To: Judiciary, Division A

MISSISSIPPI LEGISLATURE
REGULAR SESSION 2011

By: Senator(s) McDaniel, Yancey, Watson, Jackson (15th)

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SENATE BILL NO. 2840

AN ACT TO CREATE THE PAIN-CAPABLE UNBORN CHILD PROTECTION ACT; TO DEFINE TERMS; TO PROHIBIT ABORTIONS UNDER CERTAIN CONDITIONS; TO ENACT PENALTIES; TO AMEND SECTION 73-25-29, MISSISSIPPI CODE OF 1972, TO REVISE THE GROUNDS FOR UNPROFESSIONAL CONDUCT BY A PHYSICIAN TO INCLUDE VIOLATIONS OF THE PAIN-CAPABLE UNBORN CHILD PROTECTION ACT; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. (1) This section may be known and cited as the "Pain-Capable Unborn Child Protection Act."

(2) For purposes of the Pain-Capable Unborn Child Protection Act:

(a) "Abortion" means the use or prescription of any instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to 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 which causes the premature termination of the pregnancy.

(b) "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 the Pain-Capable Unborn Child Protection Act.

(c) "Fertilization" means the fusion of a human spermatozoon with a human ovum.
(d) "Medical emergency" means a condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

(e) "Post-fertilization age" means the age of the unborn child as calculated from the fertilization of the human ovum.

(f) "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.

(g) "Physician" means any person licensed to practice medicine and surgery or osteopathic medicine under the Uniform Credentialing Act.

(h) "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.

(i) "Unborn child" or "fetus" each mean an individual organism of the species homo sapiens from fertilization until live birth.

(j) "Woman" means a female human being whether or not she has reached the age of majority.

(3) The Legislature makes the following findings:

(a) At least by twenty (20) weeks after fertilization there is substantial evidence that an unborn child has the physical structures necessary to experience pain;
(b) There is substantial evidence that, by twenty (20) weeks after fertilization, unborn children seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted as a response to pain;

(c) Anesthesia is routinely administered to unborn children who have developed twenty (20) weeks or more past fertilization who undergo prenatal surgery;

(d) Even before twenty (20) weeks after fertilization, unborn children have been observed to exhibit hormonal stress responses to painful stimuli. Such responses were reduced when pain medication was administered directly to the unborn children;

and

(e) It is the purpose of the State of Mississippi 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.

(4) (a) Except in the case of a medical emergency which prevents compliance with this section, no abortion shall 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, a physician shall make inquiries of the woman and perform or cause to be performed 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 under Section 73-25-29.

(5) 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 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 (20) or more weeks unless, in reasonable medical judgment:
(a) 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; or (b) it is necessary to
preserve the life of an unborn child. No such condition shall be
deemed to exist if it is based on a claim or diagnosis that the
woman will engage in conduct which would result in her death or in
substantial and irreversible physical impairment of a major bodily
function. In such a case, 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 of the woman than
would another available method. No such greater risk shall be
deemed to exist if it is based on a claim or diagnosis that the
woman will engage in conduct which would result in her death or in
substantial and irreversible physical impairment of a major bodily
function.

(6) (a) Any 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 forms and rules and
regulations adopted and promulgated by the department:
(i) If a determination of probable
post-fertilization age was made, the probable post-fertilization
age determined, and the method and basis of the determination;
(ii) If a determination of probable post-fertilization age was not made, the basis of the determination that a medical emergency existed;

(iii) If the probable post-fertilization age 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 abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, or the basis of the determination that it was necessary to preserve the life of an unborn child; and

(iv) The method used for the abortion and, in the case of an abortion performed when the probable post-fertilization age was determined to be twenty (20) or more weeks, 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 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 than would other available methods.

(b) 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 in accordance with this section for each of the items listed in subsection (1) of this section. Each report shall also 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.
(c) Any physician who fails to submit a report by the end of thirty (30) days following the due date shall be subject to a late fee of Five Hundred Dollars ($500.00) 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 the Pain-Capable Unborn Child Protection Act who has not submitted a report, or has submitted only an incomplete report, more than one (1) year following the due date, may, in an action brought in the manner in which actions are brought to enforce Section 73-25-29 be directed by a court of competent jurisdiction to submit a complete report within a time period stated by court order or be subject to civil contempt. Failure by any physician to conform to any requirement of this section, other than late filing of a report, constitutes unprofessional conduct under Section 73-25-29. Failure by any physician to submit a complete report in accordance with a court order constitutes unprofessional conduct under Section 73-25-29. Intentional or reckless falsification of any report required under this section is a misdemeanor.

(d) The department shall adopt and promulgate rules and regulations to assist in compliance with this section not later than December 1, 2011.

(7) Any person who intentionally or recklessly performs or attempts to perform an abortion in violation of subsection (5) of this section is guilty of a felony punishable, upon conviction, by a fine not to exceed Five Thousand Dollars ($5,000.00) and imprisonment not to exceed ten (10) years, or both. No penalty shall be assessed against the woman upon whom the abortion is performed or attempted to be performed.

(8) (a) Any woman upon whom an abortion has been performed in violation of the Pain-Capable Unborn Child Protection Act or the father of the unborn child who was the subject of such an abortion may maintain an action against the person who performed the abortion as an intentional or a reckless violation of the
Pain-Capable Unborn Child Protection Act for actual damages. Any woman upon whom an abortion has been attempted in violation of the Pain-Capable Unborn Child Protection Act may maintain an action against the person who attempted to perform the abortion in an intentional or a reckless violation of the Pain-Capable Unborn Child Protection Act for actual damages.

(b) A cause of action for injunctive relief against any person who has intentionally violated the Pain-Capable Unborn Child Protection Act may be maintained by the woman upon whom an abortion was performed or attempted to be performed in violation of the Pain-Capable Unborn Child Protection Act, 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 attempted to be performed in violation of the Pain-Capable Unborn Child Protection Act, by a district attorney with appropriate jurisdiction, or by the Attorney General. The injunction shall prevent the abortion provider from performing further abortions in violation of the Pain-Capable Unborn Child Protection Act in this state.

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

(e) No damages or attorney's fees may be assessed against the woman upon whom an abortion was performed or attempted to be performed except as provided in paragraph (d) of this subsection (8).
(9) In every civil or criminal proceeding or action brought under the Pain-Capable Unborn Child Protection Act, the court shall rule whether the anonymity of any woman upon whom an abortion has been performed or attempted shall be preserved from public disclosure if she does not give her consent to 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. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or attempted, anyone, other than a public official, who brings an action under subsection (8) of this section shall do so under a pseudonym. This section shall not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

SECTION 2. Section 73-25-29, Mississippi Code of 1972, is amended as follows:

73-25-29. (1) The grounds for the nonissuance, suspension, revocation or restriction of a license or the denial of reinstatement or renewal of a license are:

(a) Habitual personal use of narcotic drugs, or any other drug having addiction-forming or addiction-sustaining liability.

(b) Habitual use of intoxicating liquors, or any beverage, to an extent which affects professional competency.
(c) Administering, dispensing or prescribing any narcotic drug, or any other drug having addiction-forming or addiction-sustaining liability otherwise than in the course of legitimate professional practice.

(d) Conviction of violation of any federal or state law regulating the possession, distribution or use of any narcotic drug or any drug considered a controlled substance under state or federal law, a certified copy of the conviction order or judgment rendered by the trial court being prima facie evidence thereof, notwithstanding the pendency of any appeal.

(e) Procuring, or attempting to procure, or aiding in, an abortion that is not medically indicated.

(f) Conviction of a felony or misdemeanor involving moral turpitude, a certified copy of the conviction order or judgment rendered by the trial court being prima facie evidence thereof, notwithstanding the pendency of any appeal.

(g) Obtaining or attempting to obtain a license by fraud or deception.

(h) Unprofessional conduct, which includes, but is not limited to:

   (i) Practicing medicine under a false or assumed name or impersonating another practitioner, living or dead.

   (ii) Knowingly performing any act which in any way assists an unlicensed person to practice medicine.

   (iii) Making or willfully causing to be made any flamboyant claims concerning the licensee's professional excellence.

   (iv) Being guilty of any dishonorable or unethical conduct likely to deceive, defraud or harm the public.

   (v) Obtaining a fee as personal compensation or gain from a person on fraudulent representation of a disease or injury condition generally considered incurable by competent medical authority in the light of current scientific knowledge and
practice can be cured or offering, undertaking, attempting or agreeing to cure or treat the same by a secret method, which he refuses to divulge to the board upon request.

(vi) Use of any false, fraudulent or forged statement or document, or the use of any fraudulent, deceitful, dishonest or immoral practice in connection with any of the licensing requirements, including the signing in his professional capacity any certificate that is known to be false at the time he makes or signs such certificate.

(vii) Failing to identify a physician's school of practice in all professional uses of his name by use of his earned degree or a description of his school of practice.

(viii) 1. Performance by a physician of an abortion as defined in Section 1(1) of Senate Bill No. 2930, 2011 Regular Session, under circumstances when the physician will not be available for a period of at least forty-eight (48) hours for postoperative care unless the postoperative care is delegated to and accepted by another physician;

2. Performance of an abortion upon a minor without having satisfied the notice requirements of Section 41-41-53;

3. The intentional and knowing performance of a partial-birth abortion as defined in subsection (9) of Section 41-41-73, unless the procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself; and


(i) The refusal of a licensing authority of another state or jurisdiction to issue or renew a license, permit or
certificate to practice medicine in that jurisdiction or the
revocation, suspension or other restriction imposed on a license,
permit or certificate issued by such licensing authority which
prevents or restricts practice in that jurisdiction, a certified
copy of the disciplinary order or action taken by the other state
or jurisdiction being prima facie evidence thereof,
notwithstanding the pendency of any appeal.

(j) Surrender of a license or authorization to practice
medicine in another state or jurisdiction or surrender of
membership on any medical staff or in any medical or professional
association or society while under disciplinary investigation by
any of those authorities or bodies for acts or conduct similar to
acts or conduct which would constitute grounds for action as
defined in this section.

(k) Final sanctions imposed by the United States
Department of Health and Human Services, Office of Inspector
General or any successor federal agency or office, based upon a
finding of incompetency, gross misconduct or failure to meet
professionally recognized standards of health care; a certified
copy of the notice of final sanction being prima facie evidence
thereof. As used in this paragraph, the term "final sanction"
means the written notice to a physician from the United States
Department of Health and Human Services, Officer of Inspector
General or any successor federal agency or office, which
implements the exclusion.

(l) Failure to furnish the board, its investigators or
representatives information legally requested by the board.

(m) Violation of any provision(s) of the Medical
Practice Act or the rules and regulations of the board or of any
order, stipulation or agreement with the board.

(2) In addition to the grounds specified in subsection (1)
of this section, the board shall be authorized to suspend the
license of any licensee for being out of compliance with an order
for support, as defined in Section 93-11-153. The procedure for suspension of a license for being out of compliance with an order for support, and the procedure for the reissuance or reinstatement of a license suspended for that purpose, and the payment of any fees for the reissuance or reinstatement of a license suspended for that purpose, shall be governed by Section 93-11-157 or 93-11-163, as the case may be. If there is any conflict between any provision of Section 93-11-157 or 93-11-163 and any provision of this chapter, the provisions of Section 93-11-157 or 93-11-163, as the case may be, shall control.

SECTION 3. This act shall take effect and be in force from and after July 1, 2011.