

Regular Session, 2012

SENATE BILL NO. 593

BY SENATOR ALARIO

CHILDREN. Provides for the Viable and Pain-Capable Unborn Child Protection Act.  
(8/1/12)

1 AN ACT

2 To amend and reenact R.S. 40:1299.35.1(4), (7) through (11), 1299.35.2(B) and (C), the  
3 heading of R.S. 40:1299.35.4, 1299.35.4(A),(B) and (C) and 1299.35.12 and to enact  
4 R.S. 40:1299.35 and 1299.35.1(12),(13),(14) and (15) , relative to abortion; to  
5 provide for the Viable and Pain-Capable Unborn Child Protection Act; to provide for  
6 definitions; to provide for penalties; to provide for an effective date, and to provide  
7 for related matters.

8 Section 1. R.S. 40:1299.35.1(4), (7) through (11), 1299.35.2(B) and (C), the heading  
9 of R.S. 40:1299.35.4, R.S. 1299.35.4(A),(B) and (C) and 1299.35.12 are hereby amended  
10 and reenacted and R.S. 40:1299.35 and 1299.35.1(12),(13),(14) and (15) are hereby enacted  
11 to read as follows:

12 **§1299.35. Short title**

13 **This Part may be cited as the "Viable and Pain-Capable Unborn Child**  
14 **Protection Act"**.

15 §1299.35.1. Definitions

16 As used in R.S. 40:1299.35.0 through 1299.35.19, the following words have  
17 the following meanings:

1 (1) \* \* \*

2 \* \* \*

3 (4) ~~"Good faith medical judgment" means a physician's use of reasonable~~  
4 ~~care and diligence, along with his best judgment, in the application of his skill. The~~  
5 ~~standard of care required of every health care provider, except a hospital, in~~  
6 ~~rendering professional services or health care to a patient, shall be to exercise that~~  
7 ~~degree of skill ordinarily employed, under similar circumstances, by the members~~  
8 ~~of his profession in good standing in the same community or locality, but if the~~  
9 ~~physician was performing abortion procedures that are considered to be included in~~  
10 ~~the areas of a medical specialty, then the standard shall be that of the degree of skill~~  
11 ~~ordinarily employed, under similar circumstances, by one practicing in good standing~~  
12 ~~in that specialty.~~ (11) "Department" means the Department of Health and Hospitals.

13 \* \* \*

14 **(7) "Medical emergency" means the existence of any medical condition**  
15 **of a pregnant woman in which a reasonably prudent physician, with knowledge**  
16 **of the case and treatment possibilities with respect to the medical conditions**  
17 **involved, would determine that the immediate abortion or termination of**  
18 **pregnancy is necessary without first determining post-fertilization age or**  
19 **meeting the other requirements of this Part so as to avert the pregnant woman's**  
20 **death or to avert substantial and irreversible physical impairment of a major**  
21 **bodily function arising from continued pregnancy, not including psychological**  
22 **or emotional conditions.**

23 ~~(7)~~**(8)** "Physician" means a person licensed to practice medicine in the state  
24 of Louisiana.

25 **(9) "Post-fertilization age" means the age of the unborn child as**  
26 **calculated from the fusion of a human spermatozoon with a human ovum.**

27 ~~(8)~~**(10)** "Pregnant" means that female reproductive condition of having a  
28 developing embryo or fetus in the uterus which commences at fertilization and  
29 implantation.

1           **(11) "Probable post-fertilization age of the unborn child" means what,**  
2           **in reasonable medical judgment, will with reasonable probability be the post-**  
3           **fertilization age of the unborn child at the time the abortion is planned to be**  
4           **performed or induced.**

5           **(12) "Reasonable medical judgment" means a medical judgment that**  
6           **would be made by a reasonably prudent physician, knowledgeable about the**  
7           **case and the treatment possibilities with respect to the medical conditions**  
8           **involved.**

9           **(13) "Termination of pregnancy after viability", means the deliberate**  
10           **and artificial termination of a pregnancy for reasons of medical emergency**  
11           **after the unborn child has reached the point of viability with knowledge that the**  
12           **termination of pregnancy will, with reasonable likelihood, create a serious risk**  
13           **to the sustained survival of the unborn child. This definition and the provisions**  
14           **of this Part shall not apply in any way to a natural or artificially induced**  
15           **delivery in a licensed hospital when the physician in reasonable good faith and**  
16           **under the ordinary standard of care determines that the unborn child has**  
17           **reached full term, and such physician intends to deliver the child alive, even if**  
18           **complications result in the death of the unborn child or the woman.**

19           ~~(9)~~**(14)** "Unborn child" or "fetus" means the unborn offspring of human  
20           beings from the moment of conception through pregnancy and until live birth.

21           ~~(10)~~**(15)** "Viable" and "viability" each mean that stage of fetal development  
22           when, in the **reasonable medical** judgment of the physician based upon the  
23           particular facts of the case before him, and in light of the most advanced medical  
24           technology and information available to him, there is a reasonable likelihood of  
25           sustained survival of the unborn child outside the body of his mother, with or without  
26           artificial support; **provided that there shall be a legal presumption that an**  
27           **unborn child is viable when the unborn child has reached the probable post-**  
28           **fertilization age of twenty weeks (the equivalent of a gestational age of twenty-**  
29           **two weeks or greater).**

1 §1299.35.2. Abortion by physician; determination of viability; ultrasound test  
2 required; exceptions; penalties

3 \* \* \*

4 B. Viability. Except in the case of a medical emergency, before a physician  
5 performs an abortion, the physician, by use of his ~~good faith~~ **reasonable** medical  
6 judgment, shall first determine **the probable post-fertilization age of the unborn**  
7 **child to determine** if the unborn child is viable **and thus entitled to legal**  
8 **protection in accord with R.S. 1299.35.4, provided that there shall be a legal**  
9 **presumption that an unborn child is viable when the unborn child has reached**  
10 **the probable post-fertilization age of twenty weeks (the equivalent of a probable**  
11 **gestational age of twenty-two weeks or greater).**

12 C. Determination of Viability. In order to preserve the health of the woman,  
13 and in order to assist in making an accurate finding of viability considering  
14 gestational age, weight, and lung maturity of the unborn child, the physician  
15 intending to ~~terminate a pregnancy~~ **perform an abortion** shall first perform or cause  
16 to be performed an ultrasound examination pursuant to the provisions of Subsection  
17 D of this Section. The physician shall enter such findings and determination of  
18 viability in the medical record of the pregnant woman, along with photographs or  
19 prints of the ultrasound evidencing the findings.

20 \* \* \*

21 §1299.35.4. Abortion ~~after viability~~ **of viable, pain-capable unborn child**  
22 **prohibited; hospital requirement for termination of pregnancy**  
23 **after viability;** second attendant physician required; duties

24 A . ~~Before a physician may perform an abortion upon a pregnant woman~~  
25 ~~whose unborn child is viable, such physician shall first certify in writing that the~~  
26 ~~abortion is necessary to preserve the life or health of the woman and shall further~~  
27 ~~certify in writing the medical indications for such abortion and the probable health~~  
28 ~~consequences.~~ **Prohibition; penalties. No person shall intentionally or knowingly**  
29 **perform or induce, or attempt to perform or induce, an abortion upon a woman**

1 when it has been determined that the probable post-fertilization age of the  
2 woman's unborn child is twenty or more weeks, unless, in reasonable medical  
3 judgment, she has a condition which so complicates her medical condition as to  
4 necessitate the abortion of her pregnancy to avert her death or to avert serious  
5 risk of substantial and irreversible physical impairment of a major bodily  
6 function, not including psychological or emotional conditions. In addition to the  
7 civil remedies and criminal penalties provided by R.S. 40:1299.35.19, a violation  
8 of this Section shall provide a basis for professional disciplinary action and  
9 license revocation provided for under law.

10 B. Good faith effort required to protect the life of the unborn child in  
11 terminations of pregnancy after viability; hospital requirement; prohibitions.

12 (1) When the pregnant woman whose unborn child has been determined  
13 to have a probable post-fertilization age of twenty or more weeks is not  
14 prohibited due to a medical condition of the woman that requires a termination  
15 of pregnancy after viability to avert her death or to avert serious risk of  
16 substantial and irreversible physical impairment of a major bodily function, not  
17 including psychological or emotional conditions, the physician shall certify the  
18 supporting findings or medical conclusions in the woman's medical record and  
19 shall proceed medically only if necessary, in accord with the provisions of this  
20 Section.

21 (2) Except in the case of medical emergency, a termination of pregnancy  
22 after viability under this Section shall be performed only in a properly licensed  
23 hospital. Any physician who induces ~~performs an abortion upon a woman carrying~~  
24 ~~a viable unborn child a termination of pregnancy after viability~~ shall utilize the  
25 available method or technique ~~of abortion~~ most likely to preserve the life and health  
26 of the unborn child. In cases where the method or technique of abortion which  
27 would most likely preserve the life and health of the unborn child would present a  
28 greater risk to the life and health of the woman than another available method or  
29 technique, the physician may utilize such other method or technique. In all cases

1 where the physician performs induces a termination of pregnancy after viability  
 2 ~~an abortion upon a viable unborn child~~, the physician shall certify in writing the  
 3 available method or techniques considered and the reasons for choosing the method  
 4 or technique employed.

5 (3) No person performing a termination of pregnancy after viability shall  
 6 knowingly or intentionally harm or damage the brain, spinal cord, heart, lungs,  
 7 or other vital organs of the unborn child, nor knowingly or intentionally cause  
 8 the unborn child to be dismembered or poisoned, except in cases of medical  
 9 emergency.

10 C. Born-Alive Infant Care. Except in the case of medical emergency, ~~An~~  
 11 ~~abortion of a viable unborn child~~ a termination of pregnancy after viability as  
 12 defined in R.S. 40:1299.35.1 shall be performed or induced only when there is in  
 13 attendance a another physician ~~other than the physician performing or inducing the~~  
 14 ~~abortion~~ who shall take control of and provide immediate medical care for an infant  
 15 born alive in accord with the ordinary and reasonable standard of care ~~as a result~~  
 16 ~~of the abortion.~~ During the performance of the abortion, the physician performing  
 17 it, and subsequently to the abortion, the physician required by this Section to be in  
 18 attendance, ~~shall take all reasonable steps in keeping with good medical practice,~~  
 19 ~~consistent with the procedure used, to preserve the life and health of the viable~~  
 20 ~~unborn child and born-alive infant, respectively, provided that it does not pose an~~  
 21 ~~increased risk to the life or physical health of the woman.~~

22 \* \* \*

23 §1299.35.12. Emergency

24 The provisions of ~~R.S. 40:1299.35.2, 1299.35.4, 1299.35.5, and 1299.35.6~~  
 25 R.S. 40:1299.35.0 through 1299.35.19 shall not apply to an abortion or  
 26 termination of pregnancy in the case of ~~when a medical emergency compels the~~  
 27 ~~immediate performance of an abortion because the continuation of the pregnancy~~  
 28 ~~poses an immediate threat and grave risk to the life or permanent physical health of~~  
 29 ~~the pregnant woman~~ as defined in R.S. 40:1299.35.1. Within twenty-four hours, the

1 attending physician shall certify **the medical reasons supporting** ~~to~~ the **medical**  
 2 emergency ~~need for the abortion~~ and shall enter such certification in the medical  
 3 record of the pregnant woman.

4 \* \* \*

5 Section 2. Legislative findings and purpose

6 A. The Legislature's purposes in promulgating this Act, based on the  
 7 following findings, include:

8 (1) Based on the documented risks to women's health, prohibit abortions at  
 9 or after twenty weeks post-fertilization except in cases of a medical emergency.

10 (2) Prohibit abortions of unborn children presumed to be viable at or after  
 11 twenty weeks post-fertilization, in part, because of the pain felt by an unborn child.

12 (3) Define "medical emergency" to encompass only those circumstances in  
 13 which a pregnant woman's life or a major, physical bodily function is threatened.  
 14 *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007).

15 B. The Legislature makes the following findings:

16 (1) Abortion can cause serious physical and psychological (both short- and  
 17 long term) complications for women, including but not limited to: uterine  
 18 perforation, uterine scarring, cervical perforation or other injury, infection, bleeding,  
 19 hemorrhage, blood clots, failure to actually terminate the pregnancy, incomplete  
 20 abortion (retained tissue), pelvic inflammatory disease, endometritis, missed ectopic  
 21 pregnancy, cardiac arrest, respiratory arrest, renal failure, metabolic disorder, shock,  
 22 embolism, coma, placenta previa in subsequent pregnancies, preterm delivery in  
 23 subsequent pregnancies, free fluid in the abdomen, organ damage, adverse reactions  
 24 to anesthesia and other drugs, psychological or emotional complications such as  
 25 depression, anxiety, sleeping disorders, and death.

26 (2) Abortion has a higher medical risk when the procedure is performed later  
 27 in pregnancy. Compared to an abortion at eight weeks' gestation or earlier, the  
 28 relative risk increases exponentially at higher gestations. L. Bartlett et al., *Risk*  
 29 *factors for legal induced abortion-related mortality in the United States*,

1 OBSTETRICS & GYNECOLOGY 103(4):729–737 (2004).

2 (3) The incidence of major complications is highest after 20 weeks of  
3 gestation. J. Pregler & A. DeCherney, WOMEN'S HEALTH: PRINCIPLES AND  
4 CLINICAL PRACTICE 232 (2002).

5 (4) The risk of death associated with abortion increases with the length of  
6 pregnancy, from one death for every one million abortions at or before eight weeks  
7 gestation to one per 29,000 abortions at sixteen to twenty weeks and one per 11,000  
8 abortions at twenty-one or more weeks. L. Bartlett et al., *Risk factors for legal*  
9 *induced abortion-related mortality in the United States*, OBSTETRICS &  
10 GYNECOLOGY 103(4):729–737 (2004). After the first trimester, the risk of  
11 hemorrhage from an abortion, in particular, is greater, and the resultant  
12 complications may require a hysterectomy, other reparative surgery, or a blood  
13 transfusion.

14 (5) The State of Louisiana has a legitimate concern for the public's health and  
15 safety. *Williamson v. Lee Optical*, 348 U.S. 483, 486 (1985).

16 (6) The State of Louisiana "has legitimate interests from the outset of  
17 pregnancy in protecting the health of women." *Planned Parenthood of Southeastern*  
18 *Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992); *Planned Parenthood Arizona, Inc.*  
19 *v. American Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 194  
20 (Ariz.App. Div. 1,2011). More specifically, Louisiana "has a legitimate concern with  
21 the health of women who undergo abortions." *Akron v. Akron Ctr. for Reproductive*  
22 *Health, Inc.*, 462 U.S. 416, 428-29 (1983).

23 (7) There is substantial and well-documented medical evidence that an  
24 unborn child by at least twenty weeks gestation has the capacity to feel pain during  
25 an abortion. K. Anand, *Pain and its effects in the human neonate and fetus*, NEW  
26 ENGLAND JOURNAL OF MEDICINE, 317:1321-29 (1987).

27 (8) Pain receptors (nociceptors) are present throughout the unborn child's  
28 entire body by no later than sixteen weeks after fertilization and nerves link these  
29 receptors to the brain's thalamus and subcortical plate by no later than twenty weeks.



1 (9) By eight weeks after fertilization, the unborn child reacts to touch. After  
2 twenty weeks post-fertilization, the unborn child reacts to stimuli that would be  
3 recognized as painful if applied to an adult human, for example, by recoiling.

4 (10) In the unborn child, application of such painful stimuli is associated with  
5 significant increases in stress hormones known as the stress response.

6 (11) Subjection to such painful stimuli is associated with long-term harmful  
7 neurodevelopmental effects, such as altered pain sensitivity and, possibly,  
8 emotional, behavioral, and learning disabilities later in life.

9 (12) For the purposes of surgery on unborn children, fetal anesthesia is  
10 routinely administered and is associated with a decrease in stress hormones  
11 compared to their level when painful stimuli is applied without such anesthesia.

12 (13) The position, asserted by some medical experts, that the unborn child is  
13 incapable of experiencing pain until a point later in pregnancy than twenty weeks  
14 after fertilization predominately rests on the assumption that the ability to experience  
15 pain depends on the cerebral cortex and requires nerve connections between the  
16 thalamus and the cortex. However, recent medical research and analysis, especially  
17 since 2007, provides strong evidence for the conclusion that a functioning cortex is  
18 not necessary to experience pain.

19 (14) Substantial evidence indicates that children born missing the bulk of the  
20 cerebral cortex, those with hydranencephaly, nevertheless experience pain.

21 (15) In adults, stimulation or ablation of the cerebral cortex does not alter  
22 pain perception, while stimulation or ablation of the thalamus does.

23 (16) Substantial evidence indicates that structures used for pain processing  
24 in early development differ from those of adults, using different neural elements  
25 available at specific times during development, such as the subcortical plate, to fulfill  
26 the role of pain processing.

27 (17) The position, asserted by some medical experts, that the unborn child  
28 remains in a coma-like sleep state that precludes the unborn child experiencing pain  
29 is inconsistent with the documented reaction of unborn children to painful stimuli

1 and with the experience of fetal surgeons who have found it necessary to sedate the  
2 unborn child with anesthesia to prevent the unborn child from thrashing about in  
3 reaction to invasive surgery.

4 (18) Consequently, there is substantial medical evidence that an unborn child  
5 is capable of experiencing pain by twenty weeks after fertilization.

6 (19) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the  
7 context of determining the severability of a state statute regulating abortion the  
8 United States Supreme Court noted that an explicit statement of legislative intent  
9 specifically made applicable to a particular statute is of greater weight than a general  
10 savings or severability clause, it is the intent of the state that if anyone or more  
11 provisions, sections, subsections, sentences, clauses, phrases or words of this Act or  
12 the application thereof to any person or circumstance is found to be unconstitutional,  
13 the same is hereby declared to be severable and the balance of this Act shall remain  
14 effective notwithstanding such unconstitutionality. Moreover, the state declares that  
15 it would have passed this Act, and each provision, section, subsection, sentence,  
16 clause, phrase or word thereof, irrespective of the fact that any one or more  
17 provisions, sections, subsections, sentences, clauses, phrases or words, or any of their  
18 applications, were to be declared unconstitutional.

19 Section 3. If any provision or item of this Act, or the application thereof, is held  
20 invalid, such invalidity shall not affect other provisions, items, or applications of the act  
21 which can be given effect without the invalid provision, item, or application and to this end  
22 the provisions of this Act are hereby declared severable.

23 Section 4. This Act shall become effective August 1, 2012.

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The original instrument and the following digest, which constitutes no part of the legislative instrument, were prepared by Tracy Sabina Sudduth.

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## DIGEST

593

Proposed law enacts the "Viable and Pain-Capable Unborn Child Protection Act".

Proposed law provides for professional disciplinary action and license revocation for any person who intentionally or knowingly performs or induces, or attempt to perform or induce, an abortion upon a woman when it has been determined that the probable post-fertilization age of the woman's unborn child is 20 or more weeks.

Proposed law provides that there shall be a legal presumption that an unborn child is viable when the unborn child has reached the probable post-fertilization age of 20 weeks.

Proposed law provides legislative findings and purposes.

Effective August 1, 2012.

(Amends R.S. 40:1299.35.1(4), (7)-(11), 1299.35.2(B) and (C), 1299.35.4(heading), (A),(B) and (C) and 1299.35.12; adds R.S. 40:1299.35, 1299.35.1(12),(13),(14) and (15))