

State of Wisconsin



2015 Senate Bill 179

Date of enactment: **July 20, 2015**
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2015 WISCONSIN ACT 56

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

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

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

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

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

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

(L) If the unborn child is considered to be capable of experiencing pain under s. 253.107 (3) (a), a statement whether the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive or, if such a method was not used, the basis of the determination that termination of the pregnancy in that manner posed 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 than other available methods.

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

253.10 (2) (dr) "Perinatal hospice" means comprehensive support that includes support from the time of a terminal diagnosis of an unborn child through the birth and death of the child and through the postpartum period and may include the supportive care of maternal–fetal medical specialists, obstetricians, neonatologists, anesthesia specialists, specialty nurses, psychiatrists, psychologists, mental health professionals, clergy, social workers, and other professionals.

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

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

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

* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

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

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

253.10 (3) (d) 1. Geographically indexed materials that are designed to inform a woman about public and private agencies, including adoption agencies, and services that are available to provide information on family planning, as defined in s. 253.07 (1) (a), including natural family planning information, to provide ultrasound imaging services, to assist her if she has received a diagnosis that her unborn child has a disability or if her pregnancy is the result of sexual assault or incest and to assist her through pregnancy, upon childbirth and while the child is dependent. The materials shall include a comprehensive list of the agencies available, a description of the services that they offer and a description of the manner in which they may be contacted, including telephone numbers and addresses, or, at the option of the department, the materials shall include a toll-free, 24-hour telephone number that may be called to obtain an oral listing of available agencies and services in the locality of the caller and a description of the services that the agencies offer and the manner in which they may be contacted. The materials shall provide information on the availability of governmentally funded programs that serve pregnant women and children. Services identified for the woman shall include medical assistance for pregnant women and children under s. 49.47 (4) (am) and 49.471, the availability of family or medical leave under s. 103.10, the Wisconsin works program under ss. 49.141 to 49.161, child care services, child support laws and programs and the credit for expenses for household and dependent care and services necessary for gainful employment under section 21 of the Internal Revenue Code. The materials shall state that it is unlawful to perform an abortion for which consent has been coerced, that any physician who performs or induces an abortion without obtaining the woman's voluntary and informed consent is liable to her for damages in a civil action and is subject to a civil penalty, that the father of a child is liable for assistance in the support of the child, even in instances in which the father has offered to pay for an abortion, and that adoptive parents may pay the costs of prenatal care, childbirth and neonatal care. The materials shall include information, for a woman whose pregnancy is the result of sexual assault or incest, on legal protections available to the woman and her child if she wishes to oppose establishment of paternity or to terminate the father's parental rights. The materials shall include information on services in the state that are available for victims or individuals at risk of domestic abuse. The materials shall include information on the availability of perinatal hospice.

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

253.107 Probable postfertilization age; later-term abortions. (1) DEFINITIONS. In this section:

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

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

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

(2) PROBABLE POSTFERTILIZATION AGE. Except in the case of a medical emergency, no physician may perform or induce an abortion, or attempt to perform or induce an abortion, 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.

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

(b) When the unborn child is considered capable of experiencing pain and the pregnant woman is undergoing a medical emergency, the physician shall terminate the pregnancy in the manner that, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless the termination of the pregnancy in that manner poses 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 than other available methods.

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

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

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

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

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

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

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

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

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

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

(6) CONFIDENTIALITY IN COURT PROCEEDINGS. (a) In every proceeding brought under this section, the court, upon motion or sua sponte, shall rule whether the identity of any woman upon whom an abortion was performed or induced or attempted to be performed or induced shall be kept confidential unless the woman waives confidentiality. If the court determines that a woman's identity should be kept confidential, the court 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. If the court issues an order to keep a woman's identity confidential, the court shall provide written findings explaining why the woman's identity should be kept confidential, why the order is essential to that end, how the order is narrowly tailored to its purpose, and why no reasonable less restrictive alternative exists.

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

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

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

SECTION 8. Nonstatutory provisions.

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

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

(b) By 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.

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

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

(e) 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 is applied without the anesthesia.

(f) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than 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.

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

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

(i) 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.

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

(k) 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. In enacting this legislation, Wisconsin is not asking the Supreme Court to overturn or replace its holding, first articulated in *Roe v. Wade* and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, that the state interest in unborn human life, which is “legitimate” throughout pregnancy, becomes “compelling” at viability. Rather, it asserts a separate and independent compelling state interest in unborn human life that exists once the unborn child is capable of feeling pain. It is asserted not in replacement of, but in addition, to, the state interest in the viable unborn child.

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

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

SECTION 9. Effective date.

(1) This act takes effect on the first day of the 7th month beginning after publication.