

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 2011

**HOUSE BILL No. 2218**

By Representatives Kinzer, Arpke, Billinger, Boman, Brown, Brunk, Calloway, DeGraaf, Donohoe, Fund, Garber, Goico, Goodman, Gregory, Grosserode, Hedke, Henry, Hermanson, Hildabrand, Hoffman, M. Holmes, Howell, Kiegerl, Kleeb, Knox, Landwehr, Mast, McLeland, Meigs, Mesa, Montgomery, O'Brien, O'Hara, Otto, Patton, Peck, Rhoades, Rubin, Ryckman, Scapa, Schwab, Siegfried, Smith, Suellentrop, Vickrey, Weber, Wetta and B. Wolf

2-8

1 AN ACT concerning abortion; relating to restrictions on late term  
2 abortions; amending K.S.A. 65-445 and repealing the existing  
3 section.

4  
5 *Be it enacted by the Legislature of the State of Kansas:*

6 New Section 1. The legislature hereby finds and declares that:

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

11 (b) by eight weeks after fertilization, the unborn child reacts to  
12 stimuli that would be recognized as painful if applied to an adult  
13 human, for example, by recoiling;

14 (c) in the unborn child, application of such painful stimuli is  
15 associated with significant increases in stress hormones known as the  
16 stress response;

17 (d) subjection to such painful stimuli is associated with long-term  
18 harmful neurodevelopmental effects, such as altered pain sensitivity  
19 and, possibly, emotional, behavioral and learning disabilities later in  
20 life;

21 (e) for the purposes of surgery on unborn children, fetal anesthesia  
22 is routinely administered and is associated with a decrease in stress  
23 hormones compared to their level when painful stimuli is applied  
24 without such anesthesia;

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

1 than 20 weeks after fertilization predominately rests on the assumption  
2 that the ability to experience pain depends on the cerebral cortex and  
3 requires nerve connections between the thalamus and the cortex.  
4 However, recent medical research and analysis, especially since 2007,  
5 provides strong evidence for the conclusion that a functioning cortex is  
6 not necessary to experience pain;

7 (g) substantial evidence indicates that children born missing the  
8 bulk of the cerebral cortex, those with hydranencephaly, nevertheless  
9 experience pain;

10 (h) in adults, stimulation or ablation of the cerebral cortex does not  
11 alter pain perception, while stimulation or ablation of the thalamus  
12 does;

13 (i) substantial evidence indicates that structures used for pain  
14 processing in early development differ from those of adults, using  
15 different neural elements available at specific times during  
16 development, such as the subcortical plate, to fulfill the role of pain  
17 processing;

18 (j) consequently, there is substantial medical evidence that an  
19 unborn child is capable of experiencing pain by 20 weeks after  
20 fertilization; and

21 (k) it is the purpose of the state to assert a compelling state interest  
22 in protecting the lives of unborn children from the stage at which  
23 substantial medical evidence indicates that they are capable of feeling  
24 pain.

25 New Sec. 2. As used in sections 1 through 3, and amendments  
26 thereto:

27 (a) "Abortion" means the use or prescription of any instrument,  
28 medicine, drug or any other substance or device to terminate the  
29 pregnancy of a woman known to be pregnant with an intention other  
30 than to increase the probability of a live birth, to preserve the life or  
31 health of the child after live birth, or to remove a dead unborn child  
32 who died as the result of natural causes in utero, accidental trauma or a  
33 criminal assault on the pregnant woman or her unborn child, and which  
34 causes the premature termination of the pregnancy.

35 (b) "Bodily function" means physical function. The term "bodily  
36 function" does not include mental or emotional functions.

37 (c) "Department" means the department of health and  
38 environment.

39 (d) "Gestational age" means the time that has elapsed since the

- 1 first day of the woman's last menstrual period.
- 2 (e) "Medical emergency" means a condition that, in reasonable  
3 medical judgment, so complicates the medical condition of the  
4 pregnant woman as to necessitate the immediate abortion of her  
5 pregnancy without first determining gestational age to avert her death  
6 or for which a delay necessary to determine gestational age will create  
7 serious risk of substantial and irreversible physical impairment of a  
8 major bodily function. No condition shall be deemed a medical  
9 emergency if based on a claim or diagnosis that the woman will engage  
10 in conduct which would result in her death or in substantial and  
11 irreversible physical impairment of a major bodily function.
- 12 (f) "Pain-capable unborn child" means an unborn child having  
13 reached the gestational age of 22 weeks or more.
- 14 (g) "Physician" means a person licensed to practice medicine and  
15 surgery in this state.
- 16 (h) "Pregnant" or "pregnancy" means that female reproductive  
17 condition of having an unborn child in the mother's body.
- 18 New Sec. 3. (a) No person shall perform or induce, or attempt to  
19 perform or induce an abortion upon a pain-capable unborn child unless  
20 such person is a physician and has a documented referral from another  
21 physician not legally or financially affiliated with the physician  
22 performing or inducing, or attempting to perform or induce the abortion  
23 and both physicians provide a written determination, based upon a  
24 medical judgment arrived at using and exercising that degree of care,  
25 skill and proficiency commonly exercised by the ordinary skillful,  
26 careful and prudent physician in the same or similar circumstances and  
27 that would be made by a reasonably prudent physician, knowledgeable  
28 in the field, and knowledgeable about the case and the treatment  
29 possibilities with respect to the conditions involved, that: (1) The  
30 abortion is necessary to preserve the life of the pregnant woman; or (2)  
31 a continuation of the pregnancy will cause a substantial and irreversible  
32 physical impairment of a major bodily function of the pregnant woman.  
33 No such condition shall be deemed to exist if it is based on a claim or  
34 diagnosis that the woman will engage in conduct which would result in  
35 her death or in substantial and irreversible physical impairment of a  
36 major bodily function.
- 37 (b) Except in the case of a medical emergency, a copy of the  
38 written documented referral and of the abortion-performing physician's  
39 written determination shall be provided to the pregnant woman no less

1 than 30 minutes prior to the initiation of the abortion. The written  
2 determination shall be time-stamped at the time it is delivered to the  
3 pregnant woman. The medical basis for the determination shall also be  
4 reported by the physician as part of the written report made by the  
5 physician to the secretary of health and environment under K.S.A. 65-  
6 445, and amendments thereto. Such determination shall specify:

7 (1) If the abortion is necessary to preserve the life of the pregnant  
8 woman and the medical basis of such determination, including the  
9 specific medical condition the physician believes would cause the death  
10 of the pregnant woman; or

11 (2) if a continuation of the pregnancy will cause a substantial and  
12 irreversible physical impairment of a major bodily function of the  
13 pregnant woman and the medical basis of such determination, including  
14 the specific medical condition the physician believes would constitute a  
15 substantial and irreversible impairment of a major bodily function of  
16 the pregnant woman.

17 (c) (1) Except in the case of a medical emergency, prior to  
18 performing or inducing, or attempting to perform or induce an abortion  
19 upon a woman, the physician shall determine the gestational age of the  
20 unborn child according to accepted obstetrical and neonatal practice  
21 and standards applied by physicians in the same or similar  
22 circumstances. In making such a determination, the physician shall  
23 make such inquiries of the woman and perform or cause to be  
24 performed such medical examinations and tests as a reasonably prudent  
25 physician, knowledgeable about the case and medical conditions  
26 involved, would consider necessary to perform in making an accurate  
27 diagnosis with respect to gestational age. The physician shall document  
28 as part of the medical records of the woman the basis for the  
29 determination of gestational age. The physician shall report such  
30 determinations, the medical basis and the reasons for such  
31 determinations in writing to the medical care facility in which the  
32 abortion is performed **or induced** for inclusion in the report of the  
33 medical care facility to the secretary of health and environment under  
34 K.S.A. 65-445, and amendments thereto, or if the abortion is not  
35 performed **or induced** in a medical care facility, the physician who  
36 performs **or induces** the abortion shall report such determinations, the  
37 medical basis and the reasons for such determinations in writing to the  
38 secretary of health and environment as part of the written report made  
39 by the physician to the secretary of health and environment under

1 K.S.A. 65-445, and amendments thereto.

2 (2) If the physician determines the gestational age of the unborn  
3 child is 22 or more weeks, then no abortion of the pain-capable unborn  
4 child shall be performed or induced, or attempted to be performed or  
5 induced except as provided for in subsection (a). In such event, the  
6 physician who performs **or induces** the abortion shall report such  
7 determinations, the medical basis and the reasons for such  
8 determinations, including the specific medical diagnosis for the  
9 determination that an abortion is necessary to preserve the life of the  
10 pregnant woman or that a continuation of the pregnancy will cause a  
11 substantial and irreversible physical impairment of a major bodily  
12 function of the pregnant woman and the name of the referring physician  
13 required by subsection (a) in writing to the medical care facility in  
14 which the abortion is performed **or induced** for inclusion in the report  
15 of the medical care facility to the secretary of health and environment  
16 under K.S.A. 65-445, and amendments thereto, or if the abortion is not  
17 performed **or induced** in a medical care facility, the physician who  
18 performs **or induces** the abortion shall report such determinations, the  
19 medical basis and the reasons for such determinations, including the  
20 specific medical diagnosis for the determination that an abortion is  
21 necessary to preserve the life of the pregnant woman or that a  
22 continuation of the pregnancy will cause a substantial and irreversible  
23 physical impairment of a major bodily function of the pregnant woman  
24 and the name of the referring physician required by subsection (a) in  
25 writing to the secretary of health and environment as part of the written  
26 report made by the physician to the secretary of health and environment  
27 under K.S.A. 65-445, and amendments thereto.

28 (3) The physician shall retain the medical records required to be  
29 kept under this subsection for not less than 10 years.

30 (d) The secretary of health and environment shall adopt rules and  
31 regulations to administer this section. Such rules and regulations shall  
32 include:

33 (1) A detailed list of the information that must be kept by a  
34 physician under this section;

35 (2) the contents of the written reports required under this section;  
36 and

37 (3) detailed specifications regarding information that must be  
38 provided by a physician in order to comply with the obligation to  
39 disclose the medical basis and specific medical diagnosis relied upon in

1 determining gestational age and in determining that an abortion is  
2 necessary to preserve the life of the pregnant woman, or that a  
3 continuation of the pregnancy will cause a substantial and irreversible  
4 physical impairment of a major bodily function of the pregnant woman.

5 (e) A woman upon whom an abortion is performed or induced, or  
6 attempted to be performed or induced shall not be prosecuted under this  
7 section for a conspiracy to violate this section pursuant to section 34 of  
8 chapter 136 of the 2010 Session Laws of Kansas, and amendments  
9 thereto.

10 (f) Nothing in this section shall be construed to create a right to an  
11 abortion. Notwithstanding any provision of this section, a person shall  
12 not perform an abortion that is prohibited by law.

13 (g) (1) A woman upon whom an abortion is performed **or induced**  
14 in violation of this section, the father, if married to the woman at the  
15 time of the abortion, and the parents or custodial guardian of the  
16 woman, if the woman has not attained the age of 18 years at the time of  
17 the abortion, may in a civil action obtain appropriate relief, unless, in a  
18 case where the plaintiff is not the woman upon whom the abortion was  
19 performed **or induced**, the pregnancy resulted from the plaintiff's  
20 criminal conduct.

21 (2) Such relief shall include:

22 (A) Money damages for all injuries, psychological and physical,  
23 occasioned by the violation of this section;

24 (B) statutory damages equal to three times the cost of the abortion;  
25 and

26 (C) reasonable attorney fees.

27 (h) The prosecution of violations of this section may be brought by  
28 the attorney general or by the district attorney or county attorney for the  
29 county where any violation of this section is alleged to have occurred.

30 (i) If any provision of this section is held to be invalid or  
31 unconstitutional, it shall be conclusively presumed that the legislature  
32 would have enacted the remainder of this section without such invalid  
33 or unconstitutional provision.

34 (j) Upon a first conviction of a violation of this section, a person  
35 shall be guilty of a class A person misdemeanor. Upon a second or  
36 subsequent conviction of a violation of this section, a person shall be  
37 guilty of a severity level 10, person felony.

38 Sec. 4. K.S.A. 65-445 is hereby amended to read as follows: 65-  
39 445. (a) Every medical care facility shall keep written records of all

1 pregnancies which are lawfully terminated within such medical care  
2 facility and shall annually submit a written report thereon to the  
3 secretary of health and environment in the manner and form prescribed  
4 by the secretary. Every person licensed to practice medicine and  
5 surgery shall keep a record of all pregnancies which are lawfully  
6 terminated by such person in a location other than a medical care  
7 facility and shall annually submit a written report thereon to the  
8 secretary of health and environment in the manner and form prescribed  
9 by the secretary.

10 (b) Each report required by this section shall include the number  
11 of pregnancies terminated during the period of time covered by the  
12 report, the type of medical facility in which the pregnancy was  
13 terminated, information required to be reported under K.S.A. 65-6703  
14 *and section 2 3*, and amendments thereto, if applicable to the pregnancy  
15 terminated, and such other information as may be required by the  
16 secretary of health and environment, but the report shall not include the  
17 names of the persons whose pregnancies were so terminated.

18 (c) Information obtained by the secretary of health and  
19 environment under this section shall be confidential and shall not be  
20 disclosed in a manner that would reveal the identity of any person  
21 licensed to practice medicine and surgery who submits a report to the  
22 secretary under this section or the identity of any medical care facility  
23 which submits a report to the secretary under this section, except that  
24 such information, including information identifying such persons and  
25 facilities may be disclosed to the state board of healing arts upon  
26 request of the board for disciplinary action conducted by the board and  
27 may be disclosed to the attorney general upon a showing that a  
28 reasonable cause exists to believe that a violation of this act has  
29 occurred. Any information disclosed to the state board of healing arts or  
30 the attorney general pursuant to this subsection shall be used solely for  
31 the purposes of a disciplinary action or criminal proceeding. Except as  
32 otherwise provided in this subsection, information obtained by the  
33 secretary under this section may be used only for statistical purposes  
34 and such information shall not be released in a manner which would  
35 identify any county or other area of this state in which the termination  
36 of the pregnancy occurred. A violation of this subsection (c) is a class A  
37 nonperson misdemeanor.

38 (d) In addition to such criminal penalty under subsection (c), any  
39 person licensed to practice medicine and surgery or medical care

1 facility whose identity is revealed in violation of this section may bring  
2 a civil action against the responsible person or persons for any damages  
3 to the person licensed to practice medicine and surgery or medical care  
4 facility caused by such violation.

5 (e) For the purpose of maintaining confidentiality as provided by  
6 subsections (c) and (d), reports of terminations of pregnancies required  
7 by this section shall identify the person or facility submitting such  
8 reports only by confidential code number assigned by the secretary of  
9 health and environment to such person or facility and the department of  
10 health and environment shall maintain such reports only by such  
11 number.

12 **[New Sec. 5. ]**~~Nothing in this act shall be construed to repeal~~  
13 ~~any statute dealing with abortion, but shall be considered~~  
14 ~~supplemental to such other statutes.]~~

15 ~~Sec.-5. [6.]~~ K.S.A. 65-445 is hereby repealed.

16 ~~Sec.-6. [7.]~~ This act shall take effect and be in force from and after  
17 its publication in the statute book.