



2015 ASSEMBLY BILL 237

May 22, 2015 - Introduced by Representatives KREMER, BALLWEG, SANFELIPPO, ALLEN, R. BROOKS, BORN, CRAIG, EDMING, GANNON, HORLACHER, HUTTON, KAPENGA, KATSMA, KLEEFISCH, KUGLITSCH, KULP, MURPHY, PETERSEN, QUINN, ROHRKASTE, SKOWRONSKI, TITTL, VORPAGEL, CZAJA and HEATON, cosponsored by Senators LAZICH, S. FITZGERALD, FARROW, LEMAHIEU, MOULTON, NASS, ROTH, STROEBEL, VUKMIR, WANGGAARD and GUDEX. Referred to Committee on Health.

1 **AN ACT** *to amend* 253.10 (3) (c) 1. b. and 253.10 (3) (d) 1.; and *to create* 69.186
2 (1) (hf), 69.186 (1) (k) and (L), 253.10 (2) (dr), 253.10 (3) (c) 2. em. and 253.107
3 of the statutes; **relating to:** requiring a determination of probable
4 postfertilization age of an unborn child before abortion, prohibiting abortion of
5 an unborn child considered capable of experiencing pain, informed consent,
6 abortion reporting, and providing a criminal penalty.

Analysis by the Legislative Reference Bureau

This bill prohibits the performance of an abortion, except in a medical emergency, unless the physician performing or inducing the abortion has made a determination of the probable postfertilization age of the unborn child or has relied upon another physician's determination of postfertilization age. The bill prohibits any person from performing or inducing, or attempting to perform or induce, an abortion when the unborn child is considered to be capable of experiencing pain, unless the woman is undergoing a medical emergency. Under the bill, the unborn child is capable of experiencing pain if the probable postfertilization age of the unborn child is 20 or more weeks. When the unborn child is considered capable of experiencing pain and the pregnant woman is undergoing a medical emergency, the bill requires the physician to terminate the pregnancy in the manner that, in reasonable medical judgment, provides the best opportunity for the unborn child to survive. The bill allows the woman on whom the abortion was performed or

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attempted, and the father of the unborn child, unless the pregnancy is the result of sexual assault or incest, to bring a claim for damages against a person who violates these limitations and requirements. A prosecuting attorney may also bring an action for injunctive relief for intentional or reckless violations of the limitations and requirements. Any person who violates the prohibition against performing, inducing, or attempting to perform or induce an abortion when the unborn child is capable of experiencing pain is guilty of a felony subject to a fine not to exceed \$10,000, imprisonment not to exceed three years and six months, or both.

Under current law, annually, each hospital, clinic, or other facility in which an induced abortion is performed must file with DHS a report for each induced abortion performed in the calendar year. The report must contain for each patient the state, and county if Wisconsin, of residence; patient number; race; age; marital status; month and year in which the abortion was performed; education; number of weeks since patient's last menstrual period; whether the abortion was chemically or surgically induced or surgically induced following a failed chemical abortion; and any resulting complications. If the patient is a minor, the report must contain whether consent for the abortion was provided and by whom; and, if consent was not provided, on which basis the abortion was performed. Under current law, DHS is required to collect the reported information in a manner that ensures anonymity of the patient who obtained the abortion, the health care provider who performed the abortion, and the facility in which the abortion was performed. Under current law, DHS is required to publish annual demographic summaries of the reported information except what reveals the identity of a patient, provider, or facility.

The bill requires the hospital, clinic, or other facility to report the probable postfertilization age of the unborn child and whether ultrasound was used to assist in that determination of postfertilization age; or, if the probable postfertilization age of the unborn child was not determined, the nature of the medical emergency. If the unborn child is considered capable of experiencing pain, the bill requires reporting of the nature of the pregnant woman's medical emergency and a statement of whether the method of abortion used was one that provided the best opportunity for the unborn child's survival.

Under current law, a woman upon whom an abortion is to be performed or induced must give voluntary and informed written consent to an abortion. Except in a medical emergency, a woman's consent to an abortion is considered informed only if, at least 24 hours before the abortion is performed or induced, the physician or an assistant has, in person, orally provided the woman with certain information and given to the woman certain written materials. If the pregnancy is the result of sexual assault or incest, the 24-hour period, but not the provision of information, may be waived or reduced under certain circumstances. In addition to the current requirement to inform the woman, orally and in writing, of the probable gestational age, the bill requires that the woman be informed, orally and in writing, of the probable postfertilization age of the unborn child and the numerical odds of survival for an unborn child delivered at that probable postfertilization age. The bill also requires that the woman be orally informed of and provided written materials on the availability of perinatal hospice.

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For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 69.186 (1) (hf) of the statutes is created to read:

2 69.186 (1) (hf) The probable postfertilization age of the unborn child, as defined
3 in s. 253.107 (1) (c), and whether an ultrasound was used to assist in making the
4 determination of postfertilization age of the unborn child, or, if the probable
5 postfertilization age of the unborn child was not determined, the nature of the
6 medical emergency, as defined in s. 253.10 (2) (d).

7 **SECTION 2.** 69.186 (1) (k) and (L) of the statutes are created to read:

8 69.186 (1) (k) If the unborn child is considered to be capable of experiencing
9 pain under s. 253.107 (3) (a), the nature of the medical emergency, as defined in s.
10 253.10 (2) (d), that the pregnant woman had.

11 (L) If the unborn child is considered to be capable of experiencing pain under
12 s. 253.107 (3) (a), a statement whether the method of abortion used was one that, in
13 reasonable medical judgment, provided the best opportunity for the unborn child to
14 survive or, if such a method was not used, the basis of the determination that
15 termination of the pregnancy in that manner posed a greater risk either of the death
16 of the pregnant woman or of the substantial and irreversible physical impairment
17 of a major bodily function of the woman than other available methods.

18 **SECTION 3.** 253.10 (2) (dr) of the statutes is created to read:

19 253.10 (2) (dr) “Perinatal hospice” means comprehensive support that includes
20 support from the time of a terminal diagnosis of an unborn child through the birth
21 and death of the child and through the postpartum period and may include the

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1 supportive care of maternal-fetal medical specialists, obstetricians, neonatologists,
2 anesthesia specialists, specialty nurses, psychiatrists, psychologists, mental health
3 professionals, clergy, social workers, and other professionals.

4 **SECTION 4.** 253.10 (3) (c) 1. b. of the statutes is amended to read:

5 253.10 (3) (c) 1. b. The probable gestational age of the unborn child, the
6 probable postfertilization age of the unborn child, as defined in s. 253.107 (1) (c), and
7 the numerical odds of survival for an unborn child delivered at that probable
8 postfertilization age, at the time that the information is provided. The physician or
9 other qualified physician shall also provide this information to the woman in writing
10 at this time.

11 **SECTION 5.** 253.10 (3) (c) 2. em. of the statutes is created to read:

12 253.10 (3) (c) 2. em. That the printed materials described in par. (d) contain
13 information on the availability of perinatal hospice.

14 **SECTION 6.** 253.10 (3) (d) 1. of the statutes is amended to read:

15 253.10 (3) (d) 1. Geographically indexed materials that are designed to inform
16 a woman about public and private agencies, including adoption agencies, and
17 services that are available to provide information on family planning, as defined in
18 s. 253.07 (1) (a), including natural family planning information, to provide
19 ultrasound imaging services, to assist her if she has received a diagnosis that her
20 unborn child has a disability or if her pregnancy is the result of sexual assault or
21 incest and to assist her through pregnancy, upon childbirth and while the child is
22 dependent. The materials shall include a comprehensive list of the agencies
23 available, a description of the services that they offer and a description of the manner
24 in which they may be contacted, including telephone numbers and addresses, or, at
25 the option of the department, the materials shall include a toll-free, 24-hour

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1 telephone number that may be called to obtain an oral listing of available agencies
2 and services in the locality of the caller and a description of the services that the
3 agencies offer and the manner in which they may be contacted. The materials shall
4 provide information on the availability of governmentally funded programs that
5 serve pregnant women and children. Services identified for the woman shall include
6 medical assistance for pregnant women and children under s. 49.47 (4) (am) and
7 49.471, the availability of family or medical leave under s. 103.10, the Wisconsin
8 works program under ss. 49.141 to 49.161, child care services, child support laws and
9 programs and the credit for expenses for household and dependent care and services
10 necessary for gainful employment under section 21 of the Internal Revenue Code.
11 The materials shall state that it is unlawful to perform an abortion for which consent
12 has been coerced, that any physician who performs or induces an abortion without
13 obtaining the woman's voluntary and informed consent is liable to her for damages
14 in a civil action and is subject to a civil penalty, that the father of a child is liable for
15 assistance in the support of the child, even in instances in which the father has
16 offered to pay for an abortion, and that adoptive parents may pay the costs of
17 prenatal care, childbirth and neonatal care. The materials shall include
18 information, for a woman whose pregnancy is the result of sexual assault or incest,
19 on legal protections available to the woman and her child if she wishes to oppose
20 establishment of paternity or to terminate the father's parental rights. The
21 materials shall include information on services in the state that are available for
22 victims or individuals at risk of domestic abuse. The materials shall include
23 information on the availability of perinatal hospice.

24 **SECTION 7.** 253.107 of the statutes is created to read:

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2 DEFINITIONS. In this section:

3 (a) "Abortion" has the meaning given in s. 253.10 (2) (a).

4 (b) "Medical emergency" has the meaning given in s. 253.10 (2) (d).

5 (c) "Probable postfertilization age of the unborn child" means the number of
6 weeks that have elapsed from the probable time of fertilization of a woman's ovum.

7 **(2) PROBABLE POSTFERTILIZATION AGE.** Except in the case of a medical emergency,
8 no physician may perform or induce an abortion, or attempt to perform or induce an
9 abortion, unless the physician performing or inducing it has first made a
10 determination of the probable postfertilization age of the unborn child or relied upon
11 such a determination made by another physician.

12 **(3) PROTECTION OF UNBORN CHILD CAPABLE OF FEELING PAIN FROM ABORTIONS.** (a)
13 No person shall perform or induce or attempt to perform or induce an abortion upon
14 a woman when the unborn child is considered capable of experiencing pain unless
15 the woman is undergoing a medical emergency. For purposes of this subsection, an
16 unborn child is considered to be capable of experiencing pain if the probable
17 postfertilization age of the unborn child is 20 or more weeks.

18 (b) When the unborn child is considered capable of experiencing pain and the
19 pregnant woman is undergoing a medical emergency, the physician shall terminate
20 the pregnancy in the manner that, in reasonable medical judgment, provides the best
21 opportunity for the unborn child to survive.

22 **(4) PENALTY.** Any person who violates sub. (3) (a) is guilty of a Class I felony.
23 No penalty may be assessed against a woman upon whom an abortion is performed
24 or induced or attempted to be performed or induced.

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1 **(5) CIVIL REMEDIES; INJUNCTIONS.** (a) Any of the following individuals may bring
2 a claim for damages, including damages for personal injury and emotional and
3 psychological distress, against a person who performs, or attempts to perform, an
4 abortion in violation of this section:

5 1. A woman on whom an abortion is performed or induced or attempted to be
6 performed or induced.

7 2. The father of the aborted unborn child or the unborn child that is attempted
8 to be aborted, unless the pregnancy is the result of sexual assault under s. 940.225
9 (1), (2), or (3) or incest under s. 948.06 (1) or (1m).

10 (b) A person who has been awarded damages under par. (a) shall, in addition
11 to any damages awarded under par. (a), be entitled to punitive damages for a
12 violation that satisfies a standard under s. 895.043 (3).

13 (c) 1. Notwithstanding s. 814.04 (1), a person who recovers damages under par.
14 (a) or (b) may also recover reasonable attorney fees incurred in connection with the
15 action.

16 2. If a defendant prevails in an action under par. (a) and the court finds the
17 action was frivolous or brought in bad faith, notwithstanding s. 814.04 (1), the
18 defendant may recover reasonable attorney fees incurred in connection with
19 defending the action.

20 (d) A contract is not a defense to an action under this subsection.

21 (e) Nothing in this subsection limits the common law rights of a person that are
22 not in conflict with sub. (2) or (3).

23 (f) A prosecuting attorney with appropriate jurisdiction may bring an action for
24 injunctive relief against a person who has intentionally or recklessly violated this
25 section.

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1 **(6) CONFIDENTIALITY IN COURT PROCEEDINGS.** (a) In every proceeding brought
2 under this section, the court, upon motion or sua sponte, shall rule whether the
3 identity of any woman upon whom an abortion was performed or induced or
4 attempted to be performed or induced shall be kept confidential unless the woman
5 waives confidentiality. If the court determines that a woman's identity should be
6 kept confidential, the court shall issue orders to the parties, witnesses, and counsel
7 and shall direct the sealing of the record and exclusion of individuals from
8 courtrooms or hearing rooms to the extent necessary to safeguard the woman's
9 identity from public disclosure. If the court issues an order to keep a woman's
10 identity confidential, the court shall provide written findings explaining why the
11 woman's identity should be kept confidential, why the order is essential to that end,
12 how the order is narrowly tailored to its purpose, and why no reasonable less
13 restrictive alternative exists.

14 (b) Any person, except for a public official, who brings an action under this
15 section shall do so under a pseudonym unless the person obtains the written consent
16 of the woman upon whom an abortion was performed or induced, or attempted to be
17 performed or induced, in violation of this section.

18 (c) This section may not be construed to allow the identity of a plaintiff or a
19 witness to be concealed from the defendant.

20 **(7) CONSTRUCTION.** Nothing in this section may be construed as creating or
21 recognizing a right to abortion or as making lawful an abortion that is otherwise
22 unlawful.

SECTION 8. Nonstatutory provisions.

23 (1) **LEGISLATIVE FINDINGS.** The legislature finds that the best current evidence
24 confirms:
25

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1 (a) Pain receptors (unborn child's entire body nociceptors) are present no later
2 than 16 weeks after fertilization and nerves link these receptors to the brain's
3 thalamus and subcortical plate by no later than 20 weeks.

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

6 (c) In the unborn child, application of painful stimuli is associated with
7 significant increases in stress hormones known as the stress response.

8 (d) Subjection to painful stimuli is associated with long-term harmful
9 neuro-developmental effects, such as altered pain sensitivity and, possibly,
10 emotional, behavioral, and learning disabilities later in life.

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

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

21 (g) Substantial evidence indicates that children born missing the bulk of the
22 cerebral cortex, those with hydraencephaly, nevertheless experience pain.

23 (h) In adults, stimulation or ablation of the cerebral cortex does not alter pain
24 perception while stimulation or ablation of the thalamus does.

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1 (i) Substantial evidence indicates that structures used for pain processing in
2 early development differ from those of adults, using different neural elements
3 available at specific times during development, such as the subcortical plate, to fulfill
4 the rule of pain processing.

5 (j) Consequently, there is substantial medical evidence that an unborn child is
6 capable of experiencing pain by 20 weeks after fertilization. The legislature has the
7 constitutional authority to make this judgment. As the U.S. supreme court has noted
8 in *Gonzales v. Carhart*, 550 U.S. 124, 164–64 (2007): “The Court has given state and
9 federal legislatures wide discretion to pass legislation in areas where there is
10 medical and scientific uncertainty...See *Marshall v. United States*, 414 U.S. 417, 427
11 (1974) (‘When Congress undertakes to act in areas fraught with medical and
12 scientific uncertainties, legislative options must be especially broad.’) The law need
13 not give abortion doctors unfettered choice in the course of their medical practice, nor
14 should it elevate their status above other physicians in the medical community.
15 ...Medical uncertainty does not foreclose the exercise of legislative power in the
16 abortion context any more than it does in other contexts.”

17 (k) It is the purpose of the state to assert a compelling state interest in
18 protecting the lives of unborn children from the stage at which substantial medical
19 evidence indicates that they are capable of feeling pain. In enacting this legislation,
20 Wisconsin is not asking the Supreme Court to overturn or replace its holding, first
21 articulated in *Roe v. Wade* and reaffirmed in *Planned Parenthood of Southeastern*
22 *Pennsylvania v. Casey*, that the state interest in unborn human life, which is
23 “legitimate” throughout pregnancy, becomes “compelling” at viability. Rather, it
24 asserts a separate and independent compelling state interest in unborn human life

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1 that exists once the unborn child is capable of feeling pain. It is asserted not in
2 replacement of, but in addition, to, the state interest in the viable unborn child.

3 (l) The U.S. supreme court has established that the “constitutional liberty of
4 the woman to have some freedom to terminate her pregnancy...is not so
5 unlimited...that from the outset the State cannot show its concern for the life of the
6 unborn, and at a later point in fetal development the State’s interest in life has
7 sufficient force so that the right of the woman to terminate the pregnancy can be
8 restricted.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S.
9 833, 869 (1992).

10 (m) The Supreme Court decision upholding the Partial-Birth Abortion Ban
11 Act, *Gonzales v. Carhart*, 550 U.S. 124 (2007) vindicated the dissenting opinion in
12 the earlier decision that had struck down Nebraska’s Partial-Birth Abortion Ban
13 Act. That opinion stated, “[In *Casey*] We held it was inappropriate for the Judicial
14 Branch to provide an exhaustive list of state interests implicated by
15 abortion....*Casey* is premised on the States having an important constitutional role
16 in defining their interests in the abortion debate. It is only with this principle in
17 mind that [a state’s] interests can be given proper weight. ... States also have an
18 interest in forbidding medical procedures which, in the State’s reasonable
19 determination, might cause the medical profession or society as a whole to become
20 insensitive, even disdainful, to life, including life in the human fetus.... A State may
21 take measures to ensure the medical profession and its members are viewed as
22 healers, sustained by a compassionate and rigorous ethic and cognizant of the
23 dignity and value of human life, even life which cannot survive without the
24 assistance of others.” *Stenberg v. Carhart*, 530 U.S. 914, 958-59 (2000) (Kennedy,
25 J., dissenting).’

