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Summary: S.C. Pain-Capable Unborn Child Protection Act

**HISTORY OF LEGISLATIVE ACTIONS**

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12/3/2014 Senate Referred to Committee on **Medical Affairs**

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**VERSIONS OF THIS BILL**

[12/3/2014](file:///p:\pprever\2015-16\28_20141203.docx)

**A** **BILL**

TO AMEND CHAPTER 41, TITLE 44 OF THE 1976 CODE, RELATING TO ABORTIONS, BY ADDING ARTICLE 5 SO AS TO ENACT THE “SOUTH CAROLINA PAIN‑CAPABLE UNBORN CHILD PROTECTION ACT”, TO PROVIDE FINDINGS OF THE GENERAL ASSEMBLY, TO PROVIDE NECESSARY TERMS, TO PROVIDE THAT A PHYSICIAN OR ALLIED HEALTH PROFESSIONAL SHALL CALCULATE THE PROBABLE POST‑FERTILIZATION AGE OF AN EMBRYO OR FETUS BEFORE PERFORMING OR INDUCING AN ABORTION, TO PROVIDE THAT AN ABORTION MAY NOT BE PERFORMED IF THE PROBABLE POST‑FERTILIZATION AGE OF THE EMBRYO OR FETUS IS TWENTY OR MORE WEEKS, TO PROVIDE FOR EXCEPTIONS, TO REQUIRE CERTAIN EDUCATIONAL MATERIALS BE PRODUCED AND DISTRIBUTED, AND TO PROVIDE THAT THE ACT DOES NOT IMPLICITLY OR OTHERWISE REPEAL ANOTHER PROVISION OF LAW.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Chapter 41, Title 44 of the 1976 Code is amended by adding:

“Article 5

South Carolina Pain‑Capable Unborn Child Protection Act

Section 44‑41‑410. This article may be cited as the ‘South Carolina Pain‑Capable Unborn Child Protection Act’.

Section 44‑41‑420. The General Assembly makes the following findings:

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

(2) By eight weeks after fertilization, the unborn child reacts to touch. After twenty weeks, 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 levels 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 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.

(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) The position, asserted by some medical experts, that the unborn child remains in a coma‑like sleep state that precludes the unborn child experiencing pain is inconsistent with the documented reaction of unborn children to painful stimuli and with the experience of fetal surgeons who have found it necessary to sedate the unborn child with anesthesia to prevent the unborn child from thrashing about in reaction to invasive surgery.

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

(12) 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.

(13) South Carolina’s 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 is intended to be separate from and independent of South Carolina’s compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other.

(14) 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 if any one or more provisions, sections, subsections, sentences, clauses, phrases or words of this article 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 this article shall remain effective notwithstanding such unconstitutionality. Moreover, the State declares that it would have passed this article, 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, or any of their applications, were to be declared unconstitutional.

Section 44‑41‑430. For the purposes of this article:

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

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

(b) to intentionally prematurely terminate the pregnancy of a woman known to be pregnant, with an intention other than to increase the probability of a live birth or of preserving the life or health of the child after live birth.

(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 article.

(3) ‘Department’ means the South Carolina Department of Health and Environmental Control.

(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 post‑fertilization age to avert her death or 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. No condition must be considered a medical emergency if 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.

(6) ‘Physician’ means any person licensed to practice medicine and surgery or osteopathic medicine and surgery in this State.

(7) ‘Post‑fertilization age’ means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

(8) ‘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.

(9) ‘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.

(10) ‘Unborn child’ or ‘fetus’ each means an individual organism of the species homo sapiens from fertilization until live birth.

(11) ‘Woman’ means a female human being whether or not she has reached the age of majority.

Section 44‑41‑440. (A) Except in the case of a medical emergency, no abortion must 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 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 post‑fertilization age.

(B) Failure by any physician to conform to any requirement of this section constitutes ‘unprofessional conduct’ pursuant to Section 40‑47‑20(53).

Section 44‑41‑450. (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 post‑fertilization age of the woman’s unborn child is twenty 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 substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No such greater risk must be considered 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.

(B) When an abortion upon a woman whose unborn child has been determined to have a probable post‑fertilization age of twenty or more weeks is not prohibited by subsection (A), 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 must be considered 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.

Section 44‑41‑460. (A) Any abortion performed in this State must be reported by the performing physician on the standard form for reporting abortions to the state registrar, Department of Health and Environmental Control, within seven days after the abortion is performed. The names of the patient and physician may not be reported on the form or otherwise disclosed to the state registrar. The form must indicate from whom consent was obtained or circumstances waiving consent and must include:

(1) Post‑fertilization age:

(a) 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; or

(b) if a determination of probable post‑fertilization age was not made, the basis of the determination that a medical emergency existed.

(2) Method of abortion, of which the following was employed:

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

(b) manual vacuum aspiration;

(c) electrical vacuum aspiration;

(d) dilation and evacuation;

(e) combined induction abortion and dilation and evacuation;

(f) induction abortion with prostaglandins;

(g) induction abortion with intra‑amniotic instillation such as, but not limited to, saline or urea;

(h) induction abortion; and

(i) intact dilation and extraction (partial‑birth).

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

(4) Age of the patient.

(5) If the probable post‑fertilization age was determined to be twenty 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.

(6) If the probable post‑fertilization age was determined to be twenty or more weeks, whether or not the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive and, 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) Reports required by subsection (A) shall not contain the name or the address of the patient whose pregnancy was terminated, nor shall the report contain any other information identifying the patient, except that each report shall contain a unique medical record identifying number, to enable matching the report to the patient’s medical records. Such reports must be maintained in strict confidence by the department, must not be available for public inspection, and must not be made available except:

(1) to the Attorney General or solicitor with appropriate jurisdiction pursuant to a criminal investigation;

(2) to the Attorney General or solicitor pursuant to a civil investigation of the grounds for an action under Section 44‑41‑480(B); or

(3) pursuant to court order in an action under Section 44‑41‑480.

(C) By June thirtieth 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 in accordance with this section for each of the items listed in subsection (A). Each such 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. 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, induced, or attempted.

(D) Any physician who fails to submit a report by the end of thirty days following the due date must be subject to a late fee of one thousand dollars 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 article who has not submitted a report, or has submitted only an incomplete report, more than six months following the due date, may, in an action brought by the department, 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. Intentional or reckless 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 40‑47‑20(53). Intentional or reckless failure by any physician to submit a complete report in accordance with a court order constitutes ‘unprofessional conduct’ pursuant to Section 40‑47‑20(53). Intentional or reckless falsification of any report required under this section is a misdemeanor punishable by not more than one year in prison.

(E) Within ninety days of the effective date of this article, the Department of Health and Human Services shall adopt and promulgate forms and regulations to assist in compliance with this section. Subsection (A) shall take effect so as to require reports regarding all abortions performed or induced on and after the first day of the first calendar month following the effective date of such rules.

Section 44‑41‑470. Any person who intentionally or knowingly fails to conform to any requirement in Section 44‑41‑440 is guilty of a misdemeanor and, upon conviction, must be fined not less than two thousand dollars nor more than ten thousand dollars or imprisoned for not more than three years, or both. No part of the minimum fine may be suspended. For conviction of a third or subsequent offense, the sentence must be imprisonment for not less than sixty days nor more than three years, no part of which may be suspended.

Section 44‑41‑480. (A) Any woman upon whom an abortion has been performed or induced in violation of this article, 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 this article for actual and punitive damages. Any woman upon whom an abortion has been attempted in violation of this article may maintain an action against the person who attempted to perform or induce the abortion in an intentional or reckless violation of this article for actual and punitive damages.

(B) A cause of action for injunctive relief against any person who has intentionally or recklessly violated this article may be maintained by the woman upon whom an abortion was performed or induced or attempted to be performed or induced in violation of this article; 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 this article; by a county attorney with appropriate jurisdiction; or by the Attorney General. The injunction shall prevent the abortion provider from performing or inducing or attempting to perform or induce further abortions in violation of this article in this State.

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

(D) No damages or attorney’s fee may be assessed against the woman upon whom an abortion was performed or induced or attempted to be performed or induced.

Section 44‑41‑490. In every civil or criminal proceeding or action brought under this article, 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 must 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. 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 Section 44‑41‑480(A) or (B) 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 44‑41‑500. This article must not be construed to repeal, by implication or otherwise, Section 44‑41‑20 or any otherwise applicable provision of South Carolina law regulating or restricting abortion. An abortion that complies with this article but violates the provisions of Section 44‑41‑20 or any otherwise applicable provision of South Carolina law must be considered unlawful as provided in such provision. An abortion that complies with the provisions of Section 44‑41‑20 or any otherwise applicable provision of South Carolina law regulating or restricting abortion but violates this article must be considered unlawful as provided in this article. If some or all of the provisions of this article are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of South Carolina law regulating or restricting abortion must be enforced as though such restrained or enjoined provisions had not been adopted; provided, however, that whenever such temporary or permanent restraining order of injunction is stayed or dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.”

SECTION 2. This act takes effect upon approval of the Governor.

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