

Regular Session, 2012

SENATE BILL NO. 708

BY SENATORS BROOME, APPEL, CORTEZ, CROWE, DONAHUE, ERDEY, JOHNS,
LAFLEUR, LONG, MARTINY, NEVERS, PEACOCK, PERRY,
RISER, JOHN SMITH, TARVER, THOMPSON, WALSWORTH,
WARD AND WHITE

ABORTION. Requires that the fetal heartbeat be made audible to, and ultrasound images be displayed for review by, a pregnant woman prior to an abortion. (8/1/12)

1 AN ACT

2 To amend and reenact R.S. 40:1299.35.2(D) and 1299.35.6(B)(3)(h), and to enact R.S.
3 40:1299.35.2(E), relative to abortions; to provide with respect to ultrasound
4 requirements; to provide for informed consent; to provide for penalties; to provide
5 for legislative intent; and to provide for related matters.

6 Be it enacted by the Legislature of Louisiana:

7 Section 1. R.S. 40:1299.35.2(D) and 1299.35.6(B)(3)(h) are hereby amended and
8 reenacted and R.S. 40:1299.35.2(E) is hereby enacted to read as follows:

9 §1299.35.2. Abortion by physician; determination of viability; ultrasound test
10 required; exceptions; penalties

11 * * *

12 D. Ultrasound Requirements. Except in the case of a medical emergency, and
13 in addition to the provisions of R.S. 40:1299.35.6, consent to an abortion of an
14 unborn child at any stage of gestational development is voluntary and informed only
15 if an obstetric ultrasound is performed under in accordance with the provisions of
16 this Section.

17 (1) Qualifications to perform ultrasound. The ultrasound shall be performed

1 by the physician who is to perform the abortion, the referring physician, or a
2 qualified person working in conjunction with either physician. For purposes of this
3 Section, "qualified person" means a person having documented evidence that he or
4 she has completed a course in the operation of ultrasound equipment and is in
5 compliance with any other requirements of law regarding the operation of ultrasound
6 equipment.

7 (2) Requirements. At least ~~two~~ twenty-four hours prior to the woman having
8 any part of an abortion performed or induced, and prior to the administration of any
9 anesthesia or medication in preparation for the abortion on the woman, the physician
10 who is to perform the abortion, ~~the referring physician, or a qualified person working~~
11 ~~in conjunction with either physician~~ **or the physician's agent** shall comply with all
12 of the following requirements:

13 (a) Perform an obstetric ultrasound on the pregnant woman; ~~and offer to~~
14 simultaneously display the screen which depicts the active ultrasound images so that
15 the pregnant woman may view them; **and make audible the fetal heartbeat, if**
16 **present, in a quality consistent with current medical practice. Nothing in this**
17 **Section shall be construed to prevent the pregnant woman from not listening to**
18 **the sounds detected by the fetal heart monitor, or from not viewing the images**
19 **displayed on the ultrasound screen.**

20 (b) ~~Offer to provide~~ **Provide** a simultaneous **and objectively accurate**
21 **verbal** explanation of what the ultrasound is depicting, **in a manner**
22 **understandable to a layperson**, which shall include the presence and location of the
23 unborn child within the uterus and the number of unborn children depicted, the
24 dimensions of the unborn child, and the presence of ~~external members and internal~~
25 ~~organs,~~ **cardiac activity** if present and viewable, **along with the opportunity for**
26 **the pregnant woman to ask questions.**

27 (c) ~~Offer to provide~~ the pregnant woman ~~with a sealed envelope clearly~~
28 ~~marked "ultrasound print" that contains~~ **the option of requesting** an ultrasound
29 photograph or print of her unborn child of a quality consistent with current standard

1 medical practice that accurately portrays, to the extent feasible, the body of the
2 unborn child including external members, if present and viewable; ~~provided that the~~
3 ~~pregnant woman shall be informed that R.S. 40:1299.35.2 requires that she be~~
4 ~~provided with the envelope containing the ultrasound print, but that there is no~~
5 ~~requirement that she view the print image of her unborn child.~~

6 (d) Orally read the following statement to the pregnant woman in the
7 **ultrasound** examination room **and obtain certification by her signature that she**
8 **understands the following statement** prior to beginning the ultrasound
9 examination:

10 "Louisiana law requires that you be informed of three options that you may
11 request at any time during this ultrasound examination:

12 (1) ~~You have the option to view the ultrasound screen at any time during the~~
13 ~~examination.~~

14 (2) ~~You have the option to receive an oral explanation of the ultrasound~~
15 ~~images.~~

16 (3) ~~You have the option to receive an ultrasound photographic print. Please~~
17 ~~inform me now or at any time during the ultrasound examination if you want to view~~
18 ~~the screen, receive an oral explanation or receive an ultrasound print."~~

19 (e) ~~Obtain a written certification from the woman, after the ultrasound and~~
20 ~~prior to the abortion, that the requirements of this Subsection have been complied~~
21 ~~with.~~

22 **"During this ultrasound examination, you have the right to an oral**
23 **explanation of the results.**

24 **(i) You have the option to view the images on the ultrasound screen.**

25 **(ii) The heartbeat of the unborn child, if present, will be made audible,**
26 **unless you request and sign an opt-out form.**

27 **(iii) You have the right to receive answers to any questions you ask about**
28 **your ultrasound examination.**

29 **(iv) You have the right to receive an ultrasound photographic print,**

1 **which will be provided at your request."**

2 ~~(f)~~ **(e)** Retain a copy of the written certification prescribed by Subparagraph
3 ~~(e)~~ **(d)** of this Paragraph. The certification shall be placed in the medical file of the
4 woman and shall be kept by the abortion provider for a period of not less than seven
5 years. If the woman is a minor, the certification shall be placed in the medical file
6 of the minor and kept for at least seven years or for five years after the minor reaches
7 the age of majority, whichever is greater. The woman's medical files shall be kept
8 confidential as provided by law.

9 **(3) Options to view or listen to required medical information.**

10 **(a) A pregnant woman may choose not to exercise her option to request**
11 **an ultrasound photograph print as provided for under this Section.**

12 **(b) A pregnant woman may choose not to view the ultrasound images**
13 **required to be provided to and reviewed with the pregnant woman as provided**
14 **for under this Section.**

15 **(c) A pregnant woman may choose not to listen to the sounds detected by**
16 **the fetal heart monitor required to be provided to the pregnant woman as**
17 **provided for under this Section.**

18 **(d) The physician, and the pregnant woman are not subject to a penalty**
19 **under this Chapter solely because the pregnant woman chooses not to request**
20 **an ultrasound print, view the ultrasound images, or hear the heart auscultation.**

21 ~~(3)~~**(4)** Medical Emergencies.

22 (a) "Medical emergency" as used in this Section, means the existence of any
23 physical condition, not including any emotional, psychological, or mental condition,
24 which a reasonably prudent physician, with knowledge of the case and treatment
25 possibilities with respect to the medical conditions involved, would determine
26 necessitates the immediate abortion of the pregnancy to avert the pregnant woman's
27 death or to avert substantial and irreversible impairment of a major bodily function
28 arising from continued pregnancy.

29 (b) Upon a determination by a physician that a medical emergency exists with

1 respect to a pregnant woman, the provider shall certify in writing the specific
 2 medical conditions that constitute the emergency. The certification shall be placed
 3 in the medical file of the woman and shall be kept by the abortion provider for a
 4 period of not less than seven years. If the woman is a minor, then the certification
 5 shall be placed in the medical file of the minor and kept for at least seven years or
 6 for five years after the minor reaches the age of majority, whichever is greater. The
 7 woman's medical files shall be kept confidential as provided by law.

8 ~~(4) Civil penalties. In addition to whatever remedies are otherwise available~~
 9 ~~under the laws of this state, failure to comply with the requirements of this Section~~
 10 ~~shall provide a basis for professional disciplinary action provided for under law.~~

11 **(5) Penalties. Any person who intentionally or knowingly fails to comply**
 12 **with all the requirements of this Section shall be subject to the penalties as**
 13 **provided for in R.S. 40:1299.35.19.**

14 ~~(5)~~**(6) Protection of privacy in court proceedings.** In every civil or criminal
 15 proceeding or action brought under this Section, the court shall rule whether the
 16 anonymity of any female upon whom an abortion has been performed or attempted
 17 shall be preserved from public disclosure if she does not give her consent to such
 18 disclosure. The court may close any proceedings in the case and enter other
 19 protective orders to preserve the privacy of the woman upon whom the abortion has
 20 been performed or attempted. This Section may not be construed to conceal the
 21 identity of the plaintiff or of witnesses from the defendant.

22 **E. Pregnant rape survivors or victims of incest who have reported the**
 23 **act to law enforcement officials shall have the opportunity to opt out of the**
 24 **verbal explanation provisions of Subparagraph D(2)(b) of this Section, in**
 25 **addition to having the same options to view or listen to the required medical**
 26 **information as provided in Paragraph D(3) of this Section.**

27 * * *

28 §1299.35.6. Woman's Right To Know

29 * * *

1 B. Informed consent; requirements. After a woman is determined to be
2 pregnant, no abortion shall be performed or induced without the voluntary and
3 informed consent of the woman upon whom the abortion is to be performed or
4 induced. Except in the case of a medical emergency, consent to an abortion is
5 voluntary and informed if and only if:

6 * * *

7 (3) Oral information from the physician. At least twenty-four hours before
8 the abortion, the physician who is to perform the abortion or the referring physician
9 has informed the woman, orally and in person, of:

10 * * *

11 (h) The requirement that at least ~~two~~ **twenty-four** hours prior to the woman
12 having any part of an abortion performed or induced, the physician, referring
13 physician, or qualified person working in conjunction with either physician must
14 perform an obstetric ultrasound under the provisions of R.S. 40:1299.35.2 ~~for the~~
15 ~~purpose of preserving the woman's health and determining the viability of the unborn~~
16 ~~child, and that neither the physician nor the woman shall be penalized should the~~
17 ~~woman choose not to view the obstetric ultrasound images or not to accept the~~
18 ~~photographic print that shall be offered to her in a sealed envelope.~~

19 * * *

20 Section 2.A. The purpose of this Act is to conform the present Louisiana ultrasound
21 law to the language and intent of a Texas statute upheld by a unanimous panel of the U.S.
22 Court of Appeals for the Fifth Circuit in *Texas Medical Providers Performing Abortion*
23 *Services v. Lakey*, No. 11-50814 (5th Cir. 2012)(rehearing en banc denied 2-10-2012).

24 B. The three-judge panel, with Chief Judge Edith Jones writing, upheld the
25 constitutionality of 2011 TX H.B. 15, which required the fetal heartbeat to be made audible,
26 and the ultrasound images to be displayed for review by the pregnant woman prior to any
27 abortion.

28 C. The unanimous U.S. Fifth Circuit decision stated: "[The Texas statute] establishes
29 what the physician must do: have a sonogram performed, display the sonogram images,

1 perform a heart auscultation, and provide verbal explanations of the sonogram images and
 2 heart auscultation. The district court's analysis of (a)(4) ignores that the physician's
 3 unconditional obligations are merely to display images so they may be viewed, to provide
 4 an understandable explanation, and to make audible the auscultation. Section 171.012(a)(4)
 5 specifically does not require the physician to ensure the woman views the images, that she
 6 understands the explanation, or that she listens to the auscultation."

7 D. The Fifth Circuit applied established Supreme Court case law affirming the state's
 8 interest in promoting childbirth over abortion to conclude as follows: "[T]he provision of
 9 sonograms and the fetal heartbeat are routine measures in pregnancy medicine today. They
 10 are viewed as 'medically necessary' for the mother and fetus. Only if one assumes the
 11 conclusion of Appellees' argument, that pregnancy is a condition to be terminated, can one
 12 assume that such information about the fetus is medically irrelevant. The point of informed
 13 consent laws is to allow the patient to evaluate her condition and render her best decision
 14 under difficult circumstances. Denying her up to date medical information is more of an
 15 abuse to her ability to decide than providing the information. In any event, the Appellees'
 16 argument ignores that Casey and Gonzales, as noted above, emphasize that the gravity of the
 17 decision may be the subject of informed consent through factual, medical detail, that the
 18 condition of the fetus is relevant, and that discouraging abortion is an acceptable effect of
 19 mandated disclosures."

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

The original instrument was prepared by Christopher D. Adams. The following digest, which does not constitute a part of the legislative instrument, was prepared by Jeanne C. Johnson.

DIGEST

Broome (SB 708)

Present law provides the informed consent requirements for an abortion.

Present law provides except in the case of a medical emergency, and in addition to the provisions of R.S. 40:1299.35.6, consent to an abortion of an unborn child at any stage of

gestational development is voluntary and informed only if an obstetric ultrasound is performed.

Present law provides the ultrasound shall be performed by the physician who is to perform the abortion, the referring physician, or a qualified person working in conjunction with either physician.

Present law provides at least two hours prior to the woman having any part of an abortion performed or induced, and prior to the administration of any anesthesia or medication in preparation for the abortion on the woman, the physician who is to perform the abortion, the referring physician, or a qualified person working in conjunction with either physician shall comply with all of the following requirements:

1. Perform an obstetric ultrasound on the pregnant woman and offer to simultaneously display the screen which depicts the active ultrasound images so that the pregnant woman may view them.
2. Offer to provide a simultaneous explanation of what the ultrasound is depicting, including the presence and location of the unborn child within the uterus and the number of unborn children depicted, the dimensions of the unborn child, and the presence of external members and internal organs, if present and viewable.
3. Offer to provide the pregnant woman with a sealed envelope clearly marked "ultrasound print" that contains an ultrasound photograph or print of her unborn child of a quality consistent with current standard medical practice that accurately portrays, to the extent feasible, the body of the unborn child including external members, if present and viewable; provided that the pregnant woman shall be informed that present law requires that she be provided with the envelope containing the ultrasound print, but that there is no requirement that she view the print image of her unborn child.
4. Orally read the following statement to the pregnant woman in the examination room prior to beginning the ultrasound examination:

"Louisiana law requires that you be informed of three options that you may request at any time during this ultrasound examination:

- (a) You have the option to view the ultrasound screen at any time during the examination.
- (b) You have the option to receive an oral explanation of the ultrasound images.
- (c) You have the option to receive an ultrasound photographic print. Please inform me now or at any time during the ultrasound examination if you want to view the screen, receive an oral explanation or receive an ultrasound print."
5. Obtain a written certification from the woman, after the ultrasound and prior to the abortion, that the requirements of present law have been complied with.
6. Retain a copy of the written certification prescribed by present law. Present law requires certification to be placed in the medical file of the woman and kept by the abortion provider for a period of not less than seven years. If the woman is a minor, the certification shall be placed in the medical file of the minor and kept for at least seven years or for five years after the minor reaches the age of majority, whichever is greater. The woman's medical files shall be kept confidential as provided by law.

Proposed law amends present law's time requirement from two hours before the procedure

to 24 hours before the procedure and requires the physician who is to perform the abortion or the physician's agent to comply with the statutory requirements relative to performance of an obstetric ultrasound.

Proposed law amends present law to require medical personnel to simultaneously display the screen which depicts the active ultrasound images, so the woman may view the images. Proposed law further requires making audible the fetal heartbeat, if present, using a fetal heart monitor. Provides that proposed law shall not be construed to prevent the woman from not listening to the fetal monitor sounds or from not viewing the ultrasound images.

Proposed law further requires the medical personnel to provide simultaneous and objectively accurate verbal explanation of what the ultrasound is depicting in layman's terms. Proposed law deletes the requirement that the explanation include the presence of external members and internal organs and instead requires that such explanation include whether cardiac activity is present. Provides the pregnant woman the opportunity to ask questions during the description by the medical personnel. Further provides the pregnant woman the option of requesting an ultrasound photograph or print of her unborn child.

Proposed law deletes present law provisions relative to contents of the oral statement to be read to the pregnant woman in the examination room and instead requires medical personnel to orally read and obtain certification of the pregnant woman by her signature, which confirms that she understands the following statement prior to the beginning of the ultrasound examination:

"During this ultrasound examination, you have the right to an oral explanation of the results.

1. You have the option to view the images on the ultrasound screen.
2. The heartbeat of the unborn child, if present, will be made audible, unless you request and sign an opt-out form.
3. You have the right to receive answers to any questions you ask about your ultrasound examination.
4. You have the right to receive an ultrasound photographic print, which will be provided at your request."

Present law requires medical personnel to retain a copy of such written certification which shall be kept in the woman's confidential medical file for a period of not less than seven years. If the woman is a minor, such certification shall be kept in the woman's medical file for at least seven years or for five years after the minor reaches the age of minority.

Proposed law retains these provisions.

Proposed law provides the options to view or listen to required medical information.

1. A pregnant woman may choose not to exercise her option to request an ultrasound photograph print as provided for under the proposed law.
2. A pregnant woman may choose not to view the ultrasound images required to be provided to and reviewed with the pregnant woman as provided for under the proposed law.
3. A pregnant woman may choose not to listen to the sounds detected by the fetal heart monitor required to be provided to the pregnant woman as provided for under the proposed law.
4. The physician, the agent of the physician, and the pregnant woman are not subject

to a penalty under proposed law solely because the pregnant woman chooses not to request an ultrasound print, view the ultrasound images, or hear the heart auscultation.

Proposed law provides pregnant rape survivors or victims of incest who have reported the act to law enforcement officials shall have the opportunity to opt-out of the verbal explanation requirement related to the mandated obstetric ultrasound but shall have the option to view or listen to the required medical information.

Proposed law provides legislative intent.

Effective August 1, 2012.

(Amends R.S. 40:1299.35.2(D) and 1299.35.6(B)(3)(h) and adds R.S. 40:1299.35.2(E))

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Health and Welfare to the original bill

1. Removes the requirement that agent of the physician be certified by a national registry of medical sonographers.
2. Changes the required verbal instructions the medical personnel shall provide the pregnant woman prior to the procedure.
3. Provides pregnant rape survivors or victims of incest who have reported the act to law enforcement officials the opportunity to opt-out of the mandatory ultrasound.
4. Provides legislative intent.

Senate Floor Amendments to engrossed bill

1. Requires physician or physician's agent to comply with ultrasound requirements.
2. Allows victims of rape or incest to opt-out of the requirement for a verbal explanation of the ultrasound but retain the option to view or listen to required medical information.