HB18
129567-4
By Representative Rich
RFD: Health
First Read: 01-MAR-11
PFD: 02/25/2011
ENROLLED, An Act,

To prohibit elective abortions at and after 20 weeks of pregnancy; to provide legislative findings regarding medical assertions that an unborn child is capable of feeling pain; to require a physician to determine the postfertilization age of an unborn child before performing or attempting to perform an abortion; to prohibit the abortion of any unborn child with a postfertilization age of 20 weeks or more, with certain exceptions relating to the health of the woman; to require physician reporting of abortions to the Office of Vital Statistics; to amend Section 22-9A-13, Code of Alabama 1975, to require the Office of Vital Statistics to annually gather information and issue a public report regarding induced pregnancy terminations; to provide civil remedies and criminal penalties for violations; to provide for anonymity for women in court proceedings; to provide for construction with other laws; and in connection therewith would have as its purpose or effect the requirement of a new or increased expenditure of local funds within the meaning of Amendment 621 of the Constitution of Alabama of 1901, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:
Section 1. This act shall be known and may be cited as the Alabama Pain-Capable Unborn Child Protection Act.

Section 2. The Legislature makes all of the following findings:

(1) Pain receptors (nociceptors) are present throughout the unborn child's entire body by no later than 16 weeks after fertilization and nerves link these receptors to the brain's thalamus and subcortical plate by no later than 20 weeks.

(2) By eight weeks after fertilization, the unborn child reacts to touch. After 20 weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example by recoiling.

(3) For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli is applied without such anesthesia.

(4) In the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response.

(5) Subjection to such painful stimuli is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral, and learning disabilities later in life.
(6) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than 20 weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

(7) Substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain.

(8) In adults, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does.

(9) Substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing.

(10) The position, asserted by some medical experts, that the unborn child remains in a coma-like sleep state that precludes the unborn child experiencing pain is inconsistent with the documented reaction of unborn children to painful stimuli and with the experience of fetal surgeons who have
found it necessary to sedate the unborn child with anesthesia to prevent the unborn child from thrashing about in reaction to invasive surgery.

(11) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by 20 weeks after fertilization.

(12) It is the purpose of this state to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

(13) Alabama's compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain is intended to be separate from and independent of Alabama's compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other.

(14) Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion, the United States Supreme Court noted that an explicit statement of legislative intent specifically made applicable to a particular statute is of greater weight than a general savings or severability clause, it is the intent of this state that if
any one or more provisions, sections, subsections, sentences, clauses, phrases, or words of this act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this act shall remain effective notwithstanding such unconstitutionality. Moreover, this state declares that it would have passed this act, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, sections, subsections, sentences, clauses, phrases, or words, or any of their applications, were to be declared unconstitutional.

Section 3. For purposes of this act, the following terms shall have the following meanings:

(1) ABORTION. The use or prescription of any instrument, medicine, drug, or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma, or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy.

(2) ATTEMPT TO PERFORM OR INDUCE AN ABORTION. An act, or an omission of a statutorily required act, that, under
the circumstances as the actor believes them to be,
constitutes a substantial step in a course of conduct planned
to culminate in the performance or induction of an abortion in
this state in violation of this act.

(3) FERTILIZATION. The fusion of a human
spermatozoon with a human ovum.

(4) MEDICAL EMERGENCY. A condition which, in
reasonable medical judgment, so complicates the medical
condition of the pregnant woman as to necessitate the
immediate abortion of her pregnancy without first determining
postfertilization age to avert her death or for which the
delay necessary to determine postfertilization age will create
serious risk of substantial and irreversible physical
impairment of a major bodily function, not including
psychological or emotional conditions. No condition shall be
deemed a medical emergency if based on a claim or diagnosis
that the woman will engage in conduct which she intends to
result in her death or in substantial and irreversible
physical impairment of a major bodily function.

(5) POSTFERTILIZATION AGE. The age of the unborn
child as calculated from the fertilization of the human ovum.

(6) REASONABLE MEDICAL JUDGMENT. A medical judgment
that would be made by a reasonable prudent physician,
knowledgeable about the case and the treatment possibilities
with respect to the medical conditions involved.
(7) PHYSICIAN. Any person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state.

(8) PROBABLE POSTFERTILIZATION AGE OF THE UNBORN CHILD. What, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time the abortion is planned to be performed or induced.

(9) UNBORN CHILD or FETUS. An individual organism of the species homo sapiens from fertilization until live birth.

(10) WOMAN. A female human being whether or not she has reached the age of majority.

Section 4. (a) Except in the case of a medical emergency, no abortion shall be performed or induced or be attempted to be performed or induced unless the physician performing or inducing the abortion has first made a determination of the probable postfertilization age of the unborn child or relied upon such a determination made by another physician. In making such a determination, the physician shall make such inquiries of the woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to postfertilization age.
(b) Failure by any physician to conform to any requirement of this section constitutes unprofessional conduct.

Section 5. (a) No person shall perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies, that the probable postfertilization age of the unborn child of the woman is 20 or more weeks unless, in reasonable medical judgment, the woman has a condition which so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No such condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

(b) When an abortion upon a woman whose unborn child has been determined to have a probable postfertilization age of 20 or more weeks is not prohibited by this section, in such a case, the physician shall terminate the pregnancy in the manner which, in reasonable medical judgment, provides the
best opportunity for the unborn child to survive, unless, in 
reasonable medical judgment, termination of the pregnancy in 
that manner would pose a greater risk either of the death of 
the pregnant woman or of the substantial and irreversible 
physical impairment of a major bodily function, not including 
psychological or emotional conditions of the woman, than would 
another available method. No such greater risk shall be deemed 
to exist if it is based on a claim or diagnosis that the woman 
will engage in conduct which she intends to result in her 
death or in substantial and irreversible physical impairment 
of a major bodily function.

Section 6. Section 22-9A-13, Code of Alabama 1975, 
is amended to read as follows:


"(a) A report of fetal death shall be filed with the 
Office of Vital Statistics, or as otherwise directed by the 
State Registrar, within five days after the occurrence is 
known if the fetus has advanced to, or beyond, the twentieth 
week of uterogestation.

"(1) When a fetal death occurs in an institution, 
the person in charge of the institution or his or her 
designated representative shall prepare and file the report.

"(2) When a fetal death occurs outside an 
institution, the physician in attendance shall prepare and 
file the report.
"(3) When a fetal death occurs without medical attendance, the county medical examiner, the state medical examiner, or the coroner shall determine the cause of fetal death and shall prepare and file the report.

"(4) When a fetal death occurs in a moving conveyance and the fetus is first removed from the conveyance in this state or when a dead fetus is found in this state and the place of fetal death is unknown, the fetal death shall be reported in this state. The county where the fetus was first removed from the conveyance or the dead fetus was found shall be considered the county of fetal death.

"(b) A report of induced termination of pregnancy for each induced termination of pregnancy which occurs in this state shall be filed with the Office of Vital Statistics, or as otherwise directed by the State Registrar, no later than 10 days after the last day of the month during which the procedure was performed.

"(1) When the induced termination of pregnancy is performed in an institution, the person in charge of the institution or his or her designated representative shall prepare and file the report.

"(2) When the induced termination of pregnancy is performed outside an institution, the physician in attendance shall prepare and file the report.
"(3) Beginning January 1 of the year following the
effective date of the act adding this amendatory language, the
Office of Vital Statistics shall collect the following
information for all induced terminations of pregnancies in
addition to information already collected; provided, that the
definition of induced termination of pregnancy in Section
22-9A-1(5) shall be construed to include every abortion as
defined in Section 3(1) of the act adding this amendatory
language.

"a. Postfertilization age:

"1. If a determination of probable postfertilization
age was made, whether ultrasound was employed in making the
determination, and the week of probable postfertilization age
determined.

"2. If a determination of probable postfertilization
age was not made, the basis of the determination that a
medical emergency existed.

"b. Method of abortion: Which of the following was
employed:

"1. Medication abortion (such as, but not limited
to, mifepristone/misoprostol or methotrexate/misoprostol).


"3. Electrical vacuum aspiration.

"4. Dilation and evacuation."
"5. Combined induction abortion and dilation and evacuation.

"6. Induction abortion with prostaglandins.

"7. Induction abortion with intra-amniotic instillation (such as, but not limited to, saline or urea).

"8. Induction abortion, other.

"9. Intact dilation and extraction (partial-birth).

"10. Method not listed (specify).

"c. Whether an intra-fetal injection was used in an attempt to induce fetal demise (such as, but not limited to, intra-fetal potassium chloride or digoxin).

"d. Age and race of the patient.

"e. If the probable postfertilization age was determined to be 20 or more weeks, the basis of the determination that the pregnant woman had a condition which so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions.

"f. If the probable postfertilization age was determined to be 20 or more weeks, whether or not the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive and, if such a method was not used, the basis of the
determination that termination of the pregnancy in that manner
would pose a greater risk either of the death of the pregnant
woman or of the substantial and irreversible physical
impairment of a major bodily function, not including
psychological or emotional conditions, of the woman than would
other available methods.

"(3) Reports of induced termination of pregnancy
shall not contain the name or the address of the patient whose
pregnancy was terminated, nor shall the report contain any
other information identifying the patient, except that each
report shall contain a unique medical record identifying
number, to enable matching the report to the patient's medical
records.

"(4) Individual induced termination of pregnancy
reports shall be maintained in strict confidence by the Office
of Vital Statistics, shall not be available for public
inspection, and shall not be made available in court for any
purpose, and shall not be subject to discovery in any civil
action except:

"a. To the Attorney General or a district attorney
with appropriate jurisdiction pursuant to a criminal
investigation.

"b. To the Attorney General or a district attorney
pursuant to a civil investigation of the grounds for an action
under subsection (b) of Section 8 of the act adding this amending language.

"c. Pursuant to court order in an action under Section 8 of the act adding this amending language.

"d. Pursuant to investigations under Section 22-9A-25.

"e. At the request of the board or its attorney pursuant to an investigation of civil or criminal legal action related to licensure or the need for licensure of health facilities or similar investigation or legal action for failure to file reports required by this section.

"f. As provided in subdivision (b)(5)(6) of this section.

"(5)(6) The Office of Vital Statistics shall periodically make available annually issue a public report providing aggregate data about the induced terminations of pregnancy performed in this state, but for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subdivision (b)(3) of this section. Each report shall also provide aggregate data for each such item for all previous calendar years during which this section was in effect, adjusted to reflect any additional information from late or corrected reports. The Office of Vital Statistics shall take care to ensure that none of the information
included in the public reports could reasonably lead to the identification of any pregnant woman upon whom an induced termination of pregnancy was performed or attempted and shall not release the names of individual physicians or other staff members employed by institutions performing induced terminations of pregnancy. The Office of Vital Statistics shall not release the number of procedures performed by any particular institution or physician, except at the request of the board or its attorney pursuant to an investigation of civil or criminal legal action related to licensure or the need for licensure of health facilities or similar investigation or legal action for failure to file reports required by but shall include in each public report the number of induced terminations of pregnancy, by method and week of postfertilization age, reported by each institution.

Information that may not be publicly released under this subdivision shall be made available only as provided with regard to individual induced termination of pregnancy reports in subdivision (b)(5) of this section.

"(c) The reports required under this section are statistical reports only and are not to be incorporated into the official records of the Office of Vital Statistics. Certified copies of these records shall not be issued by the
Office of Vital Statistics. Except when copies of reports must
be maintained pursuant to subdivision (b)(5) of this section, the State Registrar shall dispose of retain and safeguard
all individual reports received as soon as practicable after
data from the forms is transferred to the database of the
Center for Health Statistics, or after the board or its
attorney declares there is no further need for the forms
pursuant to subdivision (b)(5) of this section. Such disposal
shall follow procedures of the State Records Commission making
them available only as provided in subdivision (b)(5) of this
section.

"(d) Subsection (c) shall also apply to all records
of fetal death and induced termination of pregnancy filed in
the Office of Vital Statistics prior to adoption of this
chapter The Office of Vital Statistics, in advance of 2013 and
each succeeding calendar year, shall determine whether as a
result of changes in abortion practice the list of methods of
abortion for reports of induced termination of pregnancy to be
used during that calendar year should be modified from those
listed in paragraph (b)(3)b. of this section so as to add new
methods, modify the description of methods, or delete methods
no longer in use, and shall issue a public notice
incorporating changes based on that determination.

"(e) The Office of Vital Statistics may charge a
filing fee for each report of induced termination of pregnancy
required by this section calculated to be sufficient, based on
the number of reports estimated to be filed, to recoup and
cover the costs to the Office of Vital Statistics of
fulfilling its duties under subsections (b) to (d), inclusive,
of this section."

Section 7. Any person who intentionally, knowingly,
or recklessly performs or induces or attempts to perform or
induce an abortion in violation of this act is guilty of a
Class C felony. No penalty shall be assessed against the woman
upon whom the abortion is performed or induced or attempted to
be performed or induced.

Section 8. (a) Any woman upon whom an abortion has
been performed or induced in violation of this act, or the
father of the unborn child who was the subject of such an
abortion, may maintain an action against the person who
performed or induced the abortion in intentional, knowing, or
reckless violation of this act for actual and punitive
damages. Any woman upon whom an abortion has been attempted in
violation of this act may maintain an action against the
person who attempted to perform the abortion in intentional,
knowing, or reckless violation of this act for actual damages.

(b) A cause of action for injunctive relief against
any person who has intentionally, knowingly, or recklessly
violated this act may be maintained by the woman upon whom an
abortion was performed or induced or attempted to be performed
or induced in violation of this act, by any person who is the
spouse, parent, sibling, or guardian of, or a current or
former licensed health care provider of, the woman upon whom
an abortion has been performed or induced or attempted to be
performed or induced in violation of this act, by a district
attorney with appropriate jurisdiction, or by the Attorney
General. The injunction shall prevent the abortion provider
from performing or inducing, or attempting to perform or
induce, further abortions in violation of this act in this
state.

(c) If judgment is rendered in favor of the
plaintiff in an action described in this section, the court
shall also render judgment for reasonable attorney fees in
favor of the plaintiff against the defendant.

(d) If judgment is rendered in favor of the
defendant and the court finds that the suit by the plaintiff
was frivolous and brought in bad faith, the court shall also
render judgment for reasonable attorney fees in favor of the
defendant against the plaintiff.

(e) No damages or attorney fees may be assessed
against the woman upon whom an abortion was performed or
induced or attempted to be performed or induced except as
provided in subsection (d).

Section 9. In every civil or criminal proceeding or
action brought under this act, the court shall rule whether
the anonymity of any woman upon whom an abortion has been
performed or induced or attempted to be performed or induced
shall be preserved from public disclosure if she does not give
her consent to such disclosure. The court, upon motion or sua
sponte, shall make such a ruling and, upon determining that
her anonymity should be preserved, shall issue orders to the
parties, witnesses, and counsel and shall direct the sealing
of the record and exclusion of individuals from courtrooms or
hearing rooms to the extent necessary to safeguard her
identity from public disclosure. Each order shall be
accompanied by specific written findings explaining why the
anonymity of the woman should be preserved from public
disclosure, why the order is essential to that end, how the
order is narrowly tailored to serve that interest, and why no
reasonable less restrictive alternative exists. In the absence
of written consent of the woman upon whom an abortion has been
performed or attempted to be performed, anyone, other than a
public official, who brings an action under Section 8 shall do
so under a pseudonym. This section shall not be construed to
conceal the identity of the plaintiff or of witnesses from the
defendant or from attorneys for the defendant.

Section 10. The provisions of this act are
supplemental to and shall be read in pari materia with Chapter
22, Title 26, Code of Alabama 1975, relating to the abortion
of viable unborn children, and the Alabama Partial-Birth
Abortion Ban Act of 1997. This act shall not be construed to
repeal, by implication or otherwise, Section 26-22-3, Section
26-23-3, Code of Alabama 1975, or any otherwise applicable
provision of Alabama's law regulating or restricting abortion.
An abortion that complies with this act but violates the
provisions of Section 26-22-3, Section 26-23-3, Code of
Alabama 1975, or any otherwise applicable provision of
Alabama's law shall be deemed unlawful as provided in such
provision. An abortion that complies with the provisions of
Section 26-22-3, Section 26-23-3, Code of Alabama 1975, or any
otherwise applicable provision of Alabama's law regulating or
restricting abortion but violates this act shall be deemed unlawful as provided in this act.

Section 11. Although this bill would have as its
purpose or effect the requirement of a new or increased
expenditure of local funds, the bill is excluded from further
requirements and application under Amendment 621, now
appearing as Section 111.05 of the Official Recompilation of
the Constitution of Alabama of 1901, as amended, because the
bill defines a new crime or amends the definition of an
existing crime.

Section 12. This act shall become effective on the
first day of the third month following its passage and
approval by the Governor, or its otherwise becoming law,
except that the amendment made by this act to Section
I hereby certify that the within Act originated in and was passed by the House 07-APR-11.

Greg Pappas
Clerk

Amended and Passed
Concurred in Senate Amendment