

Introduced by

Senators Miller, Campbell, Schaible

Representatives B. Koppelman, Larson, Rohr

1 A BILL for an Act to provide a legislative declaration; to create and enact four new sections to
2 chapter 14-02.1 and a new subsection to section 43-17-31 of the North Dakota Century Code,
3 relating to limitations on and penalties for performing or inducing an abortion or attempts to
4 perform or induce an abortion and to grounds for disciplinary action for physicians; to amend
5 and reenact sections 14-02.1-02 and 14-02.1-07 of the North Dakota Century Code, relating to
6 definitions and reporting requirements; and to provide a penalty.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

8 **SECTION 1.**

9 **Declaration of facts.**

10 1. The legislative assembly declares that:

- 11 a. Pain receptors (nociceptors) are present throughout an unborn child's entire body
12 and nerves link these receptors to the brain's thalamus and subcortical plate by
13 no later than twenty weeks;
- 14 b. By eight weeks after fertilization, an unborn child reacts to touch and after twenty
15 weeks, the unborn child reacts to stimuli that would be recognized as painful if
16 applied to an adult human, for example, by recoiling;
- 17 c. In an unborn child, application of painful stimuli is associated with significant
18 increases in stress hormones known as the stress response;
- 19 d. Subjection to painful stimuli is associated with long-term harmful
20 neurodevelopmental effects, such as altered pain sensitivity and, possibly,
21 emotional, behavioral, and learning disabilities later in life;
- 22 e. For the purposes of surgery on unborn children, fetal anesthesia is routinely
23 administered and is associated with a decrease in stress hormones compared to
24 when painful stimuli are applied without anesthesia;

- 1 f. The position, asserted by some medical experts, that an unborn child is
2 incapable of experiencing pain until a point later in pregnancy than twenty weeks
3 after fertilization predominately rests on the assumption that the ability to
4 experience pain depends on the cerebral cortex and requires nerve connections
5 between the thalamus and the cortex; however, recent medical research and
6 analysis, especially since 2007, provides strong evidence for the conclusion that
7 a functioning cortex is not necessary to experience pain;
8 g. Substantial evidence indicates that children born missing the bulk of the cerebral
9 cortex, those with hydranencephaly, nevertheless experience pain;
10 h. In adults, stimulation or ablation of the cerebral cortex does not alter pain
11 perception, while stimulation or ablation of the thalamus does;
12 i. Substantial evidence indicates that structures used for pain processing in early
13 development differ from those of adults, using different neural elements available
14 at specific times during development, such as the subcortical plate, to fulfill the
15 role of pain processing;
16 j. The position, asserted by some medical experts, that the unborn child remains in
17 a coma-like sleep state that precludes the unborn child experiencing pain is
18 inconsistent with the documented reaction of unborn children to painful stimuli
19 and with the experience of fetal surgeons who have found it necessary to sedate
20 the unborn child with anesthesia to prevent the unborn child from thrashing about
21 in reaction to invasive surgery; and that,
22 k. Consequently, there is substantial medical evidence that an unborn child is
23 capable of experiencing pain by twenty weeks after fertilization.
24 2. The legislative assembly declares there is a compelling state interest in protecting the
25 lives of unborn children from the stage at which substantial medical evidence indicates
26 that unborn children are capable of feeling pain and this compelling state interest is in
27 addition to North Dakota's compelling state interest in protecting the lives of unborn
28 children from the stage of viability, and neither state interest is intended to replace the
29 other.

30 **SECTION 2. AMENDMENT.** Section 14-02.1-02 of the North Dakota Century Code is
31 amended and reenacted as follows:

1 **14-02.1-02. Definitions.**

2 As used in this chapter:

- 3 1. "Abortion" means the act of using or prescribing any instrument, medicine, drug, or
4 any other substance, device, or means with the intent to terminate the clinically
5 diagnosable intrauterine pregnancy of a woman, including the elimination of one or
6 more unborn children in a multifetal pregnancy, with knowledge that the termination by
7 those means will with reasonable likelihood cause the death of the unborn child. Such
8 use, prescription, or means is not an abortion if done with the intent to:
- 9 a. Save the life or preserve the health of the unborn child;
- 10 b. Remove a dead unborn child caused by spontaneous abortion; or
- 11 c. Treat a woman for an ectopic pregnancy.
- 12 2. "Abortion facility" means a clinic, ambulatory surgical center, physician's office, or any
13 other place or facility in which abortions are performed or prescribed, other than a
14 hospital.
- 15 3. "Abortion-inducing drug" means a medicine, drug, or any other substance prescribed
16 or dispensed with the intent of causing an abortion.
- 17 4. "Attempt to perform or induce an abortion" means an act, or an omission of a
18 statutorily required act, that, under the circumstances as the actor believes them to be,
19 constitutes a substantial step in a course of conduct planned to culminate in the
20 performance or induction of an abortion in this state in violation of this chapter.
- 21 5. "Drug label" means the pamphlet accompanying an abortion-inducing drug which
22 outlines the protocol tested and authorized by the federal food and drug administration
23 and agreed upon by the drug company applying for the federal food and drug
24 administration authorization of that drug. Also known as "final printing labeling
25 instructions", drug label is the federal food and drug administration document that
26 delineates how a drug is to be used according to the federal food and drug
27 administration approval.
- 28 5-6. "Fertilization" means the fusion of a human spermatozoon with a human ovum.
- 29 7. "Hospital" means an institution licensed by the state department of health under
30 chapter 23-16 and any hospital operated by the United States or this state.

1 ~~6-8.~~ "Human being" means an individual living member of the species of homo sapiens,
2 including the unborn human being during the entire embryonic and fetal ages from
3 fertilization to full gestation.

4 ~~7-9.~~ "Infant born alive" means a born child which exhibits either heartbeat, spontaneous
5 respiratory activity, spontaneous movement of voluntary muscles or pulsation of the
6 umbilical cord if still attached to the child.

7 ~~8-10.~~ "Informed consent" means voluntary consent to abortion by the woman upon whom
8 the abortion is to be performed or induced provided that:

9 a. The woman is told the following by the physician who is to perform the abortion,
10 by the referring physician, or by the physician's agent, at least twenty-four hours
11 before the abortion:

12 (1) The name of the physician who will perform the abortion;

13 (2) The abortion will terminate the life of a whole, separate, unique, living
14 human being;

15 (3) The particular medical risks associated with the particular abortion
16 procedure to be employed including, when medically accurate, the risks of
17 infection, hemorrhage, danger to subsequent pregnancies, and infertility;

18 (4) The probable gestational age of the unborn child at the time the abortion is
19 to be performed; and

20 (5) The medical risks associated with carrying her child to term.

21 b. The woman is informed, by the physician or the physician's agent, at least
22 twenty-four hours before the abortion:

23 (1) That medical assistance benefits may be available for prenatal care,
24 childbirth, and neonatal care and that more detailed information on the
25 availability of that assistance is contained in the printed materials given to
26 her as described in section 14-02.1-02.1;

27 (2) That the printed materials given to her and described in section
28 14-02.1-02.1 describe the unborn child and list agencies that offer
29 alternatives to abortion;

30 (3) That the father is liable to assist in the support of her child, even in
31 instances in which the father has offered to pay for the abortion; and

1 (4) That she is free to withhold or withdraw her consent to the abortion at any
2 time without affecting her right to future care or treatment and without the
3 loss of any state or federally funded benefits to which she might otherwise
4 be entitled.

5 c. The woman certifies in writing, prior to the abortion, that the information
6 described in subdivisions a and b has been furnished to her.

7 d. Before the performance of the abortion, the physician who is to perform or induce
8 the abortion or the physician's agent receives a copy of the written certification
9 prescribed by subdivision c.

10 e. The physician has not received or obtained payment for a service provided to a
11 patient who has inquired about an abortion or has scheduled an abortion before
12 the twenty-four-hour period required by this section.

13 ~~9-11.~~ "Medical emergency" means a condition that, in reasonable medical judgment, so
14 complicates the medical condition of the pregnant woman that it necessitates an
15 immediate abortion of her pregnancy without first determining postfertilization age to
16 avert her death or for which the ~~twenty-four-hour~~ delay necessary to determine
17 postfertilization age will create serious risk of substantial and irreversible physical
18 impairment of a major bodily function, not including psychological or emotional
19 conditions. A condition may not be deemed a medical emergency if based on a claim
20 or diagnosis that the woman will engage in conduct that ~~would~~she intends to result in
21 her death or in substantial and irreversible physical impairment of a major bodily
22 function.

23 ~~10-12.~~ "Physician" means an individual who is licensed to practice medicine or osteopathy
24 under chapter 43-17 or a physician who practices in the armed services of the United
25 States or in the employ of the United States.

26 ~~11-13.~~ "Postfertilization age" means the age of the unborn child as calculated from the fusion
27 of a human spermatozoon with the human ovum.

28 ~~14.~~ "Probable gestational age of the unborn child" means what, in reasonable medical
29 judgment, will with reasonable probability be the gestational age of the unborn child at
30 the time the abortion is planned to be performed.

1 15. "Probable postfertilization age of the unborn child" means what, in reasonable medical
2 judgment, will with reasonable probability be the postfertilization age of the unborn
3 child at the time the abortion is planned to be performed or induced.

4 ~~12-16.~~ "Reasonable medical judgment" means a medical judgment that would be made by a
5 reasonably prudent physician, knowledgeable about the case and the treatment
6 possibilities with respect to the medical conditions involved.

7 ~~13-17.~~ "Unborn child" means the offspring of human beings from conception until birth.

8 ~~14-18.~~ "Viable" means the ability of an unborn child to live outside the mother's womb, albeit
9 with artificial aid.

10 **SECTION 3.** A new section to chapter 14-02.1 of the North Dakota Century Code is created
11 and enacted as follows:

12 **Determination of postfertilization age.**

13 1. Except in the case of a medical emergency, an abortion may not be performed or
14 induced or be attempted to be performed or induced unless the physician performing
15 or inducing the abortion has first made a determination of the probable postfertilization
16 age of the unborn child or relied upon such a determination made by another
17 physician. In making the determination, the physician shall make those inquiries of the
18 woman and perform or cause to be performed the medical examinations and tests as
19 a reasonably prudent physician, knowledgeable about the case and the medical
20 conditions involved, would consider necessary to perform in making an accurate
21 diagnosis with respect to postfertilization age.

22 2. A physician who fails to comply with the requirements of subsection 1 is subject to
23 disciplinary action under section 43-17-31.

24 **SECTION 4.** A new section to chapter 14-02.1 of the North Dakota Century Code is created
25 and enacted as follows:

26 **Abortion of unborn child of twenty or more weeks postfertilization age prohibited.**

27 1. A person may not perform or induce or attempt to perform or induce an abortion upon
28 a woman when it has been determined, by the physician performing or inducing or
29 attempting to perform or induce the abortion or by another physician upon whose
30 determination that physician relies, that the probable postfertilization age of the
31 woman's unborn child is twenty or more weeks, unless, in reasonable medical

1 judgment, the woman has a condition that so complicates her medical condition as to
2 necessitate the abortion of her pregnancy to avert her death or to avert serious risk of
3 substantial and irreversible physical impairment of a major bodily function, not
4 including psychological or emotional conditions. Such greater risk may not be deemed
5 to exist if it is based on a claim or diagnosis that the woman will engage in conduct
6 that she intends to result in her health or in substantial and irreversible physical
7 impairment of a major bodily function.

8 2. If an abortion upon a woman whose unborn child has been determined to have a
9 probable postfertilization age of twenty or more weeks is not prohibited by
10 subsection 1, the physician shall terminate the pregnancy in the manner which, in
11 reasonable medical judgment, provides the best opportunity for the unborn child to
12 survive, unless, in reasonable medical judgment, termination of the pregnancy in that
13 manner would pose a greater risk either of the death of the pregnant woman or of the
14 substantial and irreversible physical impairment of a major bodily function, not
15 including psychological or emotional conditions, of the woman than would other
16 available methods. Such greater risk may not be deemed to exist if it is based on a
17 claim or diagnosis that the woman will engage in conduct that she intends to result in
18 her death or in substantial and irreversible physical impairment of a major bodily
19 function.

20 **SECTION 5. AMENDMENT.** Section 14-02.1-07 of the North Dakota Century Code is
21 amended and reenacted as follows:

22 **14-02.1-07. Records required - Reporting of practice of abortion.**

23 1. Records:

24 a. All abortion facilities and hospitals in which abortions are performed shall keep
25 records, including admission and discharge notes, histories, results of tests and
26 examinations, nurses' worksheets, social service records, and progress notes,
27 and shall further keep a copy of all written certifications provided for in this
28 chapter as well as a copy of the constructive notice forms, consent forms, court
29 orders, abortion data reports, adverse event reports, abortion compliance reports,
30 and complication reports. ~~All~~In addition, all abortion facilities shall keep the
31 following records of the:

- 1 (1) The number of women who availed themselves of the opportunity to receive
2 and view an ultrasound image of their unborn children pursuant to section
3 14-02.1-04, and the number who did not; and of each of those numbers, the
4 number who, to the best of the reporting abortion facility's information and
5 belief, went on to obtain the abortion. ~~Records must be maintained in the~~
6 ~~permanent files of the hospital or abortion facility for a period of not less~~
7 ~~than seven years.~~
- 8 (2) Postfertilization age:
- 9 (a) If a determination of probable postfertilization age was made, whether
10 ultrasound was employed in making the determination, and the week
11 of probable postfertilization age determined.
- 12 (b) If a determination of probable postfertilization age was not made, the
13 basis of the determination that a medical emergency existed.
- 14 (3) Method of abortion and which of the following was employed:
- 15 (a) Medication abortion, such as mifepristone/misoprostol or
16 methorexate/misoprostol.
- 17 (b) Manual vacuum aspiration.
- 18 (c) Electrical vacuum aspiration.
- 19 (d) Dilation and evacuation.
- 20 (e) Combined induction abortion and dilation and evacuation.
- 21 (f) Induction abortion with prostaglandins.
- 22 (g) Induction abortion with intra-amniotic instillation such as saline or
23 urea.
- 24 (h) Induction abortion, other.
- 25 (i) Intact dilation and extraction.
- 26 (j) Other method, which must be specified.
- 27 (4) Whether an intra-fetal injection was used in an attempt to induce fetal
28 demise, such as intra-fetal potassium chloride or dogoxin.
- 29 (5) Age and race of the patient.
- 30 (6) If the probable postfertilization age was determined to be twenty or more
31 weeks, the basis of the determination that the pregnant woman has a

1 condition that so complicated her medical condition as to necessitate the
2 abortion of her pregnancy to aver her death or to avert serious risk of
3 substantial and irreversible physical impairment of a major bodily function,
4 not including psychological or emotional conditions.

5 (7) If the probable postfertilization age was determined to be twenty or more
6 weeks, whether the method of abortion used was one that, in reasonable
7 medical judgment, provided the best opportunity for the unborn child to
8 survive and, if such a method was not used, the basis of the determination
9 that termination of the pregnancy in that manner would pose a greater risk
10 either of the death of the pregnant woman or of the substantial and
11 irreversible physical impairment of a major bodily function, not including
12 psychological or emotional conditions, of the woman than would other
13 available methods.

14 b. The medical records of abortion facilities and hospitals in which abortions are
15 performed and all information contained therein must remain confidential and
16 may be used by the state department of health only for gathering statistical data
17 and ensuring compliance with the provisions of this chapter.

18 c. Records must be maintained in the permanent files of the hospital or abortion
19 facility for a period of not less than seven years.

20 2. Reporting:

21 a. An individual abortion compliance report and an individual abortion data report for
22 each abortion performed upon a woman must be completed by her attending
23 physician. The abortion data report must be confidential and may not contain the
24 name or the address of the woman whose pregnancy was terminated, except
25 that each report must contain a unique medical record identifying number to
26 enable matching the report to the patient's medical records. The abortion data
27 report must include the data called for in the United States standard report of
28 induced termination of pregnancy as recommended by the national center for
29 health statistics.

30 b. All abortion compliance reports must be signed by the attending physician within
31 twenty-four hours and submitted to the state department of health within ten

1 business days from the date of the abortion. All abortion data and complication
2 reports must be signed by the attending physician and submitted to the state
3 department of health within thirty days from the date of the abortion. If a
4 physician provides an abortion-inducing drug to another for the purpose of
5 inducing an abortion and the physician knows that the individual experiences
6 during or after the use an adverse event, the physician shall provide a written
7 report of the adverse event within thirty days of the event to the state department
8 of health and the federal food and drug administration via the medwatch reporting
9 system. For purposes of this section, "adverse event" is defined based upon the
10 federal food and drug administration criteria given in the medwatch reporting
11 system.

12 c. A copy of the abortion report, any complication report, and any adverse event
13 report must be made a part of the medical record of the patient at the facility or
14 hospital in which the abortion was performed. In cases when post-abortion
15 complications are discovered, diagnosed, or treated by physicians not associated
16 with the facility or hospital where the abortion was performed, the state
17 department of health shall forward a copy of the report to that facility or hospital
18 to be made a part of the patient's permanent record.

19 d. The state department of health is responsible for collecting all abortion
20 compliance reports, abortion data reports, complication reports, and adverse
21 event reports and collating and evaluating all data gathered from these reports
22 and shall annually publish a statistical report based on data from abortions
23 performed in the previous calendar year. All abortion compliance reports received
24 by the state department of health are public records. Except for disclosure to a
25 law enforcement officer or state agency, the department may not disclose an
26 abortion compliance report without first removing any individually identifiable
27 health information and any other demographic information, including race, marital
28 status, number of previous live births, and education regarding the woman upon
29 whom the abortion was performed.

30 e. The state department of health shall report to the attorney general any apparent
31 violation of this chapter.

1 3. By July first of each year, the state department of health shall issue a public report
2 providing statistics for the previous calendar year compiled from all of the reports
3 covering that year submitted in accordance with this section for each of the items
4 listed in subsection 1. Each report must also provide the statistics for all previous
5 calendar years during which this section was in effect, adjusted to reflect any
6 additional information from late or corrected reports. The state department of health
7 shall take all steps necessary to ensure that none of the information included in the
8 public reports could reasonably lead to the identification of any pregnant woman upon
9 whom an abortion was performed, induced, or attempted.

10 **SECTION 6.** A new section to chapter 14-02.1 of the North Dakota Century Code is created
11 and enacted as follows:

12 **Criminal and civil penalties.**

- 13 1. Any person who intentionally or recklessly performs or induces or attempts to perform
14 or induce an abortion in violation of section 2 or 3 of this Act is guilty of a class C
15 felony. A penalty may not be assessed against the woman upon whom the abortion is
16 performed or induced or attempted to be performed or induced.
- 17 2. Any woman upon whom an abortion has been performed or induced in violation of
18 section 2 or 3 of this Act, or the father of the unborn child who was the subject of that
19 abortion, may maintain an action against the person who performed or induced the
20 abortion in intentional or reckless violation of section 2 or 3 of this Act for actual and
21 exemplary damages. Any woman upon whom an abortion has been attempted in
22 violation of section 2 or 3 of this Act may maintain an action against the person who
23 attempted to perform or induce the abortion in an intentional or reckless violation of
24 section 2 or 3 of this Act for actual and exemplary damages.
- 25 3. A cause of action for injunctive relief against any person who has intentionally or
26 recklessly violated section 2 or 3 of this Act may be maintained by the woman upon
27 whom an abortion was performed or induced or attempted to be performed or induced
28 in violation of section 2 or 3 of this Act; by any person who is the spouse, parent,
29 sibling, or guardian of, or a current or former licensed health care provider of, the
30 woman upon whom an abortion has been performed or induced or attempted to be
31 performed or induced in violation of section 2 or 3 of this Act; by a state's attorney with

1 appropriate jurisdiction; or by the attorney general. The injunction must prevent the
2 abortion provider from performing or inducing or attempting to perform or induce
3 further abortions in violation of section 2 or 3 of this Act.

4 4. If judgment is rendered in favor of the plaintiff in an action provided for under this
5 section, the court also shall render judgment for reasonable attorney's fees in favor of
6 the plaintiff against the defendant.

7 5. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's
8 suit was frivolous and brought in bad faith, the court also shall render judgment for
9 reasonable attorney's fees in favor of the defendant against the plaintiff.

10 6. Damages and attorney's fees may not be assessed against the woman upon whom an
11 abortion was performed or induced or attempted to be performed except in
12 accordance with subsection 5.

13 **SECTION 7.** A new section to chapter 14-02.1 of the North Dakota Century Code is created
14 and enacted as follows:

15 **Protection of privacy in court proceedings.**

16 In every civil or criminal proceeding or action brought under section 5 of this Act for a
17 violation of section 2 or 3 of this Act, the court shall rule whether the anonymity of any woman
18 upon whom an abortion has been performed or induced or attempted to be performed or
19 induced may be preserved from public disclosure if she does not give her consent to such
20 disclosure. The court, upon motion or sua sponte, shall make the ruling and, upon determining
21 that her anonymity should be preserved, shall issue orders to the parties, witnesses, and
22 counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms
23 or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each
24 order must be accompanied by specific written findings explaining why the anonymity of the
25 woman should be preserved from public disclosure, why the order is essential to that end, how
26 the order is narrowly tailored to serve that interest, and why no reasonable less restrictive
27 alternative exists. In the absence of written consent of the woman upon whom an abortion has
28 been performed or induced or attempted to be performed or induced, anyone, other than a
29 public official, who brings an action under subsections 2 or 3 of section 5 of this Act shall do so
30 under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or
31 of witnesses from the defendant or from attorneys for the defendant.

1 **SECTION 8.** A new subsection to section 43-17-31 of the North Dakota Century Code is
2 created and enacted as follows:

3 The failure to comply with the requirements of subsection 1 of section 2 of this Act.