



State of Wisconsin
2021 - 2022 LEGISLATURE

LRB-0700/1
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2021 SENATE BILL 16

January 28, 2021 - Introduced by Senators ROTH, BALLWEG, BERNIER, BRADLEY, COWLES, DARLING, FELZKOWSKI, FEYEN, KAPENGA, KOOYENGA, LEMAHIEU, MARKLEIN, NASS, PETROWSKI, STAFSHOLT, STROEBEL, TESTIN, WANGGAARD and WIMBERGER, cosponsored by Representatives STEINEKE, BORN, DITTRICH, EDMING, GUNDRUM, JAGLER, KATZMA, MAGNAFICI, NEYLON, PETRYK, RAMTHUN, ROZAR, SCHRAA, SKOWRONSKI, SNYDER, SPIROS, STEFFEN, THIESFELDT, TITTL, TRANEL, ZIMMERMAN, CABRAL-GUEVARA, CALLAHAN, DALLMAN, DUCHOW, KNODL, PETERSEN and PLUMER. Referred to Committee on Judiciary and Public Safety.

- 1 **AN ACT** *to create* 253.109 and 940.01 (1) (c) of the statutes; **relating to:**
2 requirements for children born alive following abortion or attempted abortion
3 and providing a penalty.

Analysis by the Legislative Reference Bureau

This bill requires any health care provider present at the time an abortion or attempted abortion results in a child born alive to exercise the same degree of professional skill, care, and diligence to preserve the life and health of the child as a reasonably diligent and conscientious health care provider would render to any other child born alive at the same gestational age and to ensure that the child born alive is immediately transported and admitted to a hospital. A health care provider or an employee of a hospital, physician's office, or clinic where abortions are performed or induced who has knowledge of a failure to comply with the requirements of the bill must immediately report the failure to an appropriate law enforcement agency. Any person who violates the requirement to exercise professional skill, care, and diligence or to ensure the child is transported and admitted to a hospital is guilty of a felony with a penalty of a fine not to exceed \$10,000, imprisonment not to exceed six years, or both. The mother of the child born alive, however, may not be prosecuted. This bill specifies that a woman upon whom an abortion was performed or attempted may bring a claim for damages, including damages for personal injury and emotional and psychological distress, against a person who violates or attempts to violate the requirements of the bill.

The bill also makes intentionally causing the death of a child born alive as a result of an abortion or an attempted abortion a felony with a penalty of life

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imprisonment, which is the same penalty as first-degree intentional homicide. The mother of the child born alive may not be prosecuted under this provision in the bill.

Under current law, an individual who undergoes a live birth is considered born alive. "Live birth" is defined as the complete expulsion or extraction from his or her mother, of a human being, at any stage of development, who, after the expulsion or extraction, breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut and whether the expulsion or extraction occurs as a result of natural or induced labor, a cesarean section, or an abortion. Under current law, whoever is born alive as a result of an abortion is considered to have the same legal status and legal rights as a human being at any point after the human being undergoes a live birth as the result of natural or induced labor or a cesarean section.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report.

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

1 **SECTION 1.** 253.109 of the statutes is created to read:

2 **253.109 Requirements relating to a child born alive after abortion. (1)**

3 DEFINITIONS. In this section:

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

5 (b) "Born alive" means undergoes a live birth, as defined in s. 990.01 (19j).

6 (c) "Health care provider" has the meaning given in s. 146.81 (1).

7 **(2) REQUIREMENTS OF HEALTH CARE PROVIDERS.** Any health care provider present
8 at the time an abortion or attempted abortion results in a child born alive shall do
9 all of the following:

10 (a) Exercise the same degree of professional skill, care, and diligence to
11 preserve the life and health of the child as a reasonably diligent and conscientious
12 health care provider would render to any other child born alive at the same
13 gestational age.

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1 (b) Observing the exercise of skill, care, and diligence required under par. (a),
2 ensure that the child born alive is immediately transported and admitted to a
3 hospital.

4 **(3) REPORTING OF VIOLATIONS.** A health care provider or an employee of a
5 hospital, physician's office, or clinic where abortions are performed or induced who
6 has knowledge of a failure to comply with a requirement under sub. (2) shall
7 immediately report the failure to an appropriate law enforcement agency.

8 **(4) CRIMINAL PENALTY; NO PENALTY FOR MOTHER.** (a) Any person who violates sub.
9 (2) is guilty of a Class H felony.

10 (b) The mother of a child born alive under circumstances described in sub. (2)
11 may not be prosecuted for a violation of this section, an attempt to violate this section,
12 or a conspiracy to violate this section.

13 **(5) CIVIL REMEDIES; INJUNCTIONS.** (a) A woman upon whom an abortion was
14 performed, induced, or attempted may bring a claim for damages, including damages
15 for personal injury and emotional and psychological distress, against a person who
16 violates or attempts to violate sub. (2). A woman who brings a claim under this
17 paragraph may be awarded objectively verifiable monetary damages for all injuries
18 and damages equal to 3 times the cost of the abortion or attempted abortion.

19 (b) A woman who has been awarded damages under par. (a) shall, in addition
20 to any damages awarded under par. (a), be entitled to punitive damages for a
21 violation that satisfies a standard under s. 895.043 (3).

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

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

6 (e) Nothing in this subsection limits the common law rights of a person that are
7 not in conflict with sub. (2).

8 (f) A prosecuting attorney with appropriate jurisdiction or the department of
9 justice may bring an action for injunctive relief against a person who has
10 intentionally or recklessly violated this section.

11 **(6) ENFORCEMENT AUTHORITY.** The department of justice or the district attorney
12 may investigate any allegation of or institute, manage, control, and direct, in the
13 proper county, any prosecution for a violation of this section. For this purpose, the
14 department of justice shall have and exercise all powers conferred upon district
15 attorneys in such cases.

16 **(7) CONFIDENTIALITY IN COURT PROCEEDINGS.** (a) In every proceeding brought
17 under this section, the court, upon motion or sua sponte, shall rule whether the
18 identity of any woman upon whom an abortion was performed or induced or
19 attempted to be performed or induced shall be kept confidential unless the woman
20 waives confidentiality. If the court determines that a woman's identity should be
21 kept confidential, the court shall issue orders to the parties, witnesses, and counsel
22 and shall direct the sealing of the record and exclusion of individuals from
23 courtrooms or hearing rooms to the extent necessary to safeguard the woman's
24 identity from public disclosure. If the court issues an order to keep a woman's
25 identity confidential, the court shall provide written findings explaining why the

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1 woman's identity should be kept confidential, why the order is essential to that end,
2 how the order is narrowly tailored to its purpose, and why no reasonable less
3 restrictive alternative exists.

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

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

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

13 **SECTION 2.** 940.01 (1) (c) of the statutes is created to read:

14 940.01 **(1)** (c) Except as provided in sub. (2), whoever causes the death of a child
15 born alive under circumstances described in s. 253.109 (2) with intent to kill that
16 child is guilty of a Class A felony. The mother of a child born alive under
17 circumstances described in s. 253.109 (2) may not be prosecuted for a violation of this
18 paragraph, an attempt to violate this paragraph, or a conspiracy to violate this
19 paragraph.

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(END)