent of the unborn child who was the subject of the
11 abortion.

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

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

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

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

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

30
31 20-16-1111. Protection of privacy in court proceedings.

32 (a) In every civil or criminal action brought under this subchapter in
33 which any female upon whom an abortion has been performed or attempted has
34 not given her consent to disclosure of her identity, the court shall
35 determine whether the anonymity of the female shall be preserved from public
36 disclosure.

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

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

5 (A) Issue appropriate orders to the parties, witnesses,
6 and counsel;

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

8 (C) Order the exclusion of individuals from courtrooms or
9 hearing rooms to the extent necessary to safeguard the anonymity of the
10 female.

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

13 (A) Why:

14 (i) The anonymity of the female should be preserved
15 from public disclosure;

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

17 (ii) No reasonable less restrictive alternative
18 exists; and

19 (B) How the order is narrowly tailored to preserve the
20 anonymity of the female.

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

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

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