HOUSE OF REPRESENTATIVES - FLOOR VERSION

STATE OF OKLAHOMA

1st Session of the 53rd Legislature (2011)

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 1888

By: Peterson, Reynolds, Ritze, Trebilcock, Johnson, Derby and Hall of the House

and

Jolley of the Senate

COMMITTEE SUBSTITUTE

An Act relating to public health and safety; creating the Pain-Capable Unborn Child Protection Act; defining terms; making legislative findings; establishing purpose; prohibiting the performance of an abortion without certain determination; prohibiting the performance of an abortion upon determination of certain age of unborn child; providing for exceptions; requiring that the manner in which physicians terminate certain pregnancies provides the best opportunity for unborn child's survival; requiring certain report by physician; including certain information; requiring State Department of Health to issue certain report; stating certain penalties for physicians; requiring Department to promulgate rules; providing penalty; permitting certain individuals to maintain action including injunctive relief; providing for attorney fees; requiring court to rule regarding anonymity; requiring written findings under certain circumstance; providing for severability; providing

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for certain interpretation; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.1 of Title 63, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Pain-Capable Unborn Child Protection Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.2 of Title 63, unless there is created a duplication in numbering, reads as follows:

As used in the Pain-Capable Unborn Child Protection Act only:

1. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device 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 who died as the result of natural causes in utero, accidental trauma, or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy;

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2. “Attempt to perform or induce an abortion” means an act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion in this state in violation of the Pain-Capable Unborn Child Protection Act;

3. “Postfertilization age” means the age of the unborn child as calculated from the fertilization of the human ovum;

4. “Fertilization” means the fusion of a human spermatozoon with a human ovum;

5. “Medical emergency” means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman that it necessitates the immediate abortion of her pregnancy without first determining postfertilization age to avert her death or for which the delay necessary to determine postfertilization age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function;

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6. “Reasonable medical judgment” means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved;

7. “Physician” means any person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state;

8. “Probable postfertilization age of the unborn child” means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time the abortion is planned to be performed or induced;

9. “Unborn child” or “fetus” each means an individual organism of the species homo sapiens from fertilization until live birth; and

10. “Woman” means a female human being whether or not she has reached the age of majority.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.3 of Title 63, unless there is created a duplication in numbering, reads as follows:

The Legislature of the State of Oklahoma finds that:

1. Pain receptors (nociceptors) are present throughout the unborn child’s entire body by no later than sixteen (16) weeks after fertilization and nerves link these receptors to the brain’s thalamus and subcortical plate by no later than twenty (20) weeks;

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2. By eight (8) weeks after fertilization, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example by recoiling;

3. In the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response;

4. Subjection to such painful stimuli is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral, and learning disabilities later in life;

5. For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli are applied without such anesthesia;

6. The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than twenty (20) weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain;

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7. Substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain;

8. In adults, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does;

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

10. Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty (20) weeks after fertilization; and

11. It is the purpose of the State of Oklahoma to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.4 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Except in the case of a medical emergency, no abortion shall be performed or induced or be attempted to be performed or induced

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unless the physician performing or inducing it has first made a determination of the probable postfertilization age of the unborn child or relied upon such a determination made by another physician. In making such a determination, the physician shall make such inquiries of the woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to postfertilization age.

B. Failure by any physician to conform to any requirement of this section constitutes "unprofessional conduct".

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.5 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. No person shall perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies, that the probable postfertilization age of the woman's unborn child is twenty (20) or more weeks, unless, in reasonable medical judgment, she has a condition which so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of

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substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No such condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of major bodily function.

B. When an abortion upon a woman whose unborn child has been determined to have a probable postfertilization age of twenty (20) or more weeks is not prohibited by this section, the physician shall terminate the pregnancy in the manner which, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods. No such greater risk shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.6 of Title 63, unless there is created a duplication in numbering, reads as follows:

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A. Any physician who performs or induces or attempts to perform or induce an abortion shall report to the State Department of Health, on a schedule and in accordance with forms and rules and regulations adopted and promulgated by the State Department of Health that include:

1. If a determination of probable postfertilization age was made, the probable postfertilization age determined and the method and basis of the determination;

2. If a determination of probable postfertilization age was not made, the basis of the determination that a medical emergency existed;

3. If the probable postfertilization age was determined to be twenty (20) or more weeks, the basis of the determination that the pregnant woman had a condition which so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions; and

4. The method used for the abortion and, in the case of an abortion performed when the probable postfertilization age was determined to be twenty (20) or more weeks:

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a. whether the method used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive, or

b. if such a method was not used, the basis of the determination that termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function not including psychological or emotional conditions of the woman than would other available methods.

B. By June 30 of each year, the State Department of Health shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection A of this section. Each such report shall also provide the statistics for all previous calendar years during which this section was in effect, adjusted to reflect any additional information from late or corrected reports. The State Department of Health shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any pregnant woman upon whom an abortion was performed or attempted.

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C. Any physician who fails to submit a report by the end of thirty (30) days following the due date shall be subject to a late fee of Five Hundred Dollars ($500.00) for each additional thirty-day period or portion of a thirty-day period the report is overdue. Any physician required to report in accordance with this act who has not submitted a report, or has submitted only an incomplete report, more than one (1) year following the due date, may, in an action brought in the manner in which actions are brought by the State Department of Health, be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject to civil contempt. Failure by any physician to conform to any requirement of this section, other than late filing of a report, constitutes "unprofessional conduct" pursuant to Section 509 of Title 59 of the Oklahoma Statutes. Failure by any physician to submit a complete report in accordance with a court order constitutes "unprofessional conduct" pursuant to Section 509 of Title 59 of the Oklahoma Statutes. Intentional or reckless falsification of any report required under this section is a misdemeanor.

D. By February 1, 2012, the State Department of Health shall adopt and promulgate rules and regulations to assist in compliance with this section.

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SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.7 of Title 63, unless there is created a duplication in numbering, reads as follows:

Any person who intentionally or recklessly performs or induces or attempts to perform or induce an abortion in violation of the Pain-Capable Unborn Child Protection Act shall be guilty of a felony. No penalty may be assessed against the woman upon whom the abortion is performed or induced or attempted to be performed or induced.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.8 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Any woman upon whom an abortion has been performed in violation of the Pain-Capable Unborn Child Protection Act, or the father of the unborn child who was the subject of such an abortion, may maintain an action against the person who performed or induced the abortion in intentional or reckless violation of the Pain-Capable Unborn Child Protection Act for actual and punitive damages. Any woman upon whom an abortion has been attempted in violation of the Pain-Capable Unborn Child Protection Act may maintain an action against the person who attempted to perform or induce the abortion in an intentional or reckless violation of the Pain-Capable Unborn Child Protection Act for actual and punitive damages.

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B. A cause of action for injunctive relief against any person who has intentionally violated the Pain-Capable Unborn Child Protection Act may be maintained by the woman upon whom an abortion was performed or induced or attempted to be performed or induced in violation of the Pain-Capable Unborn Child Protection Act; by any person who is the spouse, parent, sibling or guardian of, or a current or former licensed health care provider of, the woman upon whom an abortion has been performed or induced or attempted to be performed or induced in violation of the Pain-Capable Unborn Child Protection Act; by a district attorney with appropriate jurisdiction; or by the Attorney General. The injunction shall prevent the abortion provider from performing or inducing further abortions in violation of the Pain-Capable Unborn Child Protection Act in the State of Oklahoma.

C. If judgment is rendered in favor of the plaintiff in an action described in this section, the court shall also render judgment for a reasonable attorney fee in favor of the plaintiff against the defendant.

D. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney fee in favor of the defendant against the plaintiff.

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E. No damages or attorney fee may be assessed against the woman upon whom an abortion was performed or attempted to be performed except in accordance with subsection D of this section.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.9 of Title 63, unless there is created a duplication in numbering, reads as follows:

In every civil or criminal proceeding or action brought under the Pain-Capable Unborn Child Protection Act, the court shall rule whether the anonymity of any woman upon whom an abortion has been performed or induced or attempted to be performed or induced 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 induced or

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attempted to be performed or induced, anyone, other than a public official, who brings an action under subsection A of Section 8 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.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.10 of Title 63, unless there is created a duplication in numbering, reads as follows:

If any one or more provisions, sections, subsections, sentences, clauses, phrases or words of the Pain-Capable Unborn Child Protection Act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of the Pain-Capable Unborn Child Protection Act shall remain effective notwithstanding such unconstitutionality. The Legislature hereby declares that it would have passed the Pain-Capable Unborn Child Protection Act, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, sections, subsections, sentences, clauses, phrases, or words of the Pain-Capable Unborn Child Protection Act, or the application of the Pain-Capable Unborn Child Protection Act, would be declared unconstitutional.

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SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-745.11 of Title 63, unless there is created a duplication in numbering, reads as follows:

Nothing in the Pain-Capable Unborn Child Protection Act shall be construed as creating or recognizing a right to abortion.

SECTION 12. This act shall become effective November 1, 2011.

COMMITTEE REPORT BY: COMMITTEE ON PUBLIC HEALTH, dated 02-24-2011 - DO PASS, As Amended and Coauthored.

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