



2011 ASSEMBLY BILL 371

November 10, 2011 - Introduced by Representatives LITJENS, BROOKS, CRAIG, ENDSLEY, HONADEL, JACQUE, KNODL, T. LARSON, LEMAHIEU, J. OTT, A. OTT, STRACHOTA, THIESFELDT, WYNN and ZIEGELBAUER, cosponsored by Senators LAZICH, GALLOWAY, GROTHMAN and LEIBHAM. Referred to Committee on Health.

1 **AN ACT** *to repeal* 940.04 (3) and (4); *to amend* 253.10 (3) (b), 253.10 (3) (d) 1.,
2 253.10 (5) and 253.10 (7); and *to create* 253.10 (2) (am), 253.10 (3) (c) 1. hm.,
3 253.10 (3) (c) 1. jm., 253.10 (3) (c) 2. fm., 253.10 (7m) and 253.105 of the statutes;
4 **relating to:** voluntary and informed consent to an abortion, information on
5 domestic abuse services, giving a woman an abortion-inducing drug, repealing
6 criminal sanctions against women who perform or obtain certain abortion
7 procedures, and providing a penalty.

Analysis by the Legislative Reference Bureau

VOLUNTARY AND INFORMED CONSENT AND INFORMATION ON DOMESTIC ABUSE SERVICES

Under current law, a woman upon whom an abortion is to be performed or induced must give voluntary and informed written consent to the abortion. Consent is voluntary only if it is given freely and without coercion. This bill requires that the physician who is to perform or induce the abortion determine whether or not the woman's consent is, in fact, voluntary. The physician must determine if the woman's consent is voluntary by speaking to her in person, out of the presence of anyone other than a person working for or with the physician. If the physician has reason to suspect that the woman is in danger of being physically harmed by anyone who is coercing the woman to consent to an abortion against her will, the physician must

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inform the woman of services for victims or individuals at risk of domestic abuse and provide her with private access to a telephone.

Currently, a woman's consent to an abortion is considered informed only if, at least 24 hours before the abortion is performed or induced, the physician or an assistant has, in person, orally provided the woman with certain information and given the woman written materials prepared by the Department of Health Services (DHS). If the pregnancy is the result of sexual assault or incest, the 24-hour period, but not the provision of information, may be waived or reduced under certain circumstances. Any person who violates the informed consent requirements is required to forfeit not less than \$1,000 nor more than \$10,000 and is liable to the woman upon whom the abortion is performed or induced.

The bill requires that, at least 24 hours before the abortion is performed or induced, the physician or another qualified physician inform the woman that she has a right to refuse or consent to an abortion, that her consent is not voluntary if anyone is coercing her to consent to an abortion against her will, and that it is unlawful for the physician to perform or induce the abortion without her voluntary consent. The physician or another qualified physician must also inform the woman, at least 24 hours before the abortion is induced that, if the abortion is induced by an abortion-inducing drug, the woman must return to the abortion facility for a follow-up visit 12 to 18 days after use of the drug to confirm the termination of the pregnancy and evaluate the woman's medical condition. The bill requires that the physician or assistant inform the woman that the materials prepared by DHS, which must be given to her, contain information on services available for victims or individuals at risk of domestic abuse. Additionally, the bill requires DHS to include in the printed materials information on services in the state that are available for victims or individuals at risk of domestic abuse. The bill specifies that none of the penalties for violating the informed consent requirements may be assessed against the woman upon whom the abortion is to be performed or induced or attempted to be performed or induced.

RESTRICTIONS ON THE USE OF ABORTION-INDUCING DRUGS

This bill prohibits a person from giving a woman an abortion-inducing drug unless the physician who provided the drug for the woman performs a physical exam on the woman and is physically present in the room when the drug is given to the woman. An abortion-inducing drug is a drug that is prescribed to terminate the pregnancy of a woman who is known to be pregnant. Under this bill, a person who gives a woman an abortion-inducing drug in a manner that violates the prohibition is guilty of a Class I felony and may be subject to a civil action. This bill specifies that a penalty may not be assessed against a woman who receives an abortion-inducing drug.

REPEAL OF CERTAIN ABORTION PROHIBITIONS

Under current law, a pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined not more than \$200, imprisoned not more than six months, or both. For the same action with respect to an unborn quick child the penalty is a fine not to exceed \$10,000, imprisonment for not more than three years and six month, or both. None of these

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penalties apply to a therapeutic abortion that is performed by a physician; is necessary, or advised by two other physicians as necessary, to save the life of the mother; and is performed, except on an emergency basis, in a licensed maternity hospital. These provisions were cited, along with other provisions not affected by this bill that prohibit performing an abortion generally, in *Roe v. Wade*, 410 U.S. 113 (1973), as substantially similar to a Texas statute that was held to violate the due process clause of the 14th Amendment to the U.S. Constitution.

A separate provision in current law prohibits prosecution of and imposing or enforcing a fine or imprisonment against a woman who obtains an abortion or otherwise violates any abortion law with respect to her unborn child or fetus. Further, crimes of being a party to a crime, solicitation, and conspiracy do not apply to a woman who obtains an abortion or otherwise violates an abortion law with respect to her unborn child or fetus.

This bill repeals the provisions in current law under which a pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined, imprisoned, or both. The bill does not affect any other criminal prohibition or limitation on abortion in current law and does not affect the provision that prohibits the prosecution, fine, or imprisonment against a woman who obtains an abortion or otherwise violates any abortion law with regard to her unborn child or fetus.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 253.10 (2) (am) of the statutes is created to read:

2 253.10 (2) (am) “Abortion-inducing drug” means a drug, medicine, oral
3 hormonal compound, mixture, or preparation, when it is prescribed to terminate the
4 pregnancy of a woman known to be pregnant.

5 **SECTION 2.** 253.10 (3) (b) of the statutes is amended to read:

6 253.10 (3) (b) *Voluntary consent.* Consent under this section to an abortion is
7 voluntary only if the consent is given freely and without coercion by any person. The
8 physician who is to perform or induce the abortion shall determine whether the
9 woman’s consent is, in fact, voluntary. Notwithstanding par. (c) 3., the physician
10 shall make the determination by speaking to the woman in person, out of the

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1 presence of anyone other than a person working for or with the physician. If the
2 physician has reason to suspect that the woman is in danger of being physically
3 harmed by anyone who is coercing the woman to consent to an abortion against her
4 will, the physician shall inform the woman of services for victims or individuals at
5 risk of domestic abuse and provide her with private access to a telephone.

6 **SECTION 3.** 253.10 (3) (c) 1. hm. of the statutes is created to read:

7 253.10 (3) (c) 1. hm. If the abortion is induced by an abortion-inducing drug,
8 that the woman must return to the abortion facility for a follow-up visit 12 to 18 days
9 after the use of an abortion-inducing drug to confirm the termination of the
10 pregnancy and evaluate the woman's medical condition.

11 **SECTION 4.** 253.10 (3) (c) 1. jm. of the statutes is created to read:

12 253.10 (3) (c) 1. jm. That the woman has a right to refuse to consent to an
13 abortion, that her consent is not voluntary if anyone is coercing her to consent to an
14 abortion against her will, and that it is unlawful for the physician to perform or
15 induce the abortion without her voluntary consent.

16 **SECTION 5.** 253.10 (3) (c) 2. fm. of the statutes is created to read:

17 253.10 (3) (c) 2. fm. That the printed materials described in par. (d) contain
18 information on services available for victims or individuals at risk of domestic abuse.

19 **SECTION 6.** 253.10 (3) (d) 1. of the statutes is amended to read:

20 253.10 (3) (d) 1. Geographically indexed materials that are designed to inform
21 a woman about public and private agencies, including adoption agencies, and
22 services that are available to provide information on family planning, as defined in
23 s. 253.07 (1) (a), including natural family planning information, to provide
24 ultrasound imaging services, to assist her if she has received a diagnosis that her
25 unborn child has a disability or if her pregnancy is the result of sexual assault or

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1 incest and to assist her through pregnancy, upon childbirth and while the child is
2 dependent. The materials shall include a comprehensive list of the agencies
3 available, a description of the services that they offer and a description of the manner
4 in which they may be contacted, including telephone numbers and addresses, or, at
5 the option of the department, the materials shall include a toll-free, 24-hour
6 telephone number that may be called to obtain an oral listing of available agencies
7 and services in the locality of the caller and a description of the services that the
8 agencies offer and the manner in which they may be contacted. The materials shall
9 provide information on the availability of governmentally funded programs that
10 serve pregnant women and children. Services identified for the woman shall include
11 medical assistance for pregnant women and children under s. 49.47 (4) (am) and
12 49.471, the availability of family or medical leave under s. 103.10, the Wisconsin
13 works program under ss. 49.141 to 49.161, child care services, child support laws and
14 programs and the credit for expenses for household and dependent care and services
15 necessary for gainful employment under section 21 of the ~~internal revenue code~~
16 Internal Revenue Code. The materials shall state that it is unlawful to perform an
17 abortion for which consent has been coerced, that any physician who performs or
18 induces an abortion without obtaining the woman's voluntary and informed consent
19 is liable to her for damages in a civil action and is subject to a civil penalty, that the
20 father of a child is liable for assistance in the support of the child, even in instances
21 in which the father has offered to pay for an abortion, and that adoptive parents may
22 pay the costs of prenatal care, childbirth and neonatal care. The materials shall
23 include information, for a woman whose pregnancy is the result of sexual assault or
24 incest, on legal protections available to the woman and her child if she wishes to
25 oppose establishment of paternity or to terminate the father's parental rights. The

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1 materials shall state that fetal ultrasound imaging and auscultation of fetal heart
2 tone services are obtainable by pregnant women who wish to use them and shall
3 describe the services. The materials shall include information on services in the
4 state that are available for victims or individuals at risk of domestic abuse.

5 **SECTION 7.** 253.10 (5) of the statutes is amended to read:

6 253.10 (5) PENALTY. Any person who violates sub. (3) or (3m) (a) 2. or (b) 2. shall
7 be required to forfeit not less than \$1,000 nor more than \$10,000. No penalty may
8 be assessed against the woman upon whom the abortion is performed or induced or
9 attempted to be performed or induced.

10 **SECTION 8.** 253.10 (7) of the statutes is amended to read:

11 253.10 (7) AFFIRMATIVE DEFENSE. No person is liable under sub. (5) or (6) or
12 under s. 441.07 (1) (f), 448.02 (3) (a), or 457.26 (2) (gm) for failure under sub. (3) (c)
13 2. d. to provide the printed materials described in sub. (3) (d) to a woman or for failure
14 under sub. (3) (c) 2. d., e., f., fm., or g. to describe the contents of the printed materials
15 if the person has made a reasonably diligent effort to obtain the printed materials
16 under sub. (3) (e) and s. 46.245 and the department and the county department under
17 s. 46.215, 46.22, or 46.23 have not made the printed materials available at the time
18 that the person is required to give them to the woman.

19 **SECTION 9.** 253.10 (7m) of the statutes is created to read:

20 253.10 (7m) CONFIDENTIALITY IN COURT PROCEEDINGS. (a) In every proceeding
21 brought under this section, the court, upon motion or sua sponte, shall rule whether
22 the identity of any woman upon whom an abortion was performed or induced or
23 attempted to be performed or induced shall be kept confidential unless the woman
24 waives confidentiality. If the court determines that a woman's identity should be
25 kept confidential, the court shall issue orders to the parties, witnesses, and counsel

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1 and shall direct the sealing of the record and exclusion of individuals from
2 courtrooms or hearing rooms to the extent necessary to safeguard the woman's
3 identity from public disclosure. If the court issues an order to keep a woman's
4 identity confidential, the court shall provide written findings explaining why the
5 woman's identity should be kept confidential, why the order is essential to that end,
6 how the order is narrowly tailored to its purpose, and why no reasonable less
7 restrictive alternative exists.

8 (b) Any person, except for a public official, who brings an action under this
9 section shall do so under a pseudonym unless the person obtains the written consent
10 of the woman upon whom an abortion was performed or induced, or attempted to be
11 performed or induced, in violation of this section.

12 (c) The section may not be construed to allow the identity of a plaintiff or a
13 witness to be concealed from the defendant.

14 **SECTION 10.** 253.105 of the statutes is created to read:

15 **253.105 Prescription and use of abortion-inducing drugs. (1)** In this
16 section:

17 (a) "Abortion" has the meaning given in s. 253.10 (2) (a).

18 (b) "Abortion-inducing drug" has the meaning given in s. 253.10 (2) (am).

19 (c) "Physician" has the meaning given in s. 448.01 (5).

20 **(2)** No person may give an abortion-inducing drug to a woman unless the
21 physician who prescribed, or otherwise provided, the abortion-inducing drug for the
22 woman:

23 (a) Performs a physical exam of the woman before the information is provided
24 under s. 253.10 (3) (c) 1.

25 (b) Is physically present in the room when the drug is given to the woman.

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1 **(3) PENALTY.** Any person who violates sub. (2) is guilty of a Class I felony. No
2 penalty may be assessed against a woman to whom an abortion-inducing drug is
3 given.

4 **(4) CIVIL REMEDIES.** (a) Any of the following persons has a claim against a
5 person who intentionally or recklessly violates sub. (2):

6 1. A woman to whom an abortion-inducing drug was given in violation of sub.
7 (2).

8 2. If the abortion-inducing drug was given to a minor in violation of sub. (2),
9 a parent or guardian of the minor.

10 3. The father of the unborn child aborted as the result of an abortion-inducing
11 drug given in violation of sub. (2), unless the pregnancy of the person to whom the
12 abortion-inducing drug was given was the result of sexual assault in violation of s.
13 940.225, 944.06, 948.02, 948.025, 948.06, 948.085, or 948.09 and the violation was
14 committed by the father.

15 (b) A claim for relief under par. (a) may include:

16 1. Damages arising out of the inducement of the abortion, including damages
17 for personal injury and emotional and psychological distress.

18 2. Punitive damages for a violation that satisfies the standard under s. 895.043
19 (3).

20 (c) Notwithstanding s. 814.04 (1), a person who recovers damages under this
21 subsection may also recover reasonable attorney fees incurred in connection with the
22 action.

23 (d) A conviction under sub. (3) is not a condition precedent to bringing an action,
24 obtaining a judgment, or collecting a judgment under this subsection.

25 (e) A contract is not a defense to an action under this subsection.

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1 (f) Nothing in this section limits the common law rights of a person that are not
2 in conflict with sub. (2).

3 **(5) CONFIDENTIALITY IN COURT PROCEEDINGS.** (a) In every proceeding brought
4 under this section, the court, upon motion or sua sponte, shall rule whether the
5 identity of any woman upon whom an abortion was induced or attempted to be
6 induced shall be kept confidential unless the woman waives confidentiality. If the
7 court determines that a woman's identity should be kept confidential, the court shall
8 issue orders to the parties, witnesses, and counsel and shall direct the sealing of the
9 record and exclusion of individuals from courtrooms or hearing rooms to the extent
10 necessary to safeguard the woman's identity from public disclosure. If the court
11 issues an order to keep a woman's identity confidential, the court shall provide
12 written findings explaining why the woman's identity should be kept confidential,
13 why the order is essential to that end, how the order is narrowly tailored to its
14 purpose, and why no reasonable less restrictive alternative exists.

15 (b) Any person, except for a public official, who brings an action under this
16 section shall do so under a pseudonym unless the person obtains the written consent
17 of the woman upon whom an abortion was induced, or attempted to be induced, in
18 violation of this section.

19 (c) The section may not be construed to allow the identity of a plaintiff or a
20 witness to be concealed from the defendant.

21 **(6) CONSTRUCTION.** Nothing in this section may be construed as creating or
22 recognizing a right to abortion or as making lawful an abortion that is otherwise
23 unlawful.

24 **SECTION 11.** 940.04 (3) and (4) of the statutes are repealed.

