

AN ACT establishing the Pain Capable Unborn Child Protection Act.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔SECTION 1. A NEW SECTION OF KRS CHAPTER 311 IS CREATED TO READ AS FOLLOWS:

As used in Sections 1 to 7 of this Act:

- (1) "Abortion" means the use or prescription of any instrument, medicine, drug, or any 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;*
- (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 Sections 1 to 7 of this Act;*
- (3) "Fertilization" means the fusion of a human spermatozoon with a human ovum;*
- (4) "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. 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;*

- (5) "Physician" means any person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state;
- (6) "Post-fertilization age" means the age of the unborn child as calculated from the fertilization of the human ovum;
- (7) "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;
- (8) "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;
- (9) "Unborn child" or "fetus" each mean an individual organism of the species homo sapiens from fertilization until live birth; and
- (10) "Woman" means a female human being whether or not she has reached the age of majority.

➔SECTION 2. A NEW SECTION OF KRS CHAPTER 311 IS CREATED TO READ AS FOLLOWS:

The General Assembly makes the following findings:

- (1) Pain receptors, known as, nociceptors are present throughout an unborn child's entire body by no later than sixteen (16) weeks after fertilization, and nerves link these receptors to the brain's thalamus and subcortical plate by no later than twenty (20) weeks;
- (2) By eight (8) weeks after fertilization, an 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 painful stimuli is associated with significant increases in stress hormones known as the stress response;
- (4) Subjection to 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 level when painful stimuli is applied without 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 (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;
- (7) Substantial evidence indicates that children born missing the bulk of the cerebral cortex, including 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) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty (20) weeks after fertilization; and
- (11) It is the purpose of the General Assembly 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.

➔SECTION 3. A NEW SECTION OF KRS CHAPTER 311 IS CREATED TO READ AS FOLLOWS:

- (1) Except in the case of a medical emergency, 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 this determination, the physician shall make those inquiries of the woman and perform or cause to be performed those 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.

(2) Failure by any physician to conform to any requirement of this section constitutes, "dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public or any member thereof" under KRS 311.597.

➔SECTION 4. A NEW SECTION OF KRS CHAPTER 311 IS CREATED TO READ AS FOLLOWS:

(1) 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 (20) 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. This condition shall not 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.

(2) When an abortion upon a woman whose unborn child has been determined to

have a probable post-fertilization age of twenty (20) or more weeks is not prohibited by this section, 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 other available methods. This greater risk shall not 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.

➔SECTION 5. A NEW SECTION OF KRS CHAPTER 311 IS CREATED TO READ AS FOLLOWS:

- (1) Any woman upon whom an abortion has been performed in violation of Section 4 of this 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 or induced the abortion in intentional or reckless violation of Section 4 of this Act for actual and punitive damages.
- (2) A cause of action for injunctive relief against any person who has intentionally violated Section 4 of this Act may be maintained by the woman upon whom an abortion was performed or induced or attempted to be performed or induced in violation of Section 4 of this 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 induced or attempted to be performed or induced in violation of Section 4 of this Act or by the county attorney of the county where the violation occurred or by the Attorney General. The injunction shall prevent the abortion provider from performing or inducing further abortions in violation of Section 4 of this Act in this state.

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

(4) 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 a reasonable attorney's fee in favor of the defendant against the plaintiff.

(5) No damages or attorney's fee may be assessed against the woman upon whom an abortion was performed or attempted to be performed except in accordance with subsection (4) of this section.

➔SECTION 6. A NEW SECTION OF KRS CHAPTER 311 IS CREATED TO READ AS FOLLOWS:

In every civil or criminal proceeding or action brought under Sections 1 to 7 of this Act, 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 shall be preserved from public disclosure if she does not give her consent to the disclosure. The court, upon motion or upon its own motion, shall make this 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 order of this type 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 induced or attempted to be performed or induced, any person, other than a public official, who brings an action under subsection (1) or (2) of

Section 5 of this Act 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 7. A NEW SECTION OF KRS CHAPTER 311 IS CREATED TO READ AS FOLLOWS:

If any one (1) or more provisions, sections, subsections, sentences, clauses, phrases, or words of Sections 1 to 7 of this Act 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 Sections 1 to 7 of this Act shall remain effective notwithstanding the unconstitutionality. The General Assembly hereby declares that it would have passed Sections 1 to 7 of this Act, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one (1) or more provisions, sections, subsections, sentences, clauses, phrases, or words of Sections 1 to 7 of this Act, or the application of Sections 1 to 7 of this Act, would be declared unconstitutional.

➔Section 8. KRS 311.990 is amended to read as follows:

- (1) Any person who violates KRS 311.250 shall be guilty of a violation.
- (2) Any college or professor thereof violating the provisions of KRS 311.300 to 311.350 shall be civilly liable on his bond for a sum not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each violation, which may be recovered by an action in the name of the Commonwealth.
- (3) Any person who presents to the county clerk for the purpose of registration any license which has been fraudulently obtained, or obtains any license under KRS 311.380 to 311.510 by false or fraudulent statement or representation, or practices podiatry under a false or assumed name or falsely impersonates another practitioner or former practitioner of a like or different name, or aids and abets any person in the practice of podiatry within the state without conforming to the requirements of KRS

311.380 to 311.510, or otherwise violates or neglects to comply with any of the provisions of KRS 311.380 to 311.510, shall be guilty of a Class A misdemeanor. Each case of practicing podiatry in violation of the provisions of KRS 311.380 to 311.510 shall be considered a separate offense.

- (4) Each violation of KRS 311.560 shall constitute a Class D felony.
- (5) Each violation of KRS 311.590 shall constitute a Class D felony. Conviction under this subsection of a holder of a license or permit shall result automatically in permanent revocation of such license or permit.
- (6) Conviction of willfully resisting, preventing, impeding, obstructing, threatening, or interfering with the board or any of its members, or of any officer, agent, inspector, or investigator of the board or the Cabinet for Health and Family Services, in the administration of any of the provisions of KRS 311.550 to 311.620 shall be a Class A misdemeanor.
- (7) Each violation of subsection (1) of KRS 311.375 shall, for the first offense, be a Class B misdemeanor, and, for each subsequent offense shall be a Class A misdemeanor.
- (8) Each violation of subsection (2) of KRS 311.375 shall, for the first offense, be a violation, and, for each subsequent offense, be a Class B misdemeanor.
- (9) Each day of violation of either subsection of KRS 311.375 shall constitute a separate offense.
- (10)
 - (a) Any person who intentionally or knowingly performs an abortion contrary to the requirements of KRS 311.723(1) shall be guilty of a Class D felony; and
 - (b) Any person who intentionally, knowingly, or recklessly violates the requirements of KRS 311.723(2) shall be guilty of a Class A misdemeanor.
- (11)
 - (a)
 1. Any physician who performs a partial-birth abortion in violation of KRS 311.765 shall be guilty of a Class D felony. However, a physician shall not be guilty of the criminal offense if the partial-birth abortion was

- necessary to save the life of the mother whose life was endangered by a physical disorder, illness, or injury.
2. A physician may seek a hearing before the State Board of Medical Licensure on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, illness, or injury. The board's findings, decided by majority vote of a quorum, shall be admissible at the trial of the physician. The board shall promulgate administrative regulations to carry out the provisions of this subparagraph.
 3. Upon a motion of the physician, the court shall delay the beginning of the trial for not more than thirty (30) days to permit the hearing, referred to in subparagraph 2. of this paragraph, to occur.
- (b) Any person other than a physician who performs a partial-birth abortion shall not be prosecuted under this subsection but shall be prosecuted under provisions of law which prohibit any person other than a physician from performing any abortion.
 - (c) No penalty shall be assessed against the woman upon whom the partial-birth abortion is performed or attempted to be performed.
- (12) Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether, the person upon whom the abortion is to be performed is an unemancipated minor, and who intentionally or knowingly fails to conform to any requirement of KRS 311.732 is guilty of a Class A misdemeanor.
 - (13) Any person who negligently releases information or documents which are confidential under KRS 311.732 is guilty of a Class B misdemeanor.
 - (14) Any person who performs an abortion upon a married woman either with knowledge or in reckless disregard of whether KRS 311.735 applies to her and who intentionally, knowingly, or recklessly fails to conform to the requirements of KRS

- 311.735 shall be guilty of a Class D felony.
- (15) Any person convicted of violating KRS 311.750 shall be guilty of a Class B felony.
- (16) Any person who violates KRS 311.760(2) shall be guilty of a Class D felony.
- (17) Any person who violates KRS 311.770~~[or 311.780]~~ shall be guilty of a Class D felony.
- (18) A person convicted of violating Section 4 of this Act~~[KRS 311.780]~~ shall be guilty of a Class ~~D~~~~[C]~~ felony.
- (19) Any person who violates KRS 311.810 shall be guilty of a Class A misdemeanor.
- (20) Any professional medical association or society, licensed physician, or hospital or hospital medical staff who shall have violated the provisions of KRS 311.606 shall be guilty of a Class B misdemeanor.
- (21) Any administrator, officer, or employee of a publicly owned hospital or publicly owned health care facility who performs or permits the performance of abortions in violation of KRS 311.800(1) shall be guilty of a Class A misdemeanor.
- (22) Any person who violates KRS 311.905(3) shall be guilty of a violation.
- (23) Any person who violates the provisions of KRS 311.820 shall be guilty of a Class A misdemeanor.
- (24) (a) Any person who fails to test organs, skin, or other human tissue which is to be transplanted, or violates the confidentiality provisions required by KRS 311.281, shall be guilty of a Class A misdemeanor;
- (b) Any person who has human immunodeficiency virus infection, who knows he is infected with human immunodeficiency virus, and who has been informed that he may communicate the infection by donating organs, skin, or other human tissue who donates organs, skin, or other human tissue shall be guilty of a Class D felony.
- (25) Any person who sells or makes a charge for any transplantable organ shall be guilty of a Class D felony.

- (26) Any person who offers remuneration for any transplantable organ for use in transplantation into himself shall be fined not less than five thousand dollars (\$5,000) nor more than fifty thousand dollars (\$50,000).
- (27) Any person brokering the sale or transfer of any transplantable organ shall be guilty of a Class C felony.
- (28) Any person charging a fee associated with the transplantation of a transplantable organ in excess of the direct and indirect costs of procuring, distributing, or transplanting the transplantable organ shall be fined not less than fifty thousand dollars (\$50,000) nor more than five hundred thousand dollars (\$500,000).
- (29) Any hospital performing transplantable organ transplants which knowingly fails to report the possible sale, purchase, or brokering of a transplantable organ shall be fined not less than ten thousand dollars (\$10,000) or more than fifty thousand dollars (\$50,000).

➔Section 9. KRS 213.101 is amended to read as follows:

(1) Each induced termination of pregnancy which occurs in the Commonwealth, regardless of the length of gestation, shall be reported to the Vital Statistics Branch by the person in charge of the institution within fifteen (15) days after the end of the month in which the termination occurred. If the induced termination of pregnancy was performed outside an institution, the attending physician shall prepare and file the report within fifteen (15) days after the end of the month in which the termination occurred. **These reports shall:**

(a) Include the following information for each reported induced termination of pregnancy:

1. If a determination of probable post-fertilization age was made, the probable post-fertilization age determined and the method and basis of the determination;

2. If a determination of probable post-fertilization age was not made, the

basis of the determination that a medical emergency existed;

3. 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; and

4. 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 used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive, or, if that 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; and

(b) ~~{The report shall }~~Collect no information which will identify the physician, woman, or man involved.

(2) The name of the person completing the report under subsection (1) of this section and the reporting institution shall not be subject to disclosure under KRS 61.870 to 61.884.

(3) By June 30 of each year, the Vital Statistics Branch 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 annual 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 Vital Statistics Branch shall 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 or attempted.

(4) (a) Any person or institution 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) for each additional thirty (30) day period or portion of a thirty (30) day period the report is overdue.

(b) Any person or institution who fails to submit a report, or who has submitted only an incomplete report, more than one (1) year following the due date, may, in a civil action brought by the Vital Statistics Branch, 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.

(c) Failure by any physician to conform to any requirement of this section, other than late filing of a report, or to submit a complete report in accordance with a court order constitutes "dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public or any member thereof" under KRS 311.597.

(5) Intentional or reckless falsification of any report required under this section is a Class A misdemeanor.

(6) Within ninety (90) days of the effective date of this Act, the Vital Statistics Branch shall promulgate administrative regulations to assist in compliance with this section.

➔Section 10. The following KRS section is repealed:

311.780 Prohibition of abortion after viability -- Exceptions.

➔Section 11. Sections 1 to 7 of this Act shall be known and may be cited as the Kentucky Pain-Capable Unborn Child Protection Act.