

State of South Dakota

NINETY-FIRST SESSION
LEGISLATIVE ASSEMBLY, 2016

265X0060

SENATE HEALTH AND HUMAN SERVICES

ENGROSSED NO. **SB 72** - 02/19/2016

Introduced by: Senators Monroe, Brown, Cammack, Greenfield (Brock), Haggar (Jenna), Heineman (Phyllis), Holien, Jensen (Phil), Novstrup (David), Olson, Omdahl, Rampelberg, Rusch, and Shorma and Representatives Latterell, Anderson, Bolin, Brunner, Campbell, Craig, Deutsch, DiSanto, Greenfield (Lana), Haggar (Don), Harrison, Haugaard, Heinemann (Leslie), Holmes, Klumb, Langer, Marty, May, Mickelson, Novstrup (Al), Partridge, Peterson (Kent), Qualm, Rasmussen, Ring, Rounds, Russell, Schoenbeck, Stalzer, Steinhauer, Tulson, Verchio, Westra, Wiik, Willadsen, Wollmann, and Zikmund

1 FOR AN ACT ENTITLED, An Act to prohibit the abortion of an unborn child who is capable
2 of experiencing pain and to provide a penalty therefor.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That chapter 34-23A be amended by adding a NEW SECTION to read:

5 The Legislature finds that:

6 (1) The state has a compelling state interest in protecting the lives of unborn children
7 from the stage at which substantial medical evidence indicates that they are capable
8 of feeling pain;

9 (2) There is substantial medical evidence that an unborn child is capable of experiencing
10 pain by twenty weeks after fertilization.

11 Section 2. That chapter 34-23A be amended by adding a NEW SECTION to read:



1 Terms used in this Act mean:

2 (1) "Post-fertilization age," the age of an unborn child as calculated from the fusion of
3 a human spermatozoon with a human ovum;

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

7 (3) "Reasonable medical judgment," a medical judgment that would be made by a
8 reasonably prudent physician, knowledgeable about the case and the treatment
9 possibilities with respect to the medical conditions involved;

10 (4) "Serious health risk to the unborn child's mother," a physician's reasonable medical
11 judgment that the mother of an unborn child has a medical condition that so
12 complicates her health that it necessitates the immediate abortion of her pregnancy
13 to avert her death or to avert serious risk of substantial and irreversible physical
14 impairment of a major bodily function, not including a psychological or emotional
15 condition. No greater risk may be determined to exist if it is based on a claim or
16 diagnosis that the woman will engage in conduct which she intends to result in her
17 death or in substantial and irreversible physical impairment of a major bodily
18 function;

19 (5) "Woman," a female human being whether or not she has reached the age of majority.

20 Section 3. That chapter 34-23A be amended by adding a NEW SECTION to read:

21 It is a Class 1 misdemeanor to intentionally or recklessly perform, or attempt to perform, an
22 abortion of an unborn child capable of feeling pain unless it is necessary to prevent a serious
23 health risk to the unborn child's mother. No penalty may be assessed against the woman upon
24 whom the abortion is performed, or attempted to be performed.

1 Section 4. That chapter 34-23A be amended by adding a NEW SECTION to read:

2 For purposes of this Act, an unborn child is capable of feeling pain when the physician
3 performing, or attempting to perform, the abortion or another physician upon whose
4 determination that physician relies, determines that the probable post-fertilization age of the
5 unborn child is twenty or more weeks.

6 In determining the post-fertilization age of the unborn child, the physician shall make
7 inquiries of the pregnant woman and perform medical examinations and tests that a reasonably
8 prudent physician would perform to accurately diagnose the post-fertilization age of an unborn
9 child.

10 Section 5. That chapter 34-23A be amended by adding a NEW SECTION to read:

11 The provisions of sections 4 of this Act do not apply in a case when, in reasonable medical
12 judgment, a serious health risk to the unborn child's mother exists that so complicates the
13 medical condition of the pregnant woman that it necessitates the immediate abortion of her
14 pregnancy without first determining the post-fertilization age of the unborn child to avert her
15 death or for which the delay necessary to determine post-fertilization age will create serious risk
16 of substantial and irreversible physical impairment of a major bodily function, not including a
17 psychological or emotional condition. No serious health risk may be deemed an exception if
18 based on a claim or diagnosis that the woman will engage in conduct which she intends to result
19 in her death or in substantial and irreversible physical impairment of a major bodily function.

20 Section 6. That chapter 34-23A be amended by adding thereto a NEW SECTION to read
21 as follows:

22 When an abortion of an unborn child capable of feeling pain is necessary to prevent serious
23 health risk to the unborn child's mother, the physician shall abort the pregnancy in the manner
24 which, in reasonable medical judgment, provides the best opportunity for the unborn child to

1 survive, unless, in reasonable medical judgment, aborting the pregnancy in that manner would
2 pose a greater risk either of the death of the pregnant woman or of the substantial and
3 irreversible physical impairment of a major bodily function, not including a psychological or
4 emotional condition, of the woman than would other available methods. No greater risk may be
5 determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct
6 which she intends to result in her death or in substantial and irreversible physical impairment
7 of a major bodily function.

8 Section 7. That § 34-23A-34 be amended to read as follows:

9 34-23A-34. The Department of Health shall prepare a reporting form for physicians which
10 shall provide for the collection of the following information:

- 11 (1) The month, day, and year of the induced abortion;
- 12 (2) The method of abortion used for each induced abortion;
- 13 (3) The approximate gestational age, in weeks, of the unborn child involved in the
14 abortion;
- 15 (4) The age of the mother at the time of the abortion and, if the mother was younger than
16 sixteen years of age at the time the child was conceived, the age of the father, if
17 known;
- 18 (5) The specific reason for the induced abortion, including the following:
 - 19 (a) The pregnancy was a result of rape;
 - 20 (b) The pregnancy was a result of incest;
 - 21 (c) The mother could not afford the child;
 - 22 (d) The mother did not desire to have the child;
 - 23 (e) The mother's emotional health was at risk;
 - 24 (f) The mother would suffer substantial and irreversible impairment of a major

- 1 bodily function if the pregnancy continued;
- 2 (g) Other, which shall be specified;
- 3 (6) Whether the induced abortion was paid for by:
 - 4 (a) Private insurance;
 - 5 (b) Public health plan;
 - 6 (c) Other, which shall be specified;
- 7 (7) Whether coverage was under:
 - 8 (a) A-fee-for-service insurance company;
 - 9 (b) A managed care company; or
 - 10 (c) Other, which shall be specified;
- 11 (8) A description of the complications, if any, for each abortion and for the aftermath of
- 12 each abortion;
- 13 (9) The fee collected for performing or treating the abortion;
- 14 (10) The type of anesthetic, if any, used for each induced abortion;
- 15 (11) The method used to dispose of fetal tissue and remains;
- 16 (12) The specialty area of the physician;
- 17 (13) Whether the physician performing the induced abortion has been subject to license
- 18 revocation or suspension or other professional sanction;
- 19 (14) The number of previous abortions the mother has had;
- 20 (15) The number of previous live births of the mother, including both living and deceased;
- 21 (16) The date last normal menses began for the mother;
- 22 (17) The name of physician performing the induced abortion;
- 23 (18) The name of hospital or physician office where the induced abortion was performed;
- 24 (19) A unique patient number that can be used to link the report to medical report for

1 inspection, clarification, and correction purposes but that cannot, of itself, reasonably
2 lead to the identification of any person obtaining an abortion;

3 (20) Certain demographic information including:

4 (a) State, county, and city of occurrence of abortion;

5 (b) State, county, and city of residence of mother;

6 (c) Marital status of mother;

7 (d) Education status of mother;

8 (e) Race ~~and hispanic origin~~ of mother;

9 (21) Certain Rhesus factor (Rh) information including:

10 (a) Whether the mother received the Rh test;

11 (b) Whether the mother tested positive for the Rh-negative factor;

12 (c) Whether the mother received a Rho(D) immune globulin injection; ~~and~~

13 (22) The sex of the unborn child and the following information:

14 (a) Whether the pregnant mother used a sex-determining test;

15 (b) What type of sex-determining test the pregnant mother used; and

16 (c) The approximate gestational age of the unborn child, in weeks, when the test
17 was taken;

18 (23) The post-fertilization age of the unborn child and the following information:

19 (a) How the post-fertilization age was determined or if a determination was not
20 made, the basis of the determination that an exception existed;

21 (b) Whether an intra-fetal injection was used in an attempt to induce fetal demise;

22 (c) If the unborn child was deemed capable of experiencing pain, pursuant to
23 section 4 of this Act, the basis of the determination that a serious health risk
24 to the unborn child's mother exists;

1 (d) If the unborn child was deemed capable of experiencing pain pursuant to
2 section 4 of this Act, whether the method of the abortion used was that, in
3 reasonable medical judgment, provided the best opportunity for the unborn
4 child to survive and, if such a method was not used, the basis of the
5 determination that termination of the pregnancy in that manner would pose a
6 greater risk either of the death of the pregnant woman or of the substantial and
7 irreversible physical impairment of a major bodily function, not including a
8 psychological or emotional condition, of the woman than other available
9 methods.

10 Section 8. That chapter 34-23A be amended by adding a NEW SECTION to read:

11 Nothing in this Act repeals, by implication or otherwise, any provision not explicitly
12 repealed.

13 Section 9. That chapter 34-23A be amended by adding a NEW SECTION to read:

14 If a part of this Act is invalid, all valid parts that are severable from the invalid part remain
15 in effect. If a part of this Act is invalid in one or more of its applications, the part remains in
16 effect in all valid applications that are severable from the invalid applications.

17 Section 10. That § 34-23A-4 be amended to read:

18 34-23A-4. An abortion may be performed following the twelfth week of pregnancy and
19 ~~through the twenty-fourth~~ up to the twentieth week of pregnancy by a physician only in a
20 hospital licensed under the provisions of chapter 34-12 or in a hospital operated by the United
21 States, this state, or any department, agency, or political subdivision of either or in the case of
22 hospital facilities not being available, in the licensed physician's medical clinic or office of
23 practice subject to the requirements of § 34-23A-6.

24 Section 11. That § 34-23A-5 be amended to read:

1 34-23A-5. An abortion may be performed following the ~~twenty-fourth~~ twentieth week of
2 pregnancy by a physician only in a hospital authorized under § 34-23A-4 and only if there is
3 ~~appropriate and~~ reasonable medical judgment that performance of an abortion is necessary to
4 preserve the life or health of the mother due to a serious health risk to the unborn child's mother.