

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2888/P2dn
MGD:jld:kjf

September 7, 2001

Rob:

This bill is based on the instructions that Rep. Freese and Sen. Welch provided at our meeting last month and additional instructions that you and Mary Klaver have provided. It does not yet contain the cloning prohibitions. In addition, please note the following:

1. Section 940.17 (6) contains language that would exempt cryopreservation from the prohibitions in s. 940.17 (2) to (5). We did not discuss how the bill should cover a living embryo that is no longer a viable candidate for implantation, either because of problems in its early development or (in the case of a thawed embryo) because of harm that resulted from cryopreservation. If the clinic freezes or refreezes the embryo, the language that I added will exempt them from liability if the embryo suffers additional harm or dies as a result. But the bill does not authorize the clinic to do anything else that might cause the death of that damaged embryo. Is that okay? (If you want to take a different approach, I may need to revise the "described under" language in sub. (7), since that language may include cryopreservation.) Note that, as a practical matter, because of the time and costs involved with thawing and refreezing, this approach may require clinics to maintain unused embryos in a cryopreserved state indefinitely, including embryos that are not viable.

2. Based on what I have learned in limited research, mifepristone/RU-486 can result in an embryo being born alive. Apparently, the likelihood of that occurring is extremely small. But some physicians prescribing mifepristone/RU-486 would likely be aware of that remote possibility, and presumably, in prescribing the drug, they would intend that the miscarriage cause the death of any embryo born alive. A court might view the possibility of criminal liability in such a case as an unconstitutional burden on a woman's right to use mifepristone/RU-486 under *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). Although saline injections are relatively rare, see Centers for Disease Control and Prevention, Abortion Surveillance -- United States, 1997, p. 43 (December 8, 2000), (http://www.cdc.gov/nccdphp/drh/pdf/mmwr_ss/ss4911.pdf), the bill would be subject to the same constitutional problem with respect to them. I suggested to Mary Klaver that the bill include a cross-reference in s. 939.75 so that the bill does not apply to abortion procedures or the prescription or use of contraceptives. She suggested another alternative, which I think is problematic. In the interest of getting this to you more quickly, rather than try to

develop language that Mary supports and that works, I decided to wait until the next redraft to include a provision to address this problem.

3. Based on instructions that I received from Mary Klaver, the bill no longer would prohibit the possession of stem cells or tissue derived from them. In view of that, the bill does not have a delayed effective date. Please let me know if you want me to include one.

4. In lieu of characterizing the separation of an embryo into separate living cells as "causing the death of the embryo," the bill treats the separation as creating an in vitro human embryo, which is prohibited under sub. (7) if done for the purpose of stem cell research. This made sense conceptually and made the bill simpler than it would have been if we defined "death."

5. The addition of "into a born individual" at the end of the definition of "nontherapeutic human embryo research" is intended to ensure that the definition does not include the development of embryonic cells into specialized cells.

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