

STATE OF NEW YORK

6064

2019-2020 Regular Sessions

IN ASSEMBLY

February 26, 2019

Introduced by M. of A. LAWRENCE -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to protecting pain-capable unborn children

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. This act may be cited as the "pain-capable unborn child
2 protection act".

3 § 2. The legislature makes the following findings:

4 (1) Pain receptors are present throughout the unborn child's entire
5 body and nerves link these receptors to the brain's thalamus and subcor-
6 tical plate by no later than twenty weeks after fertilization.

7 (2) By eight weeks after fertilization, the unborn child reacts to
8 touch. After twenty weeks, the unborn child reacts to stimuli that would
9 be recognized as painful if applied to an adult human.

10 (3) In the unborn child, application of such painful stimuli is asso-
11 ciated with significant increases in stress hormones known as the stress
12 response.

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

17 (5) For the purposes of surgery on unborn children, fetal anesthesia
18 is routinely administered and is associated with a decrease in stress
19 hormones compared to their level when painful stimuli are applied with-
20 out the anesthesia.

21 (6) The position, asserted by some medical experts, that the unborn
22 child is incapable of experiencing pain until a point later in pregnancy
23 than twenty weeks after fertilization predominantly rests on the assump-
24 tion that the ability to experience pain depends on the cerebral cortex
25 and requires nerve connections between the thalamus and the cortex.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 However, recent medical research and analysis, especially since 2007,
2 provides strong evidence for the conclusion that a functioning cortex is
3 not necessary to experience pain.

4 (7) Substantial evidence indicates that children born missing the bulk
5 of the cerebral cortex, those with hydranencephaly, nevertheless experi-
6 ence pain.

7 (8) In adults, stimulation or ablation of the cerebral cortex does not
8 alter pain perception, while stimulation or ablation of the thalamus
9 does.

10 (9) Substantial evidence indicates that structures used for pain proc-
11 essing in early development differ from those of adults, using different
12 neural elements available at specific times during development, such as
13 the subcortical plate, to fulfill the role of pain processing.

14 (10) The position, asserted by some commentators, that the unborn
15 child remains in a coma-like sleep state that precludes the unborn child
16 experiencing pain is inconsistent with the documented reaction of unborn
17 children to painful stimuli and with the experience of fetal surgeons
18 who had found it necessary to sedate the unborn child with anesthesia to
19 prevent the unborn child from engaging in vigorous movement in reaction
20 to invasive surgery.

21 (11) Consequently, there is substantial medical evidence that an
22 unborn child is capable of experiencing pain by twenty (20) weeks after
23 fertilization. The Legislature has the constitutional authority to make
24 this judgment. As the United States Supreme Court has noted in *Gonzales*
25 *v. Carhart*, 550 U.S. 124, 162-64 (2007). "The Court has given state and
26 federal legislatures wide discretion to pass legislation in areas where
27 there is medical and scientific uncertainty...See *Marshall v. United*
28 *States*, 414 U.S. 417, 427 (1974) ('When Congress undertakes to act in
29 areas fraught with medical and scientific uncertainties, legislative
30 options must be especially broad.')...The law need not give abortion
31 doctors unfettered choice in the course of their medical practice, nor
32 should it elevate their status above other physicians in the medical
33 community....Medical uncertainty does not foreclose the exercise of
34 legislative power in the abortion context any more than it does in other
35 contexts."

36 (12) It is the purpose of the State to assert a compelling state
37 interest in protecting the lives of unborn children from the stage at
38 which substantial medical evidence indicates that they are capable of
39 feeling pain.

40 (13) In enacting this legislation the state is not asking the Supreme
41 Court to overturn or replace its holding, first articulated in *Roe v.*
42 *Wade* and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania*
43 *v. Casey*, that the state interest in unborn human life, which is "legit-
44 imate" throughout pregnancy, becomes "compelling" at viability. Rather,
45 it asserts a separate and independent compelling state interest in
46 unborn human life that exists once the unborn child is capable of feel-
47 ing pain, which is asserted not in replacement of, but in addition to
48 the state's compelling state interest in protecting the lives of unborn
49 children from the stage of viability.

50 (14) The United States Supreme Court has established that the "consti-
51 tutional liberty of the woman to have some freedom to terminate her
52 pregnancy...is not so unlimited...that from the outset the State cannot
53 show its concern for the life of the unborn, and at a later point in
54 fetal development the State's interest in life has sufficient force so
55 that the right of the woman to terminate the pregnancy can be

1 restricted." *Planned Parenthood of Southeastern Pennsylvania v. Casey*,
2 505 U.S. 833, 869 (1992).

3 (15) The Supreme Court decision upholding the Partial-Birth Abortion
4 Ban Act, *Gonzales v. Carhart*, 550 U.S. 124 (2007) vindicated the
5 dissenting opinion in the earlier decision that had struck down
6 Nebraska's Partial-Birth Abortion Ban Act. That opinion stated, "{In
7 Casey} We held it was inappropriate for the Judicial Branch to provide
8 an exhaustive list of state interests implicated by abortion...Casey is
9 premised on the States having an important constitutional role in defin-
10 ing their interests in the abortion debate. It is only with this princi-
11 ple in mind that {a state's} interests can be given proper
12 weight...States also have an interest in forbidding medical procedures
13 which, in the State's reasonable determination, might cause the medical
14 profession or society as a whole to become insensitive, even disdainful,
15 to life, including life in the human fetus...A State may take measures
16 to ensure the medical profession and its members are viewed as healers,
17 sustained by a compassionate and rigorous ethic and cognizant of the
18 dignity and value of human life, even life which cannot survive without
19 the assistance of others." *Stenberg v. Carhart*, 350 U.S. 914, 958-59
20 (2000)(Kennedy, J., dissenting).

21 (16) *Mindful of Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which the
22 context of determining the severability of a state statute regulating
23 abortion in the United States Supreme Court noted that an explicit
24 statement of legislative intent specifically made applicable to a
25 particular statute is of greater weight than a general savings or sever-
26 ability clause, it is the intent of the State that if any one or more
27 provisions, sections, subsections, sentences, clauses, phrases or words
28 of this act or the application thereof to any person or circumstance is
29 found to be unconstitutional, the same is hereby declared to be severa-
30 ble and the balance of this act shall remain effective notwithstanding
31 such unconstitutionality. Moreover, the State declares that it would
32 have passed this act, and each provision, section, subsection, sentence,
33 clause, phrase or word thereof, irrespective of the fact that any one or
34 more provisions, sections, subsections, sentences, clauses, phrases or
35 words, or any of their applications, were to be declared unconstitu-
36 tional.

37 § 3. Article 41 of the public health law is amended by adding a new
38 title 5-B to read as follows:

39 TITLE V-B

40 PAIN-CAPABLE UNBORN CHILD PROTECTION

41 Section 4164-a. Definitions.

42 4164-b. Protection of unborn child capable of feeling pain from
43 abortion.

44 4164-c. Reporting.

45 4164-d. Criminal penalties.

46 4164-e. Civil remedies.

47 4164-f. Protection of privacy in court proceedings.

48 4164-g. Litigation defense fund.

49 4164-h. Construction.

50 § 4164-a. Definitions. As used in this title:

51 1. "Abortion" means the use or prescription of any instrument, medi-
52 cine, drug, or any other substance or device:

53 (a) to intentionally kill the unborn child of a woman known to be
54 pregnant; or

55 (b) to intentionally terminate the pregnancy of a woman known to be
56 pregnant, with an intention other than:

1 (i) after viability to produce a live birth and preserve the life and
2 health of the child born alive; or

3 (ii) to remove a dead unborn child.

4 2. "Attempt", with respect to an abortion, means conduct that, under
5 the circumstances as the actor believes them to be, constitutes a
6 substantial step in a course of conduct planned to culminate in perform-
7 ing an abortion in this state in violation of this title.

8 3. "Fertilization" means the fusion of human spermatozoon with a human
9 ovum.

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

21 5. "Physician" means a person licensed to practice medicine and
22 surgery or osteopathic medicine and surgery, or otherwise legally
23 authorized to perform an abortion.

24 6. "Post-fertilization age" means the age of the unborn child as
25 calculated from the fusion of a human spermatozoon with a human ovum.

26 7. "Probable post-fertilization age of the unborn child" means what,
27 in reasonable medical judgment, will with reasonable probability be the
28 post-fertilization age of the unborn child at the time the abortion is
29 planned to be performed or induced.

30 8. "Reasonable medical judgment" means a medical judgment that would
31 be made by a reasonably prudent physician, knowledgeable about the case
32 and the treatment possibilities with respect to the medical conditions
33 involved.

34 9. "Serious health risk to the unborn child's mother" means that in
35 reasonable medical judgment she has a condition that so complicates her
36 medical condition that it necessitates the abortion of her pregnancy to
37 avert her death or to avert serious risk of substantial and irreversible
38 physical impairment of a major bodily function, not including psycholog-
39 ical or emotional conditions. No greater risk may be determined to exist
40 if it is based on a claim or diagnosis that the woman will engage in
41 conduct which she intends to result in her death or in substantial and
42 irreversible physical impairment of a major bodily function.

43 10. "Unborn child" means an individual organism of the species homo
44 sapiens, beginning at fertilization, until the point of being born
45 alive.

46 11. "Woman" means a female human being whether or not she has reached
47 the age of majority.

48 § 4164-b. Protection of unborn child capable of feeling pain from
49 abortion. 1. No person shall perform or induce, or attempt to perform
50 or induce, an abortion of an unborn child capable of feeling pain unless
51 necessary to prevent serious health risk to the unborn child's mother.

52 2. An unborn child shall be deemed capable of feeling pain when it has
53 been determined, by the physician performing or inducing or attempting
54 to perform or induce the abortion or by another physician upon whose
55 determination that physician relies, that the probable post-fertiliza-
56 tion age of the woman's unborn child is twenty or more weeks.

3. Except in the case of a medical emergency, no abortion may be performed or induced or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination of the probable post-fertilization age of the unborn child or relied upon such a determination made by another physician. In making this 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 post-fertilization age.

4. When an abortion of an unborn child capable of feeling pain is necessary to prevent serious health risk to the unborn child's mother, 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 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 greater risk may be determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

§ 4164-c. Reporting. 1. Any physician who performs or induces or attempts to perform or induce an abortion shall report to the department, on a schedule and in accordance with forms and regulations adopted and promulgated by the department, that include:

(a) Post-fertilization age:

(i) If a determination of probable post-fertilization age was made, whether ultrasound was employed in making the determination, and the week of probable post-fertilization age determined.

(ii) If a determination of probable post-fertilization age was not made, the basis of the determination that a medical emergency existed.

(b) Method of abortion: which of the following was employed:

(i) Medication abortion (such as, but not limited to, mifepristone/misoprostol or methotrexate/misoprostol);

(ii) Manual vacuum aspiration;

(iii) Electrical vacuum aspiration;

(iv) Dilation and evacuation;

(v) Combined induction abortion and dilation and evacuation;

(vi) Induction abortion with prostaglandins;

(vii) Induction abortion with intra-amniotic instillation (such as, but not limited to, saline or urea);

(viii) Induction abortion, other; or

(ix) Intact dilation and extraction (partial-birth)

(c) Whether an intra-fetal injection was used in an attempt to induce fetal demise (such as, but not limited to, intrafetal potassium chloride or digoxin);

(d) Age and race of the patient;

(e) If the unborn child was deemed capable of experiencing pain under section forty-one hundred sixty-four-b of this title, 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;

1 (f) If the unborn child was deemed capable of experiencing pain under
2 section forty-one hundred sixty-four-b of this title, whether or not the
3 method of abortion used was one that, in reasonable medical judgment,
4 provided the best opportunity for the unborn child to survive and, if
5 such a method was not used, the basis of the determination that termi-
6 nation of the pregnancy in that manner would pose a greater risk either
7 of the death of the pregnant woman or of the substantial and irrevers-
8 ible physical impairment of a major bodily function, not including
9 psychological or emotional conditions, of the woman than would other
10 available methods.

11 2. Reports required by subdivision one of this section may not contain
12 the name or the address of the patient whose pregnancy was terminated,
13 nor may the report contain any other information identifying the
14 patient, except that each report shall contain a unique medical record
15 identifying number, to enable matching the report to the patient's
16 medical records. These reports shall be maintained in strict confidence
17 by the department, shall not be available for public inspection, and
18 shall not be made available except:

19 (a) to the attorney general or a district attorney with appropriate
20 jurisdiction pursuant to a criminal investigation;

21 (b) to the attorney general or a district attorney pursuant to a civil
22 investigation of the grounds for an action under section forty-one
23 hundred sixty-four-e of this title; or

24 (c) pursuant to court order in an action under section forty-one
25 hundred sixty-four-e of this title.

26 3. By June thirtieth of each year the department shall issue a public
27 report providing statistics for the previous calendar year compiled from
28 all of the reports covering that year submitted in accordance with this
29 section for each of the items listed in subdivision one of this section.
30 Each report shall also provide the statistics for all previous calendar
31 years during which this section was in effect, adjusted to reflect any
32 additional information from late or corrected reports. The department
33 shall take care to ensure that none of the information included in the
34 public reports could reasonably lead to the identification of any preg-
35 nant woman upon whom an abortion was performed, induced, or attempted.

36 4. Any physician who fails to submit a report by the end of thirty
37 days following the due date established by regulation shall be subject
38 to a late fee of one thousand dollars (\$1,000) for each additional thir-
39 ty-day period or portion of a thirty-day period the report is overdue.
40 Any physician required to report in accordance with this act who has not
41 submitted a report, or has submitted only an incomplete report, more
42 than six months following the due date, may, in an action brought by the
43 department, be directed by a court of competent jurisdiction to submit a
44 complete report within a period stated by court order or be subject to
45 civil contempt. Intentional or reckless failure by any physician to
46 conform to any requirement of this section constitutes professional
47 misconduct pursuant to title two-A of article two of this chapter.

48 § 4164-d. Criminal penalties. Any person who intentionally or reck-
49 lessly performs or induces or attempts to perform or induce an abortion
50 in violation of this title shall be guilty of a felony. No penalty may
51 be assessed against the woman upon whom the abortion is performed or
52 induced or attempted to be performed or induced.

53 § 4164-e. Civil remedies. 1. Any woman upon whom an abortion has been
54 performed or induced in violation of this title, or the father of the
55 unborn child who was the subject of such an abortion, may maintain an
56 action against the person who performed or induced the abortion in

1 intentional or reckless violation of this title for actual and punitive
2 damages. Any woman upon whom an abortion has been attempted in violation
3 of this title may maintain an action against the person who attempted to
4 perform or induce the abortion in an intentional or reckless violation
5 of this title for actual and punitive damages.

6 2. A cause of action for injunctive relief against any person who has
7 intentionally or recklessly violated this title may be maintained (i) by
8 the woman upon whom an adoption was performed or induced or attempted to
9 be performed or induced in violation of this title; (ii) by any person
10 who is the spouse, parent, sibling or guardian of, or a current or
11 former licensed health care provider of, the woman upon whom an abortion
12 has been performed or induced or attempted to be performed or induced in
13 violation of this title; (iii) by a prosecuting attorney with appropri-
14 ate jurisdiction; or (iv) by the attorney general. The injunction shall
15 prevent the abortion provider from performing or inducing or attempting
16 to perform or induce further abortions in violation of this title in
17 this state.

18 3. If judgment is rendered in favor of the plaintiff in an action
19 described in this section, the court shall also render judgment for a
20 reasonable attorney's fee in favor of the plaintiff against the defend-
21 ant.

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

26 5. No damages or attorney's fee may be assessed against the woman upon
27 whom an abortion was performed or induced or attempted to be performed
28 or induced except in accordance with subdivision four of this section.

29 § 4164-f. Protection of privacy in court proceedings. In every civil
30 or criminal proceeding or action brought under this title, the court
31 shall rule whether the anonymity of any woman upon whom an abortion has
32 been performed or induced or attempted to be performed or induced shall
33 be preserved from public disclosure if she does not give her consent to
34 such disclosure. The court shall make such a ruling and, upon determin-
35 ing that her anonymity should be preserved, shall issue orders to the
36 parties, witnesses, and counsel and shall direct the sealing of the
37 record and exclusion of individuals from courtrooms or hearing rooms to
38 the extent necessary to safeguard her identity from public disclosure.
39 Each such order shall be accompanied by specific written findings
40 explaining why the anonymity of the woman should be preserved from
41 public disclosure, why the order is essential to that end, how the order
42 is narrowly tailored to serve that interest, and why no reasonable less
43 restrictive alternative exists. In the absence of written consent of the
44 woman upon whom an abortion has been performed or induced or attempted
45 to be performed or induced, anyone, other than a public official, who
46 brings an action under section forty-one hundred sixty-four-e of this
47 title shall do so under a pseudonym. This section may not be construed
48 to conceal the identity of the plaintiff or of witnesses from the
49 defendant or from attorney for the defendant.

50 § 4164-g. Litigation defense fund. 1. There is hereby established in
51 the joint custody of the state comptroller and the department a special
52 fund known as the Pain-Capable Unborn Child Protection Act Litigation
53 Fund for the purpose of providing funds to pay for any costs and
54 expenses incurred by the state attorney general in relation to actions
55 surrounding defense of this law.

1 2. The fund shall consist of: (a) appropriations made to the account
2 by the legislature; and (b) any donations, gifts, or grants made to the
3 account.

4 3. The fund shall retain the interest income derived from the moneys
5 credited to the fund.

6 § 4165-h. Construction. This act shall not be construed to repeal, by
7 implication or otherwise, any otherwise applicable provision of law
8 regulating or restricting abortion. An abortion that complies with this
9 title but violates the provisions of any otherwise applicable provision
10 of law shall be deemed unlawful as provided in such provision. An
11 abortion that complies with the provisions of any otherwise applicable
12 provision of law regulating or restricting abortion but violates this
13 title shall be deemed unlawful as provided in this title. If some or all
14 of the provisions of this title are ever temporarily or permanently
15 restrained or enjoined by judicial order, all other provisions of law
16 regulating or restricting abortion shall be enforced as though such
17 restrained or enjoined provisions had not been adopted; provided, howev-
18 er, that whenever such temporary or permanent restraining order of
19 injunction is stayed or dissolved, or otherwise ceases to have effect,
20 such provisions shall have full force and effect.

21 § 4. This act shall take effect immediately.