

Stricken language would be deleted from and underlined language would be added to present law.  
Act 171 of the Regular Session

State of Arkansas  
89th General Assembly  
Regular Session, 2013

*As Engrossed: S2/14/13*  
**A Bill**

HOUSE BILL 1037

By: Representatives Mayberry, Alexander, D. Altes, Baird, Ballinger, Barnett, Bell, Biviano, Bragg, Branscum, J. Burris, Carnine, Clemmer, Collins, Cozart, Dale, Davis, Deffenbaugh, Dotson, D. Douglas, C. Douglas, Eubanks, Farrer, Fite, Gillam, Gossage, Hammer, Harris, Hickerson, Hobbs, Holcomb, House, Hutchison, Jean, Kerr, Lampkin, Lea, Lenderman, Linck, Lowery, S. Malone, D. Meeks, S. Meeks, Miller, Neal, Payton, Rice, Scott, Shepherd, Slinkard, Wardlaw, Westerman, B. Wilkins, Womack, Wren

By: Senators Hester, Bledsoe, B. King, G. Stubblefield, J. Woods

### **For An Act To Be Entitled**

AN ACT TO CREATE THE PAIN-CAPABLE UNBORN CHILD PROTECTION ACT; TO PROHIBIT THE ABORTION OF AN UNBORN CHILD OF TWENTY OR MORE WEEKS POST-FERTILIZATION AGE; TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES.

### **Subtitle**

AN ACT TO CREATE THE PAIN-CAPABLE UNBORN CHILD PROTECTION ACT AND TO DECLARE AN EMERGENCY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Title 20, Chapter 16 is amended to add an additional subchapter to read as follows:

Subchapter 13 – Pain-Capable Unborn Child Protection Act

20-16-1301. Title.

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

20-16-1302. Definitions.



As used in this subchapter:

(1) "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device:

(A) To terminate the pregnancy of a woman known to be pregnant with an intention other than to:

(i) Increase the probability of a live birth;

(ii) Preserve the life or health of the child after live birth; or

(iii) 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

(B) Which causes the premature termination of the pregnancy;

(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 this subchapter;

(3) "Fertilization" means the fusion of a human spermatozoon with a human ovum;

(4)(A) "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:

(i) Without first determining post-fertilization age to avert the death of the pregnant woman; or

(ii) For which the delay necessary to determine post-fertilization age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions.

(B) "Medical emergency" does not include a condition based on a claim or diagnosis that a pregnant 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;

(5) "Physician" means any person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state;

(6) "Post-fertilization age" means the age of the unborn child

as calculated from the fertilization of the human ovum;

(7) "Probable post-fertilization age of the unborn child" means what, in reasonable medical judgment, will, with reasonable probability, be the post-fertilization age of the unborn child at the time the abortion is planned to be performed or induced;

(8) "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;

(9) "Unborn child" 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.

20-16-1303. Legislative findings.

The General Assembly finds that:

(1) Pain receptors known as 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;

(2)(A) By eight (8) weeks after fertilization, the unborn child reacts to touch.

(B) After twenty (20) 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 those levels when painful stimuli are applied without such anesthesia;

(6)(A) 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.

(B) However, recent medical research and analysis, especially since 2007, provide strong evidence for the conclusion that a functioning cortex is not necessary to experience pain;

(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 and use 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;

(11) It is the purpose of the state 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; and

(12) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion, the United States Supreme Court noted that an explicit statement of legislative intent specifically made applicable to a particular statute is of greater weight than a general savings or severability clause, it is the intent of the state that § 1-2-117 be specifically applied to this subchapter, and moreover the General Assembly declares that it would have passed this subchapter, and each section, subsection, subdivision, sentence, clause, phrase, or word in this subchapter, irrespective of the fact that any one (1) or more sections, subsections, subdivisions, sentences, clauses, phrases, or words, or any of their applications, were to be declared

unconstitutional.

20-16-1304. Determination of post-fertilization age.

(a)(1) Except in the case of a medical emergency, an abortion shall not be performed or induced or be attempted to be performed or induced unless the physician performing or inducing the abortion 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.

(2) In making such a determination under subdivision (a)(1) of this section, 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 accurately diagnose the probable post-fertilization age of the unborn child.

(b) Any physician who purposely, knowingly, or recklessly fails to conform to any requirement of this section engages in unprofessional conduct under § 17-95-409(a)(2)(D).

20-16-1305. Abortion of unborn child of twenty (20) or more weeks post-fertilization age prohibited.

(a)(1) A person shall not 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 post-fertilization age of the unborn child of the woman is twenty (20) or more weeks.

(2)(A) However, subdivision (a)(1) of this section does not apply if, in reasonable medical judgment, the pregnant woman 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 substantial and irreversible physical impairment of a major bodily function of the pregnant woman, not including psychological or emotional conditions.

(B) A condition creating an exemption under subdivision (a)(2)(A) of this section shall not be deemed to exist if the condition is based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical

impairment of a major bodily function.

(3) Subdivision (a)(1) of this section does not apply if the pregnancy results from rape under § 5-14-103 or incest under § 5-26-202.

(b)(1) When an abortion upon a woman whose unborn child has been determined under subdivision (a)(1) of this section to have a probable post-fertilization 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.

(2)(A) However, subdivision (b)(1) of this section does not apply if, 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 of the woman, not including psychological or emotional conditions, than would other available methods.

(B) A risk creating an exemption under subdivision (b)(2)(A) of this section shall not be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

20-16-1306. Reporting.

(a)(1) A physician who performs or induces or attempts to perform or induce an abortion shall report to the Department of Health on a schedule and in accordance with rules adopted by the department.

(2) The report required under subdivision (a)(1) of this section shall include without limitation:

(A) Whether a determination of probable post-fertilization age was made, the probable post-fertilization age of the unborn child determined, and the method and basis of the determination;

(B) If a determination of probable post-fertilization age of the unborn child was not made, the basis of the determination that a medical emergency existed;

(C) If the probable post-fertilization age of the unborn child 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 immediate abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman, not including psychological or emotional conditions;

(D) The method used for the abortion; and

(E) If an abortion was performed when the probable post-fertilization age of the unborn child was determined to be twenty (20) or more weeks:

(i) Whether the method used was one that in reasonable medical judgment provided the best opportunity for the unborn child to survive; or

(ii) If such a method under subdivision (a)(2)(E)(i) of this section 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 of the woman not including psychological or emotional conditions than would other available methods.

(b)(1) By June 30 of each year the department shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted under this section for each of the items listed in subsection (a) of this section.

(2) Each report also shall 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.

(3) The department 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 induced or attempted to be performed or induced.

(c)(1) A physician who fails to submit a report by the end of thirty (30) days after the date the report is due shall be subject to a late fee of five hundred dollars (\$500) for each additional thirty-day period or portion of a thirty-day period the report is overdue.

(2) A physician required to report in accordance with this subchapter who has not submitted a report or has submitted only an incomplete report more than one (1) year following the date the report is due, in an action brought in the manner in which actions are brought by the department,

may 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.

(d)(1) Purposeful, knowing, or reckless failure by a physician to conform to any requirement of this section, other than late filing of a report, constitutes unprofessional conduct under § 17-95-409.

(2) Purposeful, knowing, or reckless failure by a physician to submit a complete report in accordance with a court order constitutes unprofessional conduct under § 17-95-409.

(3) Purposeful, knowing, or reckless falsification of any report required under this section is a Class C misdemeanor.

(e) Within ninety (90) days after the effective date of this subchapter, the department shall adopt rules to assist in compliance with this section and subdivision (a)(1) of this section shall take effect so as to require reports regarding all abortions performed or induced on or after the first day of the first calendar month following the effective date of such rules.

20-16-1307. Criminal penalties.

(a) A person who purposely, knowingly, or recklessly performs or induces or attempts to perform or induce an abortion in violation of this subchapter is guilty of a Class D felony.

(b) A penalty may not be assessed against the woman upon whom the abortion is performed or induced or attempted to be performed or induced.

20-16-1308. Civil remedies.

(a)(1) A woman upon whom an abortion has been performed in violation of this subchapter or the father of the unborn child who was the subject of an abortion in violation of this subchapter may bring an action against the person who purposely, knowingly, or recklessly performed or induced the abortion in violation of this subchapter for actual and punitive damages.

(2) A woman upon whom an abortion has been attempted in violation of this subchapter may bring an action against the person who attempted purposely, knowingly, or recklessly to perform or induce the abortion in violation of this subchapter for actual and punitive damages.

(b)(1) A cause of action for injunctive relief against a person who has purposely, knowingly, or recklessly violated this subchapter may be

maintained by:

(A) The woman upon whom an abortion was performed or induced or attempted to be performed or induced in violation of this subchapter;

(B) A 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 this subchapter;

(C) A prosecuting attorney with appropriate jurisdiction;  
or

(D) The Attorney General.

(2) The injunction shall prevent the abortion provider from performing or inducing and from attempting to perform or induce further abortions in violation of this subchapter.

(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's 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 render judgment for a reasonable attorney's fee in favor of the defendant against the plaintiff.

(e) Damages or attorney's fee shall not be assessed against the woman upon whom an abortion was performed or induced or attempted to be performed or induced except under subsection (d) of this section.

20-16-1309. Protection of privacy in court proceedings.

(a) In every civil or criminal proceeding or action brought under this subchapter, the court shall rule whether the anonymity of a 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 the disclosure.

(b) The court, upon motion or sua sponte, shall make a ruling under subsection (a) of this section and, upon determining that the woman's 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 the woman's identity from public disclosure.

(c) Each order under subsection (b) of this section shall be accompanied by specific written findings explaining:

(1) Why the anonymity of the woman should be preserved from public disclosure;

(2) Why the order is essential to that end;

(3) How the order is narrowly tailored to serve that interest;

and

(4) Why no reasonable less restrictive alternative could be fashioned.

(d) In the absence of written consent of the woman upon whom an abortion has been performed or induced or attempted to be performed or induced, anyone other than a public official who brings an action under § 20-16-1308 shall do so under a pseudonym.

(e) This section is not intended to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

20-16-1310. Construction.

(a) Since it is the intent of the state to assert two (2) separate and independent compelling state interests, those in protecting the lives of viable unborn children and protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain, this subchapter does not repeal by implication or otherwise § 20-16-705.

(b) This subchapter does not repeal by implication or otherwise any other provision of this chapter.

SECTION 2. EMERGENCY CLAUSE. It is found and determined by the General Assembly of the State of Arkansas that abortions of pain-capable unborn children may be legally performed today in Arkansas; that the suffering described in this act should be prohibited at the earliest possible moment; and that this act is immediately necessary because this act will ensure that no abortion of a pain-capable child will be performed in Arkansas after this act becomes effective. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the

public peace, health, and safety shall become effective on:

(1) The date of its approval by the Governor;

(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.

*/s/Mayberry*

***APPROVED: BECAME LAW ON 02/26/2013 Governor Veto - Senate and House Override***