

2001 DRAFTING REQUEST

Bill

Received: 10/05/2001

Received By: kenneda

Wanted: As time permits

Identical to LRB:

For: Mark Meyer (608) 266-5490

By/Representing: Bryan Brooks (aide)

This file may be shown to any legislator: NO

Drafter: kenneda

May Contact:

Addl. Drafters:

Subject: Health - abortion

Extra Copies: MGD

Submit via email: YES

Requester's email: Sen.Meyer@legis.state.wi.us

Carbon copy (CC:) to: @legis.state.wi.us

Pre Topic:

No specific pre topic given

Topic:

Prohibit human cloning and the sale or purchase of an ovum, embryo, or fetus

Instructions:

Same as 01-3079/1, except delete definition of "embryo"

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	kenneda 10/05/2001	wjackson 10/05/2001		_____			S&L
/1			pgreensl 10/05/2001	_____	lrb_docadmin 10/05/2001		S&L
/2	kenneda	gilfokm	kfollet	_____	lrb_docadmin	lrb_docadmin	

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
	01/08/2002	01/08/2002	01/08/2002 _____		01/08/2002	01/08/2002	

FE Sent For: 01/08/2002.

↳ ("1/2")

<END>

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	01/08/2002	01/08/2002	01/08/2002	_____	01/08/2002		

FE Sent For:

<END>

01-08-2002

(1/2")

Requested
By
Bryan Brooks

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Bill

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Received By: **kenneda**

Wanted: **As time permits**

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By/Representing: **Bryan Brooks (aide)**

This file may be shown to any legislator: **NO**

Drafter: **kenneda**

May Contact:

Addl. Drafters:

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Extra Copies: **MGD**

Submit via email: **YES**

Requester's email: **Sen.Meyer@legis.state.wi.us**

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/1		12-1/8-02 KMG	pgreensl 10/05/2001	_____	lrb_docadmin 10/05/2001		S&L

FE Sent For:

KSJ
1/8
KSJ/RS
1/8
<END>

2001 DRAFTING REQUEST

Bill

Received: **10/05/2001**

Received By: **kenneda**

Wanted: **As time permits**

Identical to LRB:

For: **Charles Chvala (608) 266-9170**

By/Representing: **Doug Burnett**

This file may be shown to any legislator: **NO**

Drafter: **kenneda**

May Contact:

Addl. Drafters:

Subject: **Health - abortion**

Extra Copies: **MGD**

Submit via email: **YES**

Requester's email: **Sen.Chvala@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Prohibit human cloning and the sale or purchase of an ovum, embryo, or fetus

Instructions:

Same as 01-3079/1, except delete definition of "embryo"

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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<END>

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Bill

Received: 10/05/2001

Received By: kenneda

Wanted: As time permits

Identical to LRB:

For: Charles Chvala (608) 266-9170

By/Representing: Doug Burnett

This file may be shown to any legislator: NO

Drafter: kenneda

May Contact:

Addl. Drafters:

Subject: Health - abortion

Extra Copies: MGD

Submit via email: YES

Requester's email: Sen.Chvala@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

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Instructions:

Same as 01-3079/1, except delete definition of "embryo"

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1/?	kenneda	11 WLJ 10/5	10/5 P8	10/5 P8TR			

FE Sent For:

<END>

TODAY, 10/6/01

2001 - 2002 LEGISLATURE

D-NOTE

3964/1
LRB-8079/1
DAK:wlijf
↓
stays

2001 BILL

REGEN

1 AN ACT *to amend* 50.35, 448.015 (4) and 448.02 (3) (a); and *to create* 20.9271
2 and 146.347 of the statutes; **relating to:** banning human cloning and the sale
3 or purchase of an ovum, embryo, or fetus for the purpose of cloning a human,
4 prohibiting the use of state funds for cloning, and providing penalties.

Analysis by the Legislative Reference Bureau

This bill prohibits any person from cloning or attempting to clone a human being or from selling or purchasing an ovum, embryo, or fetus for the purpose of cloning a human being. Cloning a human being is defined in the bill as creating a genetic duplicate of an individual by transferring the nucleus from any cell of that individual into a human ovum, the nucleus of which has been removed, and using that human ovum to initiate a pregnancy that could result in the birth of a human being.

Under the bill, any individual who clones or attempts to clone a human being or who sells or purchases an ovum, embryo, or fetus for the purpose of cloning a human being is subject to a forfeiture of not more than the greater of \$5,000,000 or double any monetary gain that the individual derived from the prohibited act; a violator who is a physician may be charged with unprofessional conduct. If the person violating the prohibition is not an individual (for example, a clinic or other institution), the penalty is a forfeiture of not more than the greater of \$10,000,000 or double any monetary gain that the person derived from the prohibited act; for a violator that is a hospital, the department of health and family services must suspend or revoke the hospital's certificate of approval. Lastly, under the bill, state

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funds may not be used for the purpose of cloning or attempting to clone a human being.

For further information see the *state and local* 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.** 20.9271 of the statutes is created to read:

2 **20.9271 Subsidy of cloning prohibited.** (1) In this section, “clone a human
3 being” has the meaning given in s. 146.347 (1) (a).

4 (2) No funds of this state may be authorized for or paid for the purpose of
5 cloning a human being or attempting to clone a human being.

6 (3) Whoever violates sub. (2) may be fined not more than \$10,000,000.

7 **SECTION 2.** 50.35 of the statutes is amended to read:

8 **50.35 Application and approval.** Application for approval to maintain a
9 hospital shall be made to the department on forms provided by the department. On
10 receipt of an application, the department shall, except as provided in s. 50.498, issue
11 a certificate of approval if the applicant and hospital facilities meet the requirements
12 established by the department. Except as provided in s. 50.498, this approval shall
13 be in effect until, for just cause and in the manner herein prescribed, it is suspended
14 or revoked. The certificate of approval may be issued only for the premises and
15 persons or governmental unit named in the application and is not transferable or
16 assignable. The department shall withhold, suspend or revoke approval for a failure
17 to comply with s. 165.40 (6) (a) 1. or 2. or 146.347 (2), but, except as provided in s.
18 50.498, otherwise may not withhold, suspend or revoke approval unless for a
19 substantial failure to comply with ss. 50.32 to 50.39 or the rules and standards
20 adopted by the department after giving a reasonable notice, a fair hearing and a

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1 reasonable opportunity to comply. Failure by a hospital to comply with s. 50.36 (3m)
2 shall be considered to be a substantial failure to comply under this section.

3 **SECTION 3.** 146.347 of the statutes is created to read:

4 **146.347 Human cloning prohibited.** (1) In this section:

5 (a) "Clone a human being" means create a genetic duplicate of an individual by
6 transferring the nucleus from any cell of that individual into a human ovum from
7 which the nucleus has been removed and using that human ovum to initiate a
8 pregnancy that could result in the birth of a human being.

9 (b) "Embryo" means a human being from the point of fertilization, including the
10 single-cell state, until approximately the end of the 2nd month.

11 (b) (a) "Physician" has the meaning given in s. 448.01 (5).

12 (2) No person may do any of the following:

13 (a) Clone or attempt to clone a human being.

14 (b) Purchase or sell an ovum, embryo, fetus, or fetal body part for the purpose
15 of cloning a human being.

16 (3) Violation of sub. (2) by a physician constitutes unprofessional conduct.

17 (4) (a) Except as provided in par. (b), whoever violates sub. (2) may be required
18 to forfeit not more than the greater of the following:

19 1. Five million dollars.

20 2. If the individual derived pecuniary gain from the violation, an amount equal
21 to twice the gross gain.

22 (b) Whoever is a person that is not an individual and violates sub. (2) may be
23 required to forfeit not more than the greater of the following:

24 1. Ten million dollars.

BILL

1 2. If the person derived pecuniary gain from the violation, an amount equal to
2 twice the gross gain.

3 **SECTION 4.** 448.015 (4) of the statutes is amended to read:

4 448.015 (4) “Unprofessional conduct” means those acts or attempted acts of
5 commission or omission defined as unprofessional conduct by the board under the
6 authority delegated to the board by s. 15.08 (5) (b) and any act by a physician in
7 violation of s. 146.347 (2) or ch. 450 or 961 or by a physician assistant in violation of
8 ch. 450 or 961.

9 **SECTION 5.** 448.02 (3) (a) of the statutes is amended to read:

10 448.02 (3) (a) The board shall investigate allegations of unprofessional conduct
11 and negligence in treatment by persons holding a license, certificate, or limited
12 permit granted by the board. An allegation that a physician has violated s. 146.347
13 (2), 253.10 (3), 448.30, or 450.13 (2) or has failed to mail or present a medical
14 certification required under s. 69.18 (2) within 21 days after the pronouncement of
15 death of the person who is the subject of the required certificate or that a physician
16 has failed at least 6 times within a 6-month period to mail or present a medical
17 certificate required under s. 69.18 (2) within 6 days after the pronouncement of death
18 of the person who is the subject of the required certificate is an allegation of
19 unprofessional conduct. Information contained in reports filed with the board under
20 s. 49.45 (2) (a) 12r., 50.36 (3) (b), 609.17, or 632.715, or under 42 CFR 1001.2005, shall
21 be investigated by the board. Information contained in a report filed with the board
22 under s. 655.045 (1), as created by 1985 Wisconsin Act 29, which is not a finding of
23 negligence or in a report filed with the board under s. 50.36 (3) (c) may, within the
24 discretion of the board, be used as the basis of an investigation of a person named in
25 the report. The board may require a person holding a license, certificate, or limited

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1 permit to undergo and may consider the results of one or more physical, mental, or
2 professional competency examinations if the board believes that the results of any
3 such examinations may be useful to the board in conducting its investigation.

4

(END)

D-NOTE

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3079/1dn
DAK:wlj:jf

September 18, 2001

Senator Chvala:

~~Representative Krawczyk:~~

① This draft creates several significant civil penalties (forfeitures). The LRB drafting manual states that:

A forfeiture is a civil monetary penalty. Although both forfeitures and fines are penalties, an offense that is punishable only by a forfeiture is not a crime. See s. 939.12, stats. In an action to impose only a forfeiture, the rules of civil procedure apply. Among other effects, this means that a forfeiture may be imposed with a lower burden of proof (preponderance of the evidence or clear and convincing evidence) than is required for conviction of a crime (beyond a reasonable doubt), and with a verdict agreed to by five-sixths of a jury instead of a unanimous jury, as required for conviction of a crime. See s. 805.09 (2), stats.

However, the U.S. Supreme Court has, on occasion, denominated a penalty criminal, even if labeled civil by the legislature. The U.S. Supreme Court has a multiprong test to determine whether a penalty is civil or criminal. First, a court must ask whether the legislature "indicated either expressly or impliedly a preference for one label or the other." *Hudson, et al. v. United States*, 66 U.S.L.W. 4024, 4026 (1997), quoting *United States v. Ward*, 448 U.S. 242 at 248.

Even if a court finds that the legislature has indicated an intention to establish a civil penalty, the court might still find that the penalty is so punitive as to transform the civil penalty into a criminal penalty. To determine whether the penalty is purely punitive a court must look at many factors, including:

1. Whether the penalty involves an affirmative disability or restraint (such as some type of confinement).
2. Whether the penalty has historically been considered punishment.
3. Whether the penalty comes into play only if there is a finding of intent. Generally, conviction of a crime requires some finding of intent (although there are some exceptions), whereas civil liability often does not rest on intent.

- 4. Whether the operation of the penalty will promote the traditional aims of criminal punishment — retribution and deterrence. Generally, civil penalties, while having some deterrent purpose, have a compensatory goal, i.e. compensating the government or some person for a loss resulting from the violation for which the penalty is assessed.
- 5. Whether the behavior to which the penalty applies is already a crime.
- 6. Whether the penalty appears excessive in relation to the purpose of the penalty.

See *Hudson* at 4026.

I have delineated these factors only to point out that, although you wish to denominate the penalty in this bill a civil penalty (which is a very important consideration to a court), it is possible that the nature of the penalty (its purpose, its amount, etc.) will prompt a court to view the penalty as criminal, which will therefore afford all of the rights to an accused violator as are afforded to criminal defendants. This isn't a fatal flaw to the bill. I raise the issue only to make you aware that it exists.

In this bill, I have not made the Department of Health and Family Services (DHFS) the agency responsible for assessing the penalty. It seems that the Department of Justice is probably better equipped to prosecute such a significant civil claim than is DHFS. However, if you would prefer to have DHFS directly assess the forfeiture, I can amend the bill accordingly.

2. In s. 146.347, I have defined "clone" and "embryo." Because the definition of "embryo" sweeps in the term "zygote" (which is defined in *Merriam Webster's Collegiate Dictionary* as a cell formed by the union of two gametes), I have not separately prohibited the sale or purchase of a zygote for the purpose of cloning. I also added "fetal body part" to the prohibition on purchase or sale for the purpose of cloning, since a court might view the term "fetus" as an intact fetus.

If you wish to discuss this bill with me, I would be happy to meet with you.

Debora A. Kennedy
Managing Attorney
Phone: (608) 266-0137
E-mail: debora.kennedy@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3964/1dn
DAK:wlj:pg

October 5, 2001

Senator Chvala:

This draft creates several significant civil penalties (forfeitures). The LRB drafting manual states that:

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Debra A. Kennedy
Managing Attorney
Phone: (608) 266-0137
E-mail: debra.kennedy@legis.state.wi.us

TELEPHONE DRAFTING INSTRUCTIONS

Drafting instructions received by Debora Kennedy.

DATE: 1/8/01

CONVERSATION
WITH:

Doug Burnett + Bryan Brooks

OF:

Choala + Meyer's offices

TELEPHONE NO:

REGARDING LRB #
OR DRAFT TOPIC:

INSTRUCTIONS:

Doug: OK to transfer draft to Sen Meyer

Bryan: ~~F~~ Change def of "clone a human being"
to make intentional



Keep

2001 BILL

Only change pp. 1 + 3

Gen. Cat.

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2 and 146.347 of the statutes; relating to: banning human cloning and the sale
3 or purchase of an ovum, embryo, or fetus for the purpose of cloning a human,
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intentionally

is intended to

Under the bill, any individual who clones or attempts to clone a human being or who sells or purchases an ovum, embryo, or fetus for the purpose of cloning a human being is subject to a forfeiture of not more than the greater of \$5,000,000 or double any monetary gain that the individual derived from the prohibited act; a violator who is a physician may be charged with unprofessional conduct. If the person violating the prohibition is not an individual (for example, a clinic or other institution), the penalty is a forfeiture of not more than the greater of \$10,000,000 or double any monetary gain that the person derived from the prohibited act; for a violator that is a hospital, the department of health and family services must suspend or revoke the hospital's certificate of approval. Lastly, under the bill, state

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2 **20.9271 Subsidy of cloning prohibited.** (1) In this section, “clone a human
3 being” has the meaning given in s. 146.347 (1) (a).

4 (2) No funds of this state may be authorized for or paid for the purpose of
5 cloning a human being or attempting to clone a human being.

6 (3) Whoever violates sub. (2) may be fined not more than \$10,000,000.

7 **SECTION 2.** 50.35 of the statutes is amended to read:

8 **50.35 Application and approval.** Application for approval to maintain a
9 hospital shall be made to the department on forms provided by the department. On
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16 assignable. The department shall withhold, suspend or revoke approval for a failure
17 to comply with s. 165.40 (6) (a) 1. or 2. or 146.347 (2), but, except as provided in s.
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20 adopted by the department after giving a reasonable notice, a fair hearing and a

BILL

1 reasonable opportunity to comply. Failure by a hospital to comply with s. 50.36 (3m)
2 shall be considered to be a substantial failure to comply under this section.

3 **SECTION 3.** 146.347 of the statutes is created to read:

4 **146.347 Human cloning prohibited.** (1) In this section:

5 (a) "Clone a human being" means ^{intentionally} create a genetic duplicate of an individual by
6 transferring the nucleus from any cell of that individual into a human ovum from
7 which the nucleus has been removed and ^{using that human ovum to initiate a}
8 pregnancy that ~~could~~ result in the birth of a human being. ^{is intended to}

9 (b) "Physician" has the meaning given in s. 448.01 (5).

10 (2) No person may do any of the following:

11 (a) Clone or attempt to clone a human being.

12 (b) Purchase or sell an ovum, embryo, fetus, or fetal body part for the purpose
13 of cloning a human being.

14 (3) Violation of sub. (2) by a physician constitutes unprofessional conduct.

15 (4) (a) Except as provided in par. (b), whoever violates sub. (2) may be required
16 to forfeit not more than the greater of the following:

17 1. Five million dollars.

18 2. If the individual derived pecuniary gain from the violation, an amount equal
19 to twice the gross gain.

20 (b) Whoever is a person that is not an individual and violates sub. (2) may be
21 required to forfeit not more than the greater of the following:

22 1. Ten million dollars.

23 2. If the person derived pecuniary gain from the violation, an amount equal to
24 twice the gross gain.

25 **SECTION 4.** 448.015 (4) of the statutes is amended to read:

BILL

1 448.015 (4) "Unprofessional conduct" means those acts or attempted acts of
2 commission or omission defined as unprofessional conduct by the board under the
3 authority delegated to the board by s. 15.08 (5) (b) and any act by a physician in
4 violation of s. 146.347 (2) or ch. 450 or 961 or by a physician assistant in violation of
5 ch. 450 or 961.

6 **SECTION 5.** 448.02 (3) (a) of the statutes is amended to read:

7 448.02 (3) (a) The board shall investigate allegations of unprofessional conduct
8 and negligence in treatment by persons holding a license, certificate, or limited
9 permit granted by the board. An allegation that a physician has violated s. 146.347
10 (2), 253.10 (3), 448.30, or 450.13 (2) or has failed to mail or present a medical
11 certification required under s. 69.18 (2) within 21 days after the pronouncement of
12 death of the person who is the subject of the required certificate or that a physician
13 has failed at least 6 times within a 6-month period to mail or present a medical
14 certificate required under s. 69.18 (2) within 6 days after the pronouncement of death
15 of the person who is the subject of the required certificate is an allegation of
16 unprofessional conduct. Information contained in reports filed with the board under
17 s. 49.45 (2) (a) 12r., 50.36 (3) (b), 609.17, or 632.715, or under 42 CFR 1001.2005, shall
18 be investigated by the board. Information contained in a report filed with the board
19 under s. 655.045 (1), as created by 1985 Wisconsin Act 29, which is not a finding of
20 negligence or in a report filed with the board under s. 50.36 (3) (c) may, within the
21 discretion of the board, be used as the basis of an investigation of a person named in
22 the report. The board may require a person holding a license, certificate, or limited
23 permit to undergo and may consider the results of one or more physical, mental, or

BILL

1 professional competency examinations if the board believes that the results of any
2 such examinations may be useful to the board in conducting its investigation.

3 (END)

Emery, Lynn

From: Brooks, Bryan
Sent: Tuesday, January 08, 2002 4:26 PM
To: LRB.Legal
Subject: Draft review: LRB-3964/2 Topic: Prohibit human cloning and the sale or purchase of an ovum, embryo, or fetus

It has been requested by <Brooks, Bryan> that the following draft be jacketed for the SENATE:

Draft review: LRB-3964/2 Topic: Prohibit human cloning and the sale or purchase of an ovum, embryo, or fetus