

State of Wisconsin



1995 Assembly Bill 441

Date of enactment: **May 1, 1996**
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1995 WISCONSIN ACT 309

AN ACT to amend 48.375 (4) (a) 1. and 448.02 (3) (a); to repeal and recreate 46.245 and 253.10; and to create 69.186 (1) (j), 441.07 (1) (f) and 457.26 (2) (gm) of the statutes; relating to: expanding requirements for a woman's informed consent for performance or inducement of an abortion and for consent to a minor's obtaining an abortion and providing a penalty.

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

SECTION 1. 46.245 of the statutes is repealed and recreated to read:

46.245 Information for certain pregnant women.

A county department under s. 46.215, 46.22 or 46.23 shall do all of the following:

(1) Upon request, distribute the materials described under s. 253.10 (3) (d), as prepared and distributed by the department. The county department may charge a fee not to exceed the actual cost of preparation and distribution of the materials. A physician who intends to perform or induce an abortion or another qualified physician, as defined in s. 253.10 (2) (g), who reasonably believes that he or she might have a patient for whom the information under s. 253.10 (3) (d) is required to be given, shall request a reasonably adequate number of the materials from the county department under this subsection or from the department under s. 253.10 (3) (d). An individual may request a reasonably adequate number of the materials.

(2) In any county in which a hospital, clinic or other facility in which abortions are performed is located, prepare the list specified under s. 253.10 (3) (cm) and distribute the list to each of those hospitals, clinics or other facilities.

SECTION 2. 48.375 (4) (a) 1. of the statutes is amended to read:

48.375 (4) (a) 1. The person or the person's agent has, either directly or through a referring physician or his or her agent, received and made part of the minor's medical record, under the requirements of s. 253.10, the voluntary and informed written consent of the minor and the voluntary and informed written consent of one of her parents; or of the minor's guardian or legal custodian, if one has been appointed; or of an adult family member of the minor; or of one of the minor's foster parents or treatment foster parents, if the minor has been placed in a foster home or treatment foster home and the minor's parent has signed a waiver granting the department, a county department, the foster parent or the treatment foster parent the authority to consent to medical services or treatment on behalf of the minor.

SECTION 3. 69.186 (1) (j) of the statutes is created to read:

69.186 (1) (j) If the patient is a minor, whether consent was provided under s. 48.375 (4) (a) 1. for the abortion and, if so, the relationship of the individual providing consent to the minor; or, if consent under s. 48.375 (4) (a) 1. was not provided, on which of the bases under s. 48.375 (4) (a) 2. or (b) 1., 1g., 1m., 2. or 3. the abortion was performed.

* Section 991.11, WISCONSIN STATUTES 1993-94: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

SECTION 4. 253.10 of the statutes is repealed and recreated to read:

253.10 Voluntary and informed consent for abortions. (1) **LEGISLATIVE FINDINGS AND INTENT.** (a) The legislature finds that:

1. Many women now seek or are encouraged to undergo elective abortions without full knowledge of the medical and psychological risks of abortion, development of the unborn child or of alternatives to abortion. An abortion decision is often made under stressful circumstances.

2. The knowledgeable exercise of a woman's decision to have an elective abortion depends on the extent to which the woman receives sufficient information to make a voluntary and informed choice between 2 alternatives of great consequence: carrying a child to birth or undergoing an abortion.

3. The U.S. supreme court has stated: "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 U.S. 2791, 2823 (1992).

4. It is essential to the psychological and physical well-being of a woman considering an elective abortion that she receive complete and accurate information on all options available to her in dealing with her pregnancy.

5. The vast majority of elective abortions in this state are performed in clinics that are devoted solely to providing abortions and family planning services. Women who seek elective abortions at these facilities normally do not have a prior patient-physician relationship with the physician who is to perform or induce the abortion, normally do not return to the facility for post-operative care and normally do not continue a patient-physician relationship with the physician who performed or induced the abortion. In most instances, the woman's only actual contact with the physician occurs simultaneously with the abortion procedure, with little opportunity to receive personal counseling by the physician concerning her decision. Because of this, certain safeguards are necessary to protect a woman's right to know.

6. A reasonable waiting period is critical to ensure that a woman has the fullest opportunity to give her voluntary and informed consent before she elects to undergo an abortion.

(b) It is the intent of the legislature in enacting this section to further the important and compelling state interests in all of the following:

1. Protecting the life and health of the woman subject to an elective abortion and, to the extent constitutionally permissible, the life of her unborn child.

2. Fostering the development of standards of professional conduct in the practice of abortion.

3. Ensuring that prior to the performance or inducement of an elective abortion, the woman considering an elective abortion receive personal counseling by the physician and be given a full range of information regarding her pregnancy, her unborn child, the abortion, the medical and psychological risks of abortion and available alternatives to the abortion.

4. Ensuring that a woman who decides to have an elective abortion gives her voluntary and informed consent to the abortion procedure.

(2) **DEFINITIONS.** In this section:

(a) "Abortion" means the use of an instrument, medicine, drug or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant or for whom there is reason to believe that she may be pregnant and with intent other than to increase the probability of a live birth, to preserve the life or health of the infant after live birth or to remove a dead fetus.

(b) "Agency" means a private nonprofit organization or a county department under s. 46.215, 46.22 or 46.23.

(c) "Disability" means a physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment or being regarded as having such an impairment. "Disability" includes any physical disability or developmental disability, as defined in s. 51.01 (5) (a).

(d) "Medical emergency" means a condition, in a physician's reasonable medical judgment, that so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a 24-hour delay in performance or inducement of an abortion will create serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions.

(e) "Probable gestational age of the unborn child" means the number of weeks that have elapsed from the probable time of fertilization of a woman's ovum, based on the information provided by the woman as to the time of her last menstrual period, her medical history, a physical examination performed by the physician who is to perform or induce the abortion or by any other qualified physician and any appropriate laboratory tests performed on her.

(f) "Qualified person assisting the physician" means a social worker certified under ch. 457, a registered nurse or a physician assistant to whom a physician who is to perform or induce an abortion has delegated the responsibility, as the physician's agent, for providing the information required under sub. (3) (c) 2.

(g) "Qualified physician" means a physician who by training or experience is qualified to provide the information required under sub. (3) (c) 1.

(h) "Viability" has the meaning given in s. 940.15 (1).

(3) **VOLUNTARY AND INFORMED CONSENT.** (a) *Generally.* An abortion may not be performed or induced unless the woman upon whom the abortion is to be per-

formed or induced has and, if the woman is a minor and s. 48.375 (4) (a) 2. does not apply, the individual who also gives consent under s. 48.375 (4) (a) 1. have given voluntary and informed written consent under the requirements of this section.

(b) *Voluntary consent.* Consent under this section to an abortion is voluntary only if the consent is given freely and without coercion by any person.

(c) *Informed consent.* Except if a medical emergency exists, a woman's consent to an abortion is informed only if all of the following first take place:

1. Except as provided in sub. (3m), at least 24 hours before the abortion is to be performed or induced, the physician who is to perform or induce the abortion or any other qualified physician has, in person, orally informed the woman of all of the following:

a. Whether or not, according to the reasonable medical judgment of the physician, the woman is pregnant.

b. The probable gestational age of the unborn child at the time that the information is provided. The physician or other qualified physician shall also provide this information to the woman in writing at this time.

c. The particular medical risks, if any, associated with the woman's pregnancy.

d. The probable anatomical and physiological characteristics of the woman's unborn child at the time the information is given.

e. The details of the medical or surgical method that would be used in performing or inducing the abortion.

f. The medical risks associated with the particular abortion procedure that would be used, including the risks of infection, psychological trauma, hemorrhage, endometritis, perforated uterus, incomplete abortion, failed abortion, danger to subsequent pregnancies and infertility.

g. That fetal ultrasound imaging and auscultation of fetal heart tone services are available that enable a pregnant woman to view the image or hear the heartbeat of her unborn child. In so informing the woman and describing these services, the physician shall advise the woman as to how she may obtain these services if she desires to do so.

h. The recommended general medical instructions for the woman to follow after an abortion to enhance her safe recovery and the name and telephone number of a physician to call if complications arise after the abortion.

i. If, in the reasonable medical judgment of the physician, the woman's unborn child has reached viability, that the physician who is to perform or induce the abortion is required to take all steps necessary under s. 940.15 to preserve and maintain the life and health of the child.

j. Any other information that a reasonable patient would consider material and relevant to a decision of whether or not to carry a child to birth or to undergo an abortion.

k. That the woman may withdraw her consent to have an abortion at any time before the abortion is performed or induced.

L. That, except as provided in sub. (3m), the woman is not required to pay any amount for performance or inducement of the abortion until at least 24 hours have elapsed after the requirements of this paragraph are met.

2. Except as provided in sub. (3m), at least 24 hours before the abortion is to be performed or induced, the physician who is to perform or induce the abortion, a qualified person assisting the physician or another qualified physician has, in person, orally informed the woman of all of the following:

a. That benefits under the medical assistance program may be available for prenatal care, childbirth and neonatal care.

b. That the father of the unborn child is liable for assistance in the support of the woman's child, if born, even if the father has offered to pay for the abortion.

c. That the woman has a legal right to continue her pregnancy and to keep the child, place the child in foster care, place the child with a relative for adoption or petition the court for placement of the child for adoption in the home of a person who is not a relative.

d. That the woman has the right to receive and review the printed materials described in par. (d). The physician or qualified person assisting the physician shall physically give the materials to the woman and shall, in person, orally inform her that the materials are free of charge, have been provided by the state and describe the unborn child and list agencies that offer alternatives to abortion and shall provide her with the current updated copies of the printed materials free of charge.

e. If the woman has received a diagnosis of disability for her unborn child, that the printed materials described in par. (d) contain information on community-based services and financial assistance programs for children with disabilities and their families, information on support groups for people with disabilities and parents of children with disabilities and information on adoption of children with special needs.

f. If the woman asserts that her pregnancy is the result of sexual assault or incest, that the printed materials described in par. (d) contain information on counseling services and support groups for victims of sexual assault and incest and legal protections available to the woman and her child if she wishes to oppose establishment of paternity or to terminate the father's parental rights.

g. The availability of public and private agencies and services to provide the woman with birth control information, including natural family planning information.

3. The information that is required under subs. 1. and 2. is provided to the woman in an individual setting

that protects her privacy, maintains the confidentiality of her decision and ensures that the information she receives focuses on her individual circumstances. This subdivision may not be construed to prevent the woman from having a family member, or any other person of her choice, present during her private counseling.

4. Whoever provides the information that is required under subd. 1. or 2., or both, provides adequate opportunity for the woman to ask questions, including questions concerning the pregnancy, her unborn child, abortion, foster care and adoption, and provides the information that is requested or indicates to the woman where she can obtain the information.

5. The woman certifies in writing on a form that the department shall provide, prior to performance or inducement of the abortion, that the information that is required under subds. 1. and 2. has been provided to her in the manner specified in subd. 3., that she has been offered the information described in par. (d) and that all of her questions, as specified under subd. 4., have been answered in a satisfactory manner. The physician who is to perform or induce the abortion or the qualified person assisting the physician shall write on the certification form the name of the physician who is to perform or induce the abortion. The woman shall indicate on the certification form who provided the information to her and when it was provided.

6. Prior to the performance or the inducement of the abortion, the physician who is to perform or induce the abortion or the qualified person assisting the physician receives the written certification that is required under subd. 5. The physician or qualified person assisting the physician shall place the certification in the woman's medical record and shall provide the woman with a copy of the certification.

7. If the woman considering an abortion is a minor, unless s. 48.375 (4) (a) 2. applies, the requirements to provide information to the woman under subds. 1. to 6. apply to also require provision of the information to the individual whose consent is also required under s. 48.375 (4) (a) 1. If the woman considering an abortion has been adjudicated incompetent under ch. 880, the requirements to provide information to the woman under subds. 1. to 6. apply to also require provision of the information to the person appointed as the woman's guardian.

(cm) *List upon request.* Upon request of the woman receiving information under par. (c), the physician who is to perform or induce the abortion, a qualified person assisting the physician or another qualified physician shall provide the woman with the list distributed under s. 46.245 (2) by a county department. The list shall specify public and private agencies and services that are available to provide the woman with birth control information, including natural family planning information.

(d) *Printed information.* By the date that is 60 days after the effective date of this paragraph [revisor in-

serts date], the department shall cause to be published in English, Spanish, and other languages spoken by a significant number of state residents, as determined by the department, materials that are in an easily comprehensible format and are printed in type of not less than 12-point size. The department shall distribute a reasonably adequate number of the materials to county departments as specified under s. 46.245 (1) and upon request, annually review the materials for accuracy and exercise reasonable diligence in providing materials that are accurate and current. The department may charge a fee not to exceed the actual cost of the preparation and distribution of the materials. The materials shall be all of the following:

1. Geographically indexed materials that are designed to inform a woman about public and private agencies, including adoption agencies, and services that are available to provide ultrasound imaging services, to assist her if she has received a diagnosis that her unborn child has a disability or if her pregnancy is the result of sexual assault or incest and to assist her through pregnancy, upon childbirth and while the child is dependent. The materials shall include a comprehensive list of the agencies available, a description of the services that they offer and a description of the manner in which they may be contacted, including telephone numbers and addresses, or, at the option of the department, the materials shall include a toll-free, 24-hour telephone number that may be called to obtain an oral listing of available agencies and services in the locality of the caller and a description of the services that the agencies offer and the manner in which they may be contacted. The materials shall provide information on the availability of governmentally funded programs that serve pregnant women and children. Services identified for the woman shall include aid to families with dependent children under s. 49.19, medical assistance for pregnant women and children under s. 49.47 (4) (am), the job opportunities and basic skills program under s. 49.193, the availability of family or medical leave under s. 103.10, child care services, child support laws and programs and the credit for expenses for household and dependent care and services necessary for gainful employment under section 21 of the internal revenue code. The materials shall state that it is unlawful for any person to coerce a woman to undergo an abortion, that any physician who performs or induces an abortion without obtaining the woman's voluntary and informed consent is liable to her for damages in a civil action and is subject to a civil penalty, that the father of a child is liable for assistance in the support of the child, even in instances in which the father has offered to pay for an abortion, and that adoptive parents may pay the costs of prenatal care, childbirth and neonatal care. The materials shall include information, for a woman whose pregnancy is the result of sexual assault or incest, on legal protections available to the woman and her child if she wishes to oppose establishment of paternity or to terminate the

father's parental rights. The materials shall state that fetal ultrasound imaging and auscultation of fetal heart tone services are obtainable by pregnant women who wish to use them and shall describe the services.

2. Materials, including photographs, pictures or drawings, that are designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at 2-week gestational increments for the first 16 weeks of her pregnancy and at 4-week gestational increments from the 17th week of the pregnancy to full term, including any relevant information regarding the time at which the unborn child could possibly be viable. The pictures or drawings must contain the dimensions of the unborn child and must be realistic and appropriate for the stage of pregnancy depicted. The materials shall be objective, nonjudgmental and designed to convey only accurate scientific information about the unborn child at the various gestational ages, including appearance, mobility, brain and heart activity and function, tactile sensitivity and the presence of internal organs and external members. The materials shall also contain objective, accurate information describing the methods of abortion procedures commonly employed, the medical and psychological risks commonly associated with each such procedure, including the risks of infection, psychological trauma, hemorrhage, endometritis, perforated uterus, incomplete abortion, failed abortion, danger to subsequent pregnancies and infertility, and the medical risks commonly associated with carrying a child to birth.

3. A certification form for use under par. (c) 5. that lists, in a check-off format, all of the information required to be provided under that subdivision.

(e) *Requirement to obtain materials.* A physician who intends to perform or induce an abortion or another qualified physician, who reasonably believes that he or she might have a patient for whom the information under par. (d) is required to be given, shall request a reasonably adequate number of the materials that are described under par. (d) from the department under par. (d) or from a county department as specified under s. 46.245 (1).

(f) *Medical emergency.* If a medical emergency exists, the physician who is to perform or induce the abortion necessitated by the medical emergency shall inform the woman, prior to the abortion if possible, of the medical indications supporting the physician's reasonable medical judgment that an immediate abortion is necessary to avert her death or that a 24-hour delay in performance or inducement of an abortion will create a serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions. If possible, the physician shall obtain the woman's written consent prior to the abortion. The physician shall certify these medical indications in writing and place the certification in the woman's medical record.

(g) *Presumptions.* Satisfaction of the conditions required under par. (c) creates a rebuttable presumption

that the woman's consent and, if the woman is a minor and if s. 48.375 (4) (a) 2. does not apply, the consent of the individual who also gives consent under s. 48.375 (4) (a) 1. to an abortion is informed. The presumption of informed consent may be overcome by a preponderance of evidence that establishes that the consent was obtained through fraud, negligence, deception, misrepresentation or omission of a material fact. There is no presumption that consent to an abortion is voluntary.

(3m) PREGNANCY AS THE RESULT OF SEXUAL ASSAULT OR INCEST. (a) A woman seeking an abortion may waive the 24-hour period required under sub. (3) (c) 1. (intro.) and L. and 2. (intro.) if all of the following are first done:

1. The woman alleges that the pregnancy is the result of sexual assault under s. 940.225 (1), (2) or (3) and states that a report alleging the sexual assault has been made to law enforcement authorities.

2. Whoever provides the information that is required under sub. (3) (c) 1. or 2., or both, confirms with law enforcement authorities that a report on behalf of the woman about the sexual assault has been made to law enforcement authorities, makes a notation to this effect and places the notation in the woman's medical record.

(b) The 24-hour period required under sub. (3) (c) 1. (intro.) and L. and 2. (intro.) is reduced to at least 2 hours if all of the following are first done:

1. The woman alleges that the pregnancy is the result of incest under s. 948.06 (1) and states that a report alleging the incest has been made to law enforcement authorities.

2. Whoever provides the information that is required under sub. (3) (c) 1. or 2., or both, confirms with law enforcement authorities that a report on behalf of the woman about the incest has been made to law enforcement authorities, makes a notation to this effect and places the notation in the woman's medical record.

(c) Upon receipt by the law enforcement authorities of a request for confirmation under par. (a) 2. or (b) 2., and after reasonable verification of the identity of the woman and her consent to release of the information, the law enforcement authorities shall confirm whether or not the report has been made. No record of a request or confirmation made under this paragraph may be disclosed by the law enforcement authorities.

(4) HOTLINE. The department may maintain a toll-free telephone number that is available 24 hours each day, to provide the materials specified in sub. (3) (d) 1.

(5) PENALTY. Any person who violates sub. (3) or (3m) (a) 2. or (b) 2. shall be required to forfeit not less than \$1,000 nor more than \$10,000.

(6) CIVIL REMEDIES. (a) A person who violates sub. (3) or (3m) (a) 2. or (b) 2. is liable to the woman on or for whom the abortion was performed or induced for damages arising out of the performance or inducement of the abortion, including damages for personal injury and emotional and psychological distress.

(b) A person who has been awarded damages under par. (a) shall, in addition to any damages awarded under par. (a), be entitled to not less than \$1,000 nor more than \$10,000 in punitive damages for a violation that satisfies a standard under s. 895.85 (3).

(c) A conviction under sub. (5) is not a condition precedent to bringing an action, obtaining a judgment or collecting the judgment under this subsection.

(d) Notwithstanding s. 814.04 (1), a person who recovers damages under par. (a) or (b) may also recover reasonable attorney fees incurred in connection with the action.

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

(f) Nothing in this subsection limits the common law rights of a person that are not in conflict with sub. (3).

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

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

SECTION 5. 441.07 (1) (f) of the statutes is created to read:

441.07 (1) (f) A violation of the requirements of s. 253.10 (3) (c) 2., 3., 4., 5., 6. or 7.

SECTION 6. 448.02 (3) (a) of the statutes is amended to read:

448.02 (3) (a) The board shall investigate allegations of unprofessional conduct and negligence in treatment by persons holding a license, certificate or limited permit granted by the board. An allegation that a physician has violated s. ~~253.10 (3)~~, 448.30 or 450.13 (2) or has failed to mail or present a medical certification required under s. 69.18 (2) within 21 days after the pronouncement of death of the person who is the subject of the required certificate or that a physician has failed at least 6 times within a 6-month period to mail or present a medical certificate required under s. 69.18 (2) within 6 days after the pronouncement of death of the person who is the subject of the required certificate is an allegation of unprofessional conduct. Information contained in reports filed with the board under s. 49.45 (2) (a) 12r., 50.36 (3) (b), 609.17 or 632.715 or under 42 CFR 1001.109 (e) and 42 CFR 1001.124 (a) (3) and (b) shall be investigated by the board. Information contained in a report filed with the board under s. 655.045 (1), as created by 1985 Wisconsin Act 29, which is not a finding of negligence or in a report filed with the board under s. 50.36 (3) (c) may, within the discretion of the board, be used as the basis of an investigation of the persons named in the reports. The board may require a person holding a license, certificate or limited permit to undergo and may consider the results of one or more physical, mental or professional competency examinations if the board believes that the results of any such examinations may be useful to the board in conducting its investigation.

SECTION 7. 457.26 (2) (gm) of the statutes is created to read:

457.26 (2) (gm) Violated the requirements of s. 253.10 (3) (c) 2., 3., 4., 5., 6. or 7.