

LEGISLATIVE BILL 814

Approved by the Governor August 15, 2020

Introduced by Geist, 25; Albrecht, 17; Arch, 14; Bostelman, 23; Brandt, 32; Brewer, 43; Clements, 2; Erdman, 47; Gragert, 40; Groene, 42; Halloran, 33; Hansen, B., 16; Hilgers, 21; Kolterman, 24; La Grone, 49; Linehan, 39; Lowe, 37; McDonnell, 5; Moser, 22; Murman, 38; Slama, 1; Lindstrom, 18; Hughes, 44; Briese, 41; Dorn, 30.

A BILL FOR AN ACT relating to abortion; to amend sections 28-326 and 38-2021, Reissue Revised Statutes of Nebraska, and section 28-101, Revised Statutes Supplement, 2019; to define a term; to prohibit dismemberment abortion; to provide for a hearing, immunity from liability, causes of action, injunctions, damages, attorney's fees, a penalty, and anonymity; to state intent; to harmonize provisions; to provide severability; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 28-101, Revised Statutes Supplement, 2019, is amended to read:

28-101 Sections 28-101 to 28-1357 and 28-1601 to 28-1603 and sections 3 to 9 of this act shall be known and may be cited as the Nebraska Criminal Code.

Sec. 2. Section 28-326, Reissue Revised Statutes of Nebraska, is amended to read:

28-326 For purposes of sections 28-325 to 28-345 and sections 3 to 9 of this act, unless the context otherwise requires:

(1) Abortion means the use or prescription of any instrument, medicine, drug, or other substance or device intentionally to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child, and which causes the premature termination of the pregnancy;

(2) Complications associated with abortion means any adverse physical, psychological, or emotional reaction that is reported in a peer-reviewed journal to be statistically associated with abortion such that there is less than a five percent probability ($P < .05$) that the result is due to chance;

(3) Conception means the fecundation of the ovum by the spermatozoa;

(4)(a) Dismemberment abortion means an abortion in which, with the purpose of causing the death of an unborn child, a person purposely dismembers the body of a living unborn child and extracts him or her one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors, or similar instruments that, through the convergence of two rigid levers, slice, crush, or grasp a portion of the unborn child's body to cut or rip it off.

(b) Dismemberment abortion does not include:

(i) An abortion in which suction is used to dismember the body of an unborn child by sucking fetal parts into a collection container; or

(ii) The use of instruments or suction to remove the remains of an unborn child who has already died;

(5) ~~(4)~~ Emergency situation means that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial impairment of a major bodily function;

(6) ~~(5)~~ Hospital means those institutions licensed by the Department of Health and Human Services pursuant to the Health Care Facility Licensure Act;

(7) ~~(6)~~ Negligible risk means a risk that a reasonable person would consider to be immaterial to a decision to undergo an elective medical procedure;

(8) ~~(7)~~ Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child;

(9) ~~(8)~~ Physician means any person licensed to practice medicine in this state as provided in the Uniform Credentialing Act;

(10) ~~(9)~~ Pregnant means that condition of a woman who has unborn human life within her as the result of conception;

(11) ~~(10)~~ Probable gestational age of the unborn child means what will with reasonable probability, in the judgment of the physician, be the gestational age of the unborn child at the time the abortion is planned to be performed;

(12) ~~(11)~~ Risk factor associated with abortion means any factor, including any physical, psychological, emotional, demographic, or situational factor, for which there is a statistical association with one or more complications

associated with abortion such that there is less than a five percent probability ($P < .05$) that such statistical association is due to chance. Such information on risk factors shall have been published in any peer-reviewed journals indexed by the United States National Library of Medicine's search services (PubMed or MEDLINE) or in any journal included in the Thomson Reuters Scientific Master Journal List not less than twelve months prior to the day preabortion screening was provided;

(13) ~~(12)~~ Self-induced abortion means any abortion or menstrual extraction attempted or completed by a pregnant woman on her own body;

(14) ~~(13)~~ Ultrasound means the use of ultrasonic waves for diagnostic or therapeutic purposes, specifically to monitor an unborn child;

(15) ~~(14)~~ Viability means that stage of human development when the unborn child is potentially able to live more than merely momentarily outside the womb of the mother by natural or artificial means; and

(16) ~~(15)~~ Woman means any female human being whether or not she has reached the age of majority.

Sec. 3. (1) It shall be unlawful for any person to purposely perform or attempt to perform a dismemberment abortion and thereby kill an unborn child unless a dismemberment abortion is necessary due to a medical emergency as defined in subdivision (4) of section 28-3,103.

(2) A person accused in any proceeding of unlawful conduct under subsection (1) of this section may seek a hearing before the Board of Medicine and Surgery on whether the performance of a dismemberment abortion was necessary due to a medical emergency as defined in subdivision (4) of section 28-3,103. The board's findings are admissible on that issue at any trial in which such unlawful conduct is alleged. Upon a motion of the person accused, the court shall delay the beginning of the trial for not more than thirty days to permit such a hearing to take place.

(3) No woman upon whom an abortion is performed or attempted to be performed shall be liable for performing or attempting to perform a dismemberment abortion. No nurse, secretary, receptionist, or other employee or agent who is not a physician, but who acts at the direction of a physician, shall be liable for performing or attempting to perform a dismemberment abortion. No pharmacist or other individual who is not a physician, but who fills a prescription or provides instruments or materials used in an abortion at the direction of or to a physician, shall be liable for performing or attempting to perform a dismemberment abortion.

Sec. 4. (1) A cause of action for injunctive relief against a person who has performed a dismemberment abortion in violation of section 3 of this act may be maintained by:

(a) A woman upon whom such a dismemberment abortion was performed;

(b) If the woman had not attained the age of nineteen years at the time of the dismemberment abortion, a person who is the parent or guardian of the woman upon whom such a dismemberment abortion was performed; or

(c) A prosecuting attorney with appropriate jurisdiction.

(2) The injunction shall prevent the defendant from performing or attempting to perform dismemberment abortions in this state in violation of section 3 of this act.

(3) A cause of action may not be maintained by a plaintiff if the pregnancy resulted from the plaintiff's criminal conduct.

Sec. 5. (1) A cause of action for civil damages against a person who performed a dismemberment abortion in violation of section 3 of this act may be maintained by:

(a) Any woman upon whom a dismemberment abortion has been performed in violation of section 3 of this act;

(b) The father of the unborn child, if married to the woman at the time the dismemberment abortion was performed; or

(c) If the woman had not attained the age of nineteen years at the time of the dismemberment abortion or has died as a result of the abortion, the maternal grandparents of the unborn child.

(2) No damages may be awarded a plaintiff if the pregnancy resulted from the plaintiff's criminal conduct.

(3) Damages awarded in such an action shall include money damages for all injuries, psychological and physical, occasioned by the dismemberment abortion.

Sec. 6. (1) If judgment is rendered in favor of the plaintiff in an action described in section 4 or 5 of this act, the court shall also render judgment for reasonable attorney's fees in favor of the plaintiff against the defendant.

(2) If judgment is rendered in favor of the defendant in an action described in section 4 or 5 of this act and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall render judgment for reasonable attorney's fees in favor of the defendant against the plaintiff.

(3) No attorney's fees may be assessed against the woman upon whom an abortion was performed or attempted to be performed except in accordance with subsection (2) of this section.

Sec. 7. The intentional and knowing performance of an unlawful dismemberment abortion in violation of section 3 of this act is a Class IV felony.

Sec. 8. In every civil, criminal, or administrative proceeding or action brought under sections 3 to 7 of this act, the court shall rule whether the anonymity of any woman upon whom an abortion has been performed or attempted to be performed shall be preserved from public disclosure if she does not give her

consent to such disclosure. The court, upon motion or sua sponte, shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or attempted to be performed, any person other than a public official who brings an action under section 4 or 5 of this act shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

Sec. 9. Nothing in sections 3 to 7 of this act shall be construed as creating or recognizing a right to abortion or a right to a particular method of abortion.

Sec. 10. Section 38-2021, Reissue Revised Statutes of Nebraska, is amended to read:

38-2021 Unprofessional conduct means any departure from or failure to conform to the standards of acceptable and prevailing practice of medicine and surgery or the ethics of the profession, regardless of whether a person, patient, or entity is injured, or conduct that is likely to deceive or defraud the public or is detrimental to the public interest, including, but not limited to:

(1) Performance by a physician of an abortion as defined in subdivision (1) of section 28-326 under circumstances when he or she will not be available for a period of at least forty-eight hours for postoperative care unless such postoperative care is delegated to and accepted by another physician;

(2) Performing an abortion upon a minor without having satisfied the requirements of sections 71-6901 to 71-6911;

(3) The intentional and knowing performance of a partial-birth abortion as defined in subdivision (8) ~~(7)~~ of section 28-326, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself; and

(4) Performance by a physician of an abortion in violation of the Pain-Capable Unborn Child Protection Act.

Sec. 11. If any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.

Sec. 12. Original sections 28-326 and 38-2021, Reissue Revised Statutes of Nebraska, and section 28-101, Revised Statutes Supplement, 2019, are repealed.