



State of Wisconsin
2021 - 2022 LEGISLATURE

LRB-4972/1
TJD:emw

2021 SENATE BILL 923

February 1, 2022 - Introduced by Senators BRADLEY, KAPENGA, BALLWEG, BERNIER, FELZKOWSKI, ROTH, STROEBEL, TESTIN and WANGGAARD, cosponsored by Representatives ROZAR, CALLAHAN, ALLEN, DITTRICH, EDMING, GUNDRUM, JAMES, KNODL, MAGNAFICI, PENTERMAN, PETERSEN, RAMTHUN, SCHRAA, SKOWRONSKI and THIESFELDT. Referred to Committee on Government Operations, Legal Review and Consumer Protection.

1 **AN ACT to amend** 253.10 (3) (c) 5., 253.10 (3g) (a) 5. and 448.02 (3) (a); and **to**
2 **create** 253.10 (3) (c) 1. gr. and 253.108 of the statutes; **relating to:** detection
3 of and abortion after detection of a fetal heartbeat and providing a penalty.

Analysis by the Legislative Reference Bureau

This bill prohibits, except when a medical emergency exists, any person from performing or inducing an abortion, or attempting to perform or induce an abortion, unless the person performing or inducing the abortion has first determined, or has relied on a determination made as to, whether the woman's unborn child has a detectable fetal heartbeat. The person, in attempting to detect the heartbeat, must use the most effective means of detecting the heartbeat based on the probable postfertilization age of the unborn child and condition of the woman and her pregnancy. The physician who makes or relies on a determination of whether the unborn child has a detectable fetal heartbeat must record the probable postfertilization age, the method of determining that age or the medical emergency that resulted in no determination of postfertilization age, the means used to detect the fetal heartbeat, and the date, time, and results of the use of the means to detect the heartbeat in the woman's medical record. The bill also prohibits any person from performing, inducing, or attempting to perform or induce an abortion on a woman if a fetal heartbeat is detected except when a medical emergency exists. Under the bill, an allegation that a physician violated either prohibition in the bill is considered an allegation of unprofessional conduct, and the Medical Examining Board is required to investigate allegations of unprofessional conduct.

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Under the bill, a “medical emergency” means a condition that so complicates the medical condition of a pregnant woman as to necessitate immediate medical intervention to avert her death or for which a delay will create serious risk of substantial and irreversible physical impairment of one or more of the woman’s major bodily functions. A physician who performs a medical intervention designed or intended to prevent the death of a pregnant woman is considered not to have violated the bill’s requirements, except that the physician is required to make reasonable medical efforts under the circumstances to preserve both the life of the woman and the life of the unborn child in a manner consistent with conventional medical practice.

A woman upon whom an abortion is performed or induced or attempted to be performed or induced may bring a claim for damages, including damages for personal injury and emotional and psychological distress, against a person who performs, or attempts to perform, an abortion in violation of the bill’s prohibitions. Additionally, the father, grandparent, or family member, as specified in the bill, of the unborn child or any other person may bring a claim for damages. A person who prevails in an action must recover no less than \$10,000 for each abortion performed or induced or attempted to be performed or induced in violation of the bill.

Under current law, before a person may perform or induce an abortion on a pregnant woman, an ultrasound must be performed. During the ultrasound, a person is required to perform certain actions, including providing a simultaneous oral explanation to the pregnant woman of what the ultrasound is depicting and providing a means for the pregnant woman to visualize any fetal heartbeat detected. This bill specifies that the person performing the ultrasound must include in the oral explanation whether or not a fetal heartbeat is detected. The bill requires the person qualified to perform the ultrasound to perform or arrange for another person to perform a method to detect and, if detected, listen to the fetal heartbeat. If the heartbeat is detected, the heartbeat must be made audible for the pregnant woman. The bill also requires that the woman be told, as part of the current informed consent requirements, of the requirement to detect a heartbeat and that the heartbeat be made audible for the woman if detected.

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

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

2 253.10 (3) (c) 1. gr. That the pregnant woman is required to undergo a method
3 to detect a fetal heartbeat and that, if detected, the heartbeat will be made audible
4 for the woman.

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

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1 253.10 (3) (c) 5. The woman certifies in writing on a form that the department
2 shall provide, prior to performance or inducement of the abortion, that the
3 information that is required under subds. 1. and 2. has been provided to her in the
4 manner specified in subd. 3., that the ultrasound required under sub. (3g) has been
5 performed or that requirement is waived under sub. (3m) (a), that, unless a medical
6 emergency exists, a determination of whether or not a fetal heartbeat is detectable
7 has been made and, if a heartbeat is detected, that she has been given the
8 opportunity to listen to the heartbeat, that she has been offered the information
9 described in par. (d) and that all of her questions, as specified under subd. 4., have
10 been answered in a satisfactory manner. The physician who is to perform or induce
11 the abortion or the qualified person assisting the physician shall write on the
12 certification form the name of the physician who is to perform or induce the abortion.
13 The woman shall indicate on the certification form who provided the information to
14 her and when it was provided and who performed the ultrasound and when it was
15 performed, unless the ultrasound requirement is waived under sub. (3m) (a). If the
16 ultrasound required under sub. (3g) was performed at a facility other than the
17 facility where the physician who is to perform or induce the abortion is located, the
18 woman shall provide to the physician who is to perform or induce the abortion the
19 certification form described under sub. (3g) (d).

20 **SECTION 3.** 253.10 (3g) (a) 5. of the statutes is amended to read:

21 253.10 (3g) (a) 5. Provide a means for the pregnant woman to visualize any
22 fetal heartbeat, if a heartbeat is detectable by the ultrasound transducer type chosen
23 by the woman under subd. 1., and provide to the pregnant woman, in a manner
24 understandable to a layperson, a simultaneous oral explanation, including a
25 determination of whether a fetal heartbeat is detected. The person who is qualified

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1 to perform an ultrasound shall either perform or arrange for another person to
2 perform a method as described in s. 253.108 (2) to detect and, if detected, listen to
3 a fetal heartbeat. If a heartbeat is detected, the heartbeat shall be made audible for
4 the pregnant woman.

5 **SECTION 4.** 253.108 of the statutes is created to read:

6 **253.108 Abortions when fetal heartbeat detected. (1) DEFINITIONS.** In
7 this section:

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

9 (b) "Medical emergency" means a condition, in a physician's reasonable medical
10 judgment, that so complicates the medical condition of a pregnant woman as to
11 necessitate immediate medical intervention to avert her death or for which a
12 24-hour delay will create serious risk of substantial and irreversible physical
13 impairment of one or more of the woman's major bodily functions. "Medical
14 emergency" does not include a psychological or emotional condition or any condition
15 based on a claim or diagnosis that the woman will engage in conduct that she intends
16 to result in her death or in substantial and irreversible physical impairment of a
17 major bodily function.

18 **(2) DETECTION OF FETAL HEARTBEAT REQUIRED.** (a) Except when a medical
19 emergency exists, no person may perform or induce an abortion, or attempt to
20 perform or induce an abortion, unless the person performing or inducing the abortion
21 has first determined, or has relied on a determination made as to, whether the
22 woman's unborn child has a detectable fetal heartbeat. In attempting to detect a fetal
23 heartbeat, the person making the determination shall use the most effective, in the
24 person's reasonable medical judgment, means of detecting the heartbeat based on

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1 the probable postfertilization age of the unborn child and the condition of the woman
2 and her pregnancy.

3 (b) A physician who makes or relies on a determination of whether the woman's
4 unborn child has a detectable fetal heartbeat under par. (a) shall record all of the
5 following in the woman's medical record:

6 1. The probable postfertilization age of the unborn child, as defined in s.
7 253.107 (1) (c), and the method of determining the probable postfertilization age or,
8 if the probable postfertilization age of the unborn child was not determined, the
9 nature of the medical emergency, as defined in s. 253.10 (2) (d).

10 2. The means used to detect the fetal heartbeat and the date, time, and results
11 of the use of those means.

12 **(3) PROHIBITING ABORTION OF UNBORN CHILD WITH DETECTABLE HEARTBEAT.** Except
13 when a medical emergency exists, no person may perform or induce or attempt to
14 perform or induce an abortion on a woman if a fetal heartbeat is detected under sub.
15 (2) for the unborn child.

16 **(4) MEDICAL EMERGENCIES.** No physician who performs a medical intervention
17 designed or intended to prevent the death of a pregnant woman is considered to have
18 violated sub. (2) or (3), except that the physician shall make reasonable medical
19 efforts under the circumstances to preserve both the life of the woman and the life
20 of the unborn child in a manner consistent with conventional medical practice.
21 Medical treatment provided to the woman by a physician that results in accidental
22 or unintentional injury or death to the unborn child is not a violation of this section.

23 **(5) PENALTY.** No penalty may be assessed against a woman upon whom an
24 abortion is performed or induced or attempted to be performed or induced.

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1 **(6) CIVIL REMEDIES; INJUNCTIONS; PROSECUTIONS.** (a) Any of the following may
2 bring a claim for damages, including damages for personal injury and emotional and
3 psychological distress, against a person who performs, or attempts to perform, an
4 abortion in violation of sub. (2), (3), or (4):

5 1. The woman on whom an abortion is performed or induced or attempted to
6 be performed or induced.

7 2. The father of the aborted unborn child or the unborn child that is attempted
8 to be aborted, unless the pregnancy was the result of sexual assault in violation of
9 s. 940.225, 944.06, 948.02, 948.025, 948.06, 948.085, or 948.09 and the violation was
10 committed by the father.

11 3. Any grandparent of the aborted unborn child or the unborn child that is
12 attempted to be aborted.

13 4. Any family member of the aborted unborn child or the unborn child that is
14 attempted to be aborted who is related by blood, marriage, or adoption within the 3rd
15 degree of kinship as computed under s. 990.001 (16).

16 5. Any other person, other than an officer or employee of a state or local
17 governmental entity acting in an official capacity in this state, not included in subds.
18 1. to 4.

19 (b) 1. A person who prevails in an action shall recover damages of not less than
20 \$10,000 for each abortion that is performed or induced or attempted to be performed
21 or induced in violation of sub. (2), (3), or (4).

22 2. Notwithstanding s. 814.04 (1), a person who recovers damages under par. (a)
23 may also recover reasonable court costs and attorney fees incurred in connection
24 with the action.

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1 3. If a defendant prevails in an action under par. (a) and the court finds the
2 action was frivolous or brought in bad faith, notwithstanding s. 814.04 (1), the
3 defendant may recover reasonable attorney fees incurred in connection with
4 defending the action.

5 (c) No penalty may be assessed against a woman upon whom an abortion is
6 performed or induced or attempted to be performed or induced.

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

8 (e) Nothing in this subsection limits the common law rights of a person that are
9 not in conflict with sub. (2) or (3).

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

23 (b) Any person who brings an action under this section shall do so under a
24 pseudonym unless the person obtains the written consent of the woman upon whom

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1 an abortion was performed or induced, or attempted to be performed or induced, in
2 violation of sub. (2) or (3).

3 (c) This section may not be construed to allow the identity of a plaintiff or a
4 witness to be concealed from the defendant.

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

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

9 448.02 **(3)** (a) The board shall investigate allegations of unprofessional conduct
10 and negligence in treatment by persons holding a license or certificate granted by the
11 board. An allegation that a physician has violated s. 253.10 (3), 253.108 (2) or (3),
12 448.30 or 450.13 (2) or has failed to mail or present a medical certification required
13 under s. 69.18 (2) within 21 days after the pronouncement of death of the person who
14 is the subject of the required certificate or that a physician has failed at least 6 times
15 within a 6-month period to mail or present a medical certificate required under s.
16 69.18 (2) within 6 days after the pronouncement of death of the person who is the
17 subject of the required certificate is an allegation of unprofessional conduct.
18 Information contained in reports filed with the board under s. 49.45 (2) (a) 12r., 50.36
19 (3) (b), 609.17 or 632.715, or under 42 CFR 1001.2005, shall be investigated by the
20 board. Information contained in a report filed with the board under s. 655.045 (1),
21 as created by 1985 Wisconsin Act 29, which is not a finding of negligence or in a report
22 filed with the board under s. 50.36 (3) (c) may, within the discretion of the board, be
23 used as the basis of an investigation of a person named in the report. The board may
24 require a person holding a license or certificate to undergo and may consider the
25 results of one or more physical, mental or professional competency examinations if

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

3 **SECTION 6. Nonstatutory provisions.**

4 (1) LEGISLATIVE FINDINGS. The legislature of the State of Wisconsin finds and
5 declares all of the following:

6 (a) During the embryonic stage of pregnancy, the heart of an unborn child
7 begins to beat.

8 (b) Less than 5 percent of all natural pregnancies end in spontaneous
9 miscarriage after detection of cardiac activity, which makes fetal heartbeat a key
10 medical indicator that an unborn child is likely to achieve the capacity for a live birth.

11 (c) The observation of a heartbeat in an unborn child when a heartbeat has been
12 detected is an important component of full informed consent.

13 (d) The presence of a heartbeat in an unborn child may be a material
14 consideration to many pregnant women contemplating abortion.

15 (e) The woman's decision whether to abort "is an important, and often a
16 stressful one, and it is desirable and imperative that it be made with full knowledge
17 of its nature and consequences." *Planned Parenthood v. Danforth*, 428 U.S. 52, 67
18 (1976).

19 (f) "In attempting to ensure that a woman apprehend the full consequences of
20 her decision, the State furthers the legitimate purpose of reducing the risk that a
21 woman may elect an abortion, only to discover later, with devastating psychological
22 consequences, that her decision was not fully informed. If the information the State
23 requires to be made available to the woman is truthful and not misleading, the
24 requirement may be permissible." *Planned Parenthood of Southeastern*
25 *Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992).

